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MASSACHUSETTS REPORTS^{c f}
103

CASES ARGUED AND DETERMINED
Massachusetts, IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

OCTOBER 1869 — JANUARY 1870

ALBERT G. BROWNE, JR.
REPORTER



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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.

HON. HORACE GRAY, JR.

HON. JOHN WELLS.

HON. JAMES D. COLT.

HON. SETH AMES.

HON. MARCUS MORTON.

ATTORNEY GENERAL,
HON. CHARLES ALLEN.

**The Reporter was assisted by Mr. JOHN C. GRAY, JR., of the
Suffolk Bar, in the preparation of this volume.**

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF BRISTOL, OCTOBER TERM 1869,
AT TAUNTON.

[CONTINUED FROM VOL. CII.]

PRESENT:

HON. REUBEN A. CHAPMAN, HON. HORACE GRAY, JR., HON. JOHN WELLS, HON. JAMES D. COLT, HON. MARCUS MORTON,	}	CHIEF JUSTICE. JUSTICES.
---	---	---------------------------------

**CHARLES PRESBREY vs. OLD COLONY & NEWPORT RAILWAY
 COMPANY.**

A road across one's own land is not a "private way" within the meaning of the Gen. Sta. c. 63, § 28, requiring application to be made within a year for damages for the obstruction of a private way by a railroad corporation.

In assessing, under the Gen. Sta. c. 63, § 21, the damages occasioned to land by the location of a railroad across it, they are to be assessed on the basis that the landowner has no right to cross the railroad; unless the railroad corporation has secured him such a right under §§ 40, 64-66.

In assessing, under the Gen. Sta. c. 63, § 21, the damages occasioned to a vacant tract of land by the location of a railroad which cuts off a corner of it, the depreciation of the land in value by reason of the proximity of the railroad, such as by "frightening horses and the like causes," does not constitute, of itself, a ground for recovery.

At a hearing by a sheriff's jury to assess the damages caused to a vacant tract of land by the location of a railroad across it, evidence is not admissible to show the sum paid by the railroad corporation to the owners of an adjoining estate, when it appears that it was paid as a gross sum, not only for land taken, but also for damages to the entire

Presbrey v. Old Colony & Newport Railway Company.

estate, on which was a dwelling-house near the railroad and a well within the location of the railroad, and through which the railroad was carried on a high embankment.

PETITION to the county commissioners for the assessment by a jury of damages occasioned by taking land of the petitioner, in Taunton, for the construction of the respondents' railroad. Hearing by the jury on July 12, 1869, before the sheriff, the material parts of whose certificate were substantially as follows :

The petitioner was the owner of a tract of land in Taunton containing several acres, bounded westerly by Weir Street and easterly by Ingell Street, both public highways, and, some time before March 15, 1865, the date of the location of the respondents' railroad, opened and built a way or road, thirty-two feet wide, called Presbrey Street, running from Weir Street to Ingell Street, for the purpose of selling house lots thereon, and sold two lots near Ingell Street. This way or road was never made a public highway. The location of the respondents' railroad cut off a corner of the petitioner's land and the end of his way or road. The petitioner's land had no buildings upon it.

"For the purpose of showing the value of his land, the petitioner offered to show what sum the respondents paid to the 'Willis estate,' immediately adjoining. It appeared that said sum was paid, as a gross sum, not only for the land taken, but also for damages to the entire estate, on which was a dwelling near the railroad, and also a well, covered by the line of the location of the railroad, but thus far suffered to remain open for use, and that said estate was cut through with a high embankment. The respondents objected to the admission of the evidence, because the cases were not similar, and because the damages so paid were paid as one gross sum, and not merely for the land ; but the sheriff admitted the same, and ruled that it was for the consideration of the jury."

The respondents' railroad was built and opened in the summer of 1866 ; and the petitioner never made any application to the county commissioners to assess his damages, but the respondents made the application to them on November 13, 1867.

"The respondents asked the sheriff to rule that, no application for damages sustained by reason of the obstruction of said

Presbrey v. Old Colony & Newport Railway Company.

way to the petitioner's back land having been made within one year from the time when said way was so obstructed, the petitioner was now barred of recovering such damages, by the Gen. Sta. c. 68, § 28; but the sheriff ruled otherwise, and that the statute did not apply to this case.

"The respondents' railroad had a fence along the track, but no buildings, where Presbrey Street was crossed; and the respondents asked the sheriff to rule that the petitioner could still cross to and from Weir Street over the railroad to his back land, and if so, that the cost of raising his way so as to reach Weir Street over the railroad, with the reduced value of his back land, if any, by reason of having to cross the railroad to reach Weir Street, would be the measure of damages by reason of such obstruction; and that the damages should be assessed upon the basis of such a right to cross the railroad; but the sheriff ruled that the petitioner, having an opportunity to reach the highway without crossing the railroad, had no right so to cross, and that the jury, in assessing the damages, should consider that the petitioner had no such right.

"The respondents asked the sheriff to rule that, if the petitioner had not a legal right still to cross the railroad, he had a legal right to build a new road by the side of the railroad, and in such case the sum it would cost to build the new road, and the value of the land required for the new road, and any depreciation in the value of such back land, caused by such bend in the road, would be the measure of damages by reason of such obstruction; and that in neither case could damages be assessed for depreciation in the value of the back land by reason of the proximity of the railroad through fear of frightening horses and such like causes; but if the sheriff should rule otherwise, the respondents asked that such damages might be assessed separately. The respondents also asked the sheriff to rule that depreciation in the value of the petitioner's remaining land on Weir Street by reason of the proximity of the railroad, such as frightening horses and the like, could not be included as an element of damages in this proceeding; but if the sheriff ruled otherwise, the respondents asked that any such damages might be

assessed separately. The petitioner assented to the assessment of such damages separately, but contended that he could recover the same.

"The sheriff ruled and instructed the jury that they should assess damages as follows: 1. For the value of the land actually taken by the location of the road. 2. What it would cost to build a new way from Weir Street, alongside of the railroad, including the value of the land required to build said way, which was thirty-two feet wide; and the depreciation in the land by reason of the bend in the road. 3. For the depreciation of the remaining land on Weir Street and Presbrey Street, by reason of the proximity of the railroad, such as for frightening horses, and the like causes. 4. Interest on said amounts from March 15, 1865, the date of the location, reckoned at six per cent."

The jury assessed damages separately, 1. "for the value of the land actually taken;" 2. "for the cost of building a new road thirty-two feet wide over the petitioner's remaining land, from Weir Street to Presbrey Street;" 3. "for the depreciation of the remaining land of the petitioner on Weir Street and Presbrey Street, by reason of the proximity of the railroad, such as the increased difficulty of travelling the new road with angle in it, and such as the danger of frightening horses and the like;" and assessed interest on each of the three amounts as instructed.

The respondents having alleged exceptions, the superior court ruled that the verdict should be wholly set aside, and to this ruling the petitioner alleged exceptions.

E. Amcs, for the petitioner.

E. H. Bennett, for the respondents.

WELLS, J. One question raised at the trial, though not argued here, was, that no damages could be given on account of the obstruction to the road leading from the highway across the land of the petitioner, because no application had been made therefor within one year. Gen. Sts. c. 63, § 28. But a road across one's own land is not a "private way" within the meaning of that statute. The ruling of the sheriff upon this point was correct.

The ruling was correct, also, as to the right of the petitioner

to cross the railroad; or to continue the use of the street laid out by him so as to cross "to and from Weir Street over said railroad to his back land." No such right exists, unless secured to the owner of the land under the provisions of Gen. Sta. c. 63, §§ 40, 64-66. The corporation may obstruct and prevent such crossing whenever it is deemed necessary or expedient for the safety of passengers or others, or the protection or convenience of the corporation. Its officers are the sole judges of the exigency which requires or makes it expedient to close up its line of location against such crossings by mere license. *Brainard v. Clapp*, 10 Cush. 6, 12. *Curtis v. Eastern Railroad Co.* 14 Allen, 55. *Boston Gas Light Co. v. Old Colony & Newport Railway Co.* 14 Allen, 444. Damages are properly to be assessed in reference to this nearly absolute and exclusive right which is taken. *Ham v. Salem*, 100 Mass. 350. If the corporation would lessen the damages on the ground of any right of crossing reserved to or remaining in the landowner, it must secure those rights to him in the mode pointed out by the several sections of the statutes above referred to.

The owner of the land is entitled to "all damages occasioned by laying out and making and maintaining its road," as well as by taking his land. Gen. Sta. c. 63, § 21. This includes all injury to the remaining land, by cutting off access to or egress from different parts of it, whether by roads actually in use or otherwise; or rendering it inconvenient by breaking it up into irregular pieces; or in any manner lessening its suitability for occupation as a whole, or for division into lots. If, by constructing a new way by the side of the railroad, the remaining land would be equally well accommodated as by the former one, and equally suited for occupation as a whole, or for division into lots, then the cost of constructing such new way, and the value of the land required therefor beyond that previously used as a way and taken and paid for as land by the railroad corporation would be a proper measure of damages, so far as the mere obstruction of the way is concerned.

The corporation requested that the cost of making a new way, including the value of the land required therefor, "and the de-

preciation in the land by reason of the bend in the road," should be assessed separately, as the damages on account of the loss of the former way. The petitioner assented to that mode of assessing the damages; and the only question here seems to be whether he is entitled to recover those damages in addition to the value of the land taken for the railroad. It follows, from the considerations already stated, that he is so entitled.

The jury were also instructed to assess separately the damages claimed "for the depreciation of the remaining land on Weir Street and Presbrey Street, by reason of the proximity of the railroad, such as for frightening horses, and the like causes." The damages assessed upon this ground we think are not properly recoverable. Such depreciation is not occasioned directly by any effect upon the land, of which the construction or the maintenance of the railroad is the cause. It belongs to that class of results which necessarily arise from the exercise of the franchise granted to such corporations in consideration of the general advantage which the whole community are expected to derive from it. The annoyances to the landowner are the same in kind with those which are suffered by the whole community. The fact that land, lying upon or near the location of the railroad, is thereby rendered less desirable for the erection of dwellings or other buildings, and of less market value in consequence, does not furnish an independent ground for the recovery of damages therefor. *Eames v. New England Worsted Co.* 11 Met. 570. *Fuller v. Chicopee Manufacturing Co.* 16 Gray, 46. The effect upon land of the annoyance or inconvenience arising from the laying of the track, and the frequent passing of trains over a street by which it is approached, has been frequently held to afford no ground for damages. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 10 Cush. 385. *Boston & Worcester Railroad Co. v. Old Colony Railroad Co.* 12 Cush. 606. *Caledonian Railway Co. v. Ogilvy*, 2 Macq. 229; 29 Eng. Law & Eq. 22.

The principle of these decisions may not apply when the construction or the use of the railroad is such as to cause an actual obstruction to the occupation of land, or interruption of

the business to which it is appropriated. *Western Pennsylvania Railroad Co. v. Hill*, 56 Penn. State, 460. *Boston & Worcester Railroad Co. v. Old Colony & Fall River Railroad Co.* 3 Allen, 142. But when the injury complained of consists only in annoyances, as by the "frightening of horses and such like causes," whether by crossing streets or passing near to private avenues or land, it is not such a direct and appreciable injury to the land or the landowner as to constitute, of itself, a ground for the recovery of damages; although it may make the land less desirable for some purposes, less saleable, and thus depreciate its market value.

When, however, part of a tract or lot of land is taken, the damages therefor may be more or less affected by the nature of the uses for which it is taken, and the kind and character of structures liable to be placed upon it. The basis of the estimate is not strictly the value of the land taken, with added damages for such direct injuries as may be occasioned to the remaining land. It is compensation for all damages to the whole tract, occasioned by taking a part of it for the uses and in the manner in which it is taken by the location. The inconveniences and annoyances inseparable from such uses must inevitably, and may properly, affect the estimate of damages occasioned by such appropriation of a part of the land; but they do so incidentally, and not as in themselves a ground of damage. The degree of such incidental effect will depend much upon the situation of the land, the uses to which it is appropriated, and the manner in which it is cut by the line of location. If the whole is vacant land, and the part taken is a narrow strip from one side, any claim of damages, beyond the value of the land taken, would ordinarily stand upon the same footing with a like claim where the location is outside but adjoining the boundary line of the claimant's land. Such claim, as has already been said, can be sustained only for injuries to the land itself, and for disturbance of its means of access or of convenient occupation.

By direction of the sheriff, the jury have returned separately the interest on each of the sums assessed by them as damages upon the several grounds of damage submitted to them. No

objection is made to the severance in the verdict, nor to the allowance of interest upon the value of the land taken. The respondent objects to the allowance of interest upon the sum returned as the cost of a new road, for the reason that the petitioner has not yet incurred that expense, and has not as yet suffered any loss by being deprived of the use of the old one. The difficulty upon this point arises from the fact that the parties have adopted a particular mode of fixing compensation for a part of the injury, and it is not certain that the jury would otherwise have arrived at the assessment in that mode. The respondent denies that the proposal under which the cost of the new road was estimated involved the addition of interest. As it was computed by direction of the sheriff, it does not appear that the jury intended to return the two sums as their estimate of the damages on account of the loss of the road. See *Connecticut River Railroad Co. v. Clapp*, 1 Cush. 559. Properly, the damages to be estimated for this cause would be the amount of injury or depreciation in value of the whole lot, occasioned by the loss of the means of access which had been cut off by the railroad. The assessment is to be made with reference to the time when the land was taken. But the damages awarded should be such that the verdict will be full compensation. This may require an increase of the valuation, thus made, by an amount equal to the interest thereon. Ordinarily it is supposed to be included in the general verdict. Perhaps, against the respondent requesting the assessment to be made in this form, the amount returned should be presumed to be the proper estimate of the damage, assessed as of the date when the land was taken, and with a view to the addition of interest thereon. But it is not necessary to decide this point at present, because a new trial of the whole case must be had upon another ground.

The facts stated in the report, in regard to the "Willis estate," show that the sum paid by the respondent for the land taken and damages occasioned to that estate, was improperly admitted in evidence. Upon the question of the value of land which is the subject of controversy, actual sales of other land in the vicinity, similarly situated, may be shown, and the price paid

upon such sales. The fact to be established is the market value and the prices paid upon actual sales are indications of that value. But the value of land depends so much, not only upon its intrinsic quality, but upon situation, shape, relative position and other incidental circumstances, that evidence of this character can rarely furnish an accurate measure of value, and ought always to be admitted with great caution. The question of its admissibility must be passed upon, in the first instance, by the officer presiding at the trial; and much latitude of discretion is allowed to his determination. *Shattuck v. Stoneham Branch Railroad Co.* 6 Allen, 115. But where it is made to appear that the evidence was admitted improperly, it is open to exception.

As a sale of land, the transaction in regard to the "Willis estate" did not furnish such a comparison as would enable a jury properly to arrive at the value of the vacant land of the petitioner. That payment was for a strip of land across a house lot, near the dwelling-house, and including a well; and the location involved a high embankment upon the strip so taken. The position of such a strip of land, and its relations to the dwelling-house, would inevitably and reasonably affect the price to be placed upon it, so far as to make it an unsuitable measure for the value of other lands not so connected.

But further than that; the price paid for lands purchased for the location of a railroad, designated by lines run according to the exigencies of that location, and without reference to the convenience of the landowner, is generally affected by a consideration of the disadvantage to the whole tract resulting from the manner in which the location is made. It includes all incidental injuries to the remaining land. It is in effect a settlement of all damages which would otherwise be recoverable by the proceedings provided for that purpose. Where the transaction is free from such considerations, so that it may fairly be regarded like an ordinary sale, between seller and purchaser, the evidence would be competent in the assessment of damages for other lands, to show the value of the land; and none the less so because the purchaser was a railroad corporation and the respondent in the proceedings. *Wyman v. Lexington & West Cam*

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bridge Railroad Co. 13 Met. 316. In that case, a witness was asked and allowed to state what was given by the respondents for land next adjoining the land of the petitioner. The situation and circumstances are not stated, and no ground is shown against the propriety of the ruling of the sheriff admitting the testimony, except the fact that it was a purchase by the railroad corporation for the purposes of its location. The opinion of the court apparently assumes that it was merely a purchase of land with only the ordinary incidents of a purchase. The case did not turn upon that point; and the decision cannot be regarded as settling anything more upon this question than that such evidence is not necessarily incompetent, and that exceptions will not be sustained on account of a ruling admitting it, unless they show some ground upon which the court can see that the ruling was erroneous upon the facts of the case. *Boston & Worcester Railroad Co. v. Old Colony & Fall River Railroad Co.* 3 Allen, 142.

In this case, the report shows that the sum paid by the respondent to the "Willis estate" was paid "as a gross sum, not only for the land taken, but also for damages to the entire estate." It also shows that the circumstances and the situation of the estate were such that the damages must have formed an important element in estimating the amount to be paid therefor. This, in our opinion, rendered it incompetent as evidence of the value of the adjoining vacant land.

For these reasons, the verdict was properly set aside wholly in the superior court. *Exceptions overruled.*

 BARZILLAI WALKER vs. OLD COLONY & NEWPORT RAILWAY COMPANY.

In estimating, under the Gen. Sts. c. 63, § 21, the damages occasioned to the owner of a messuage by taking part of his land for a railroad, depreciation in value of his estate arising from the proximity of the road and running of the trains, is to be considered as far, and only so far, as it is due to proximity caused by and would not have resulted but for such taking.

The turning of surface water upon land by a railroad embankment is a proper element in the estimation, under the Gen. Sts. c. 63, § 21, of damages occasioned to the landowner by the construction of the railroad.

PETITION to the county commissioners for the assessment by a jury of damages occasioned by taking land of the petitioner, in Taunton, for the construction of the respondents' railroad. Hearing by the jury before the sheriff, the material part of whose certificate was as follows :

" The premises consisted of half an acre of land on the east side of Weir Street, with a dwelling-house and other buildings upon it, the back corner of which, being about one fifteenth of an acre, was taken by the railroad.

" The petitioner claimed damages for the depreciation of his estate by reason of the proximity of the railroad to his dwelling-house, such as the noise, smoke and soot from passing trains, the whistling of the engine near his premises, and such like causes ; and he inquired of one witness how much in his opinion the estate was depreciated in value by the construction of the road. The respondents objected to this question, unless depreciation arising from the mere proximity and running of the road were excluded, but the sheriff admitted the question and the answer, which was, ' It would reduce it one third as a dwelling-house.'

" The respondents asked the sheriff also to rule that depreciation in the value of the property, arising from the proximity of the road and running of the trains, such as noise and smoke and soot from passing trains, blowing of the whistle near the petitioner's land, stopping of the trains near it, and such like causes, were not elements of damages in the case, but the sheriff, for the purposes of the trial, ruled otherwise, and directed the jury that they might assess damages for these causes as well as others.

" The petitioner testified that the surface water from rains formerly ran down Weir Street past his house, but that the construction of the railroad across Weir Street had, by raising somewhat the grade thereof, obstructed such water and turned it upon the estate adjoining his land, from which it passed into his back land and injured it ; and that the construction of a culvert about a foot square in the highway, under the railroad, would have remedied the difficulty. The respondents objected

to the assessment of any damages for this cause, but the petitioner contended that he was entitled to damages for this cause and asked the sheriff to rule accordingly; and the sheriff ruled that the jury might include damages for that cause, if they found such waste water was any damage."

The jury returned a verdict assessing damages for the petitioner; but, on exceptions by the respondents, the superior court ruled that the verdict should be wholly set aside, and to this ruling the petitioner alleged exceptions.

J. H. Dean, for the petitioner. The effects of the noise, smoke, soot, blowing of whistles, and other like causes, occasioned by the running of trains over the petitioner's land near his dwelling-house, were proper elements to be considered in estimating the damages. The words of the Gen. Sts. c. 63, § 21, "the corporation shall pay all damages occasioned by laying out and making and maintaining its road," are broad enough to include damages arising from the use of the road. Damages resulting from these and kindred causes have often been the basis of actions at law and of indictments. *Eames v. New England Worsted Co.* 11 Met. 570. *Vandine v. Burpee*, 13 Met. 288. *Rex v. White*, 1 Burr. 333. Such statutes are to be construed liberally in favor of the landowner. *Parker v. Boston & Maine Railroad*, 3 Cush. 107. *East & West India Docks & Birmingham Junction Railway Co. v. Gatlke*, 3 Macn. & Gord. 155. *The Queen v. Eastern Counties Railway Co.* 2 Q. B. 347. Danger of fire arising from the close proximity of passing trains has been recognized as a proper element of damages. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 10 Cush. 385. *In re Stockport, Timperley & Altringham Railway Co.* 10 Jur. (N. S.) 614. Damages of the same nature as those claimed here have been allowed. *Brand v. Hammersmith & City Railway Co.* Law Rep. 2 Q. B. 223. *London & Northwestern Railway Co. v. Bradley*, 3 Macn. & Gord. 336. *Western Pennsylvania Railroad Co. v. Hill*, 56 Penn. State, 460. The petitioner is entitled to damages for injury caused by surface water.

E. H. Bennett, for the respondents. Depreciation of property caused by the proximity of a railroad is not an element of

damages under the Gen. Sts. c. 63, § 21. There is no sound distinction between cases where land is actually taken, and where it is not. Such depreciation is caused by using a railroad; not "by laying out, making or maintaining" it. The landowner's legal damages are fixed and final, whether the road is ever operated or not. The emission of smoke and sparks without negligence, though it sets on fire adjoining property, is *damnum absque injuria*, and furnishes no cause of action. *Vaughan v. Taff Vale Railway Co.* 5 H. & N. 679. *Burroughs v. Housatonic Railroad Co.* 15 Conn. 124. *Chapman v. Atlantic & St. Lawrence Railroad Co.* 37 Maine, 92. *Aldridge v. Great Western Railway Co.* 3 M. & G. 515. Some courts even hold that depreciation in value arising from danger of fire from locomotives is not to be considered in estimating damages. *Sunbury & Erie Railroad Co. v. Hummell*, 27 Penn. State, 99. *Lehigh Valley Railroad Co. v. Lazarus*, 28 Penn. State, 203. *Patten v. Northern Central Railway Co.* 33 Penn. State, 426.

The right to damages does not depend upon the question whether land is actually taken, but upon the nature of the damages claimed. *Dodge v. County Commissioners*, 3 Met. 380. *Ashby v. Eastern Railroad Co.* 5 Met. 368. *Parker v. Boston & Maine Railroad*, 3 Cush. 107. *Babcock v. Western Railroad Co.* 9 Met. 553. *Tower v. Boston*, 10 Cush. 235. The authorities are uniform against the allowance of the elements of damages claimed by this petitioner. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 10 Cush. 385, 389. *Brand v. Hammersmith & City Railway Co.* Law Rep. 1 Q. B. 130; 5 C. Law Rep. 4 H. L. 171. *Albany Northern Railroad Co. v. Lansing*, 16 Barb. 68. *Canandaigua & Niagara Falls Railroad Co. v. Payne*, Ib. 273. *In re Penny*, 7 El. & Bl. 660. *Boston & Worcester Railroad Co. v. Old Colony Railroad Co.* 12 Cush. 605. *Caledonian Railway Co. v. Ogilvy*, 2 Macq. 229; 29 Eng. Law & Eq. 22. *Wood v. Stourbridge Railway Co.* 16 C. B. (N. S.) 222. *Beckett v. Midland Railway Co.* Law Rep. 1 C. P. 241.

Damages caused by turning waste water from the street upon the land were improperly allowed. A landowner has no remedy against any one who turns surface water upon his land

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either from adjoining land or from the public highway. *Turner v. Dartmouth*, 13 Allen, 291. *Franklin v. Fisk*, *ib.* 211. *Gannon v. Hargadon*, 10 Allen, 106. *Bates v. Smith*, 100 Mass. 181. Damages are not recoverable in this proceeding under the statute, for any act, unless, but for the statute, the party doing the act would be liable at common law.

WELLS, J. In this case the premises affected by the location of the railroad consisted of a dwelling-house and house lot of about half an acre of land. A part of this land was taken; and the question raised is, whether the jury might consider the depreciation of the value of the estate by reason of the proximity of the railroad to the dwelling-house, and the incidental effects of the running of trains thereon. These incidental effects are the natural and inevitable consequences of the exercise of the franchise which the legislature has granted to the corporation. They do not therefore constitute a public nuisance, and, independently of the taking of land, they cannot be made a ground for the recovery of damages, as for a private injury. See *Presbrey v. Old Colony & Newport Railway Co.*, *ante*, 1.

But, when land is taken, the owner is entitled to compensation for such injury to the value of his whole lot as is occasioned by the appropriation of a part of it to the uses for which it is taken. Such an appropriation to the uses of a railroad may clearly be more injurious to the whole lot, aside from cuts and embankments, than would an appropriation for a highway or a public park. One of the valuable incidents of the ownership of land is the right and power of exclusion. So far as the value of the property, depending on this right and power, is affected by its abridgment, compensation therefor should be included in the damages. But for the authority conferred by its franchise, the corporation might be held liable in damages, directly, for injuries to property or disturbance in its occupation, in the manner and by the causes relied on by the petitioner in this case. *Wesson v. Washburn Iron Co.* 13 Allen, 95. By taking a part of the petitioner's land the corporation is enabled to exercise its franchise so much nearer to his house, and, it may be, much more injuriously. So far as it is more injurious, to

that extent the damages for taking the land should be increased. The increase is not additional damages for the probable results of the exercise of the franchise, but compensation for the greater injury to the whole premises involved in the character of the purpose for which a part is taken.

The ruling, requested by the respondent, that depreciation of value "arising from the proximity of the road and running of the trains" should be excluded from consideration, in the assessment of damages, was properly refused. Such depreciation should be considered, so far as it is due to proximity secured by means of taking a part of the petitioner's land, and would not have resulted but for such taking.

On the other hand, the testimony of the witness offered by the petitioner and admitted, as to "how much in his opinion the estate was depreciated by the construction of the road;" and the direction to the jury "that they might assess damages for these causes as well as others," gave too broad a range to the estimate of the damages to which the petitioner was entitled. His lot contained but half an acre. If the road had been constructed close to his land, but without taking any part of it, he would have had no right to recover for any depreciation in the value of his property by reason of the several causes to which these rulings relate. It is only so far as the annoyances and inconvenience arising from these causes are increased by reason of the taking of a part of the land, that they are to be considered, as an incident of such taking, in estimating the damages or depreciation of value. The petitioner's lot did not, apparently, give him that right and power of exclusion to such an extent that the whole depreciation in the value of his property by the construction of the road can be supposed to be due to the taking of a part of his land and the causes directly affecting the premises. It is proper, therefore, that the case should be submitted to another jury. *Eldredge v. Smith*, 13 Allen, 140.

The injury from surface water turned back by the embankment of the railroad, and made to flow upon the petitioner's land, or prevented from escaping therefrom in the usual mode, was proper for the consideration of the jury in estimating his

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damages. Where there is a public, or even, as it would seem, a private right or easement of drainage, it is the duty of the railroad corporation to make suitable provision for it; and their failure to do so subjects them to an action of tort, but not to damages upon complaint. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 10 Cush. 385. *Perry v. Worcester*, 6 Gray, 544. But no such duty exists in regard to surface water. The cuts and embankments and necessary gutters of the railroad track will unavoidably modify the flow of surface water, and sometimes cause damage by keeping it back or projecting it in large quantities upon lands adjoining the road. Injuries to land from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute. *Dodge v. County Commissioners*, 3 Met. 380. *Babcock v. Western Railroad Co.* 9 Met. 553. *Parker v. Boston & Maine Railroad*, 3 Cush. 107. *Chapin v. Boston & Providence Railroad Co.* 6 Cush. 422. *Tower v. Boston*, 10 Cush. 235. *Brown v. Providence, Warren & Bristol Railroad Co.* 5 Gray, 35. *Curtis v. Eastern Railroad Co.* 14 Allen, 55.

The provisions of Gen. Sta. c. 63, § 40, authorizing the commissioners to require the corporation to construct and maintain such drains, culverts, etc., "as they judge reasonable for the security and benefit of such owners," imply that the landowners are to be protected in this respect at the expense of the corporation. If protection is not secured by means of such an order, the only indemnity which the landowner can have must be by the assessment of compensation in damages. *Turner v. Dartmouth*, 13 Allen, 291.

Upon the ground first considered, the decision of the superior court, setting aside the verdict, was right.

Exceptions overruled.

**OSDEN HAGGERTY & others vs. JAMES S. FOSTER & others.
GIOVANNI ALBINOLA & another vs. SAME.**

Authorizing a firm to apply for its benefit, and as part of its capital, United States bonds payable to bearer, deposited specially in the custody of a bank which has no notice of the giving of the authority, is not "an actual cash payment as capital," by the person giving the authority, within the meaning of the Gen. Sta. c. 55, § 2, so as to exempt him, as a special partner, from liability for the debts of the firm; although, after the making and recording of the certificate required by § 3, the bonds are applied for the benefit of the firm and realize more than the necessary amount of cash.

TWO ACTIONS OF CONTRACT against James S. Foster, Loring W. Barnes and Charles E. Carpenter, on promissory notes.

On August 1, 1866, the defendants formed a partnership under the style of Barnes & Carpenter, by articles which set forth that Barnes and Carpenter were general partners, and Foster a special and limited partner, and that Foster contributed, as his share, to the capital, the sum of \$6,666.66 "in actual cash payment." On August 2, the partners acknowledged the certificate signed by them, required by the Gen. Sta. c. 55, § 3. This certificate, which was duly recorded on August 6, and published, set forth that Foster "has contributed \$6,666.66 capital to the common stock in cash."

Foster contributed his share to the capital by three transactions; two of which it is unnecessary for the purposes of this report to specify further than that they together realized for the benefit of the firm the sum of \$5862.78. The third transaction was as follows: Foster had, on August 1, in the custody of the Attleborough National Bank, as a special deposit, deliverable to him or order, and his absolute property, two of the securities of the United States, commonly known as "seven and three tenths bonds," or "7-30 bonds," payable to bearer, each of the par value of \$1000, and at that time worth in the market, with accrued interest, somewhat over par; and on August 1 he authorized Carpenter, as a member of the firm of Barnes & Carpenter, to take these bonds and sell, use and apply them for the purpose of aiding in making up Foster's contribution to the capital of the firm. Carpenter accordingly thereafter took

the bonds, without further direction or authority, sold or otherwise disposed of them, and applied the proceeds for the benefit and in the business of the firm, as it had occasion therefor; but he did not take any actual formal possession, nor dispose of them, until some time in September 1866, at which time the firm first had occasion to use the money. From the sale or disposal of the two bonds there was received the sum of \$2115.

Foster contended that the three transactions constituted a payment or contribution to the capital of the firm, made by him in cash, within the meaning of the Gen. Sts. c. 55, § 2; but this the plaintiffs denied, and contended that by reason of noncompliance with the provisions of the statute he was a general partner in the firm.

The notes declared on were made by the firm of Barnes & Carpenter, and no payment was ever made on any of them, except a dividend of five per cent. from the estate of Barnes & Carpenter, who went into bankruptcy after the date of the writs in these actions, and received their discharge.

The cases were submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts, of which the material part was substantially as above given; if the court should be of opinion that Foster was liable as general partner, then judgment to be rendered against him alone for the amount of the notes with interest, less the five per cent. dividend; but if the court should be of opinion that he was a special partner only, then judgment to be rendered in his favor; and were argued in writing.

J. T. Morse, Jr., for the plaintiffs.

E. Ames & J. Daggett, for Foster.

COURT, J. Upon the agreed statement of facts, the defendant Foster must be held liable as a general partner in the firm of Barnes & Carpenter. In the formation of the special partnership under the statute, there was a failure to comply with one requisition which is made necessary in order to secure exemption from such liability.

By the Gen. Sts. c. 55, §§ 2-4, the special partner is required to contribute to the common stock a specific sum in actual cash

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payment as capital; all the partners must make and severally sign a certificate, which shall contain, among other things, the amount of the capital stock which each special partner has contributed; and if a false statement is made, all the persons interested in the partnership shall be liable as general partners for all the engagements thereof.

It is unnecessary to consider all the modes in which Foster attempted to complete his contribution as special partner. His liability as general partner is fixed, if within the true construction of the statute any one of the methods adopted is not to be regarded as an actual cash payment of any part of the amount. It is wholly immaterial that the transaction at the time was honestly intended and understood by the parties to be sufficient; that the securities actually transferred afforded the means by which their cash value was in fact subsequently realized; or that creditors were not actually defrauded. The statute is plain and explicit. It requires payment to be made when a certificate is signed, acknowledged and recorded as the foundation of the partnership; and this certificate must recite what has been done, not that which is executory. Its object is to provide a fund, on the day the company is formed, to be thereafter subject to no contingencies or losses, except those which come from the proper business of the partnership. The use of the phrase "actual cash payment," is emphatic and significant. It is wisely intended to exclude a construction, by which commercial securities, of any description short of cash, may be regarded, by the aid of mercantile usage or otherwise, as substantially equivalent to cash; and to remove from all parties the temptation to evade its requirements in this respect.

In the cases at bar, it appears that, on the day when the articles of copartnership were entered into, the Attleborough Bank had in its custody two obligations of the United States for one thousand dollars each, payable to bearer, which belonged to the defendant Foster and were deliverable to him or his order on demand, and which he authorized Carpenter, dealing with him as a member of the proposed firm, to take, sell and apply, as a part of his contribution, to the capital. These obligations

were worth, at the time, somewhat more than their par value, and were in fact taken and sold by Carpenter some time in the month of September following, and applied to the use of the firm as it had occasion for the money. Assuming that the authority given to Carpenter to make this appropriation was sufficient, yet it does not appear that any action was taken under it by Carpenter, or any notice of the transaction given to the bailees of these securities, before they were finally taken and sold by him.

A majority of the court are unable to regard this as a compliance with a provision, which demands an actual cash payment, and requires it to be certified, acknowledged and recorded, before the partnership is formed. These securities were at best but the agreement of a third party to pay money at a future day; they cannot be treated as cash; they were not so treated by the bank, in whose safekeeping they were placed, and which held them as a special deposit; nor were they so regarded by the parties themselves, who expressly provided for their future sale and conversion into money. If considered as equivalent to cash, yet there was no delivery of them valid as against the individual creditors of Foster, who for some considerable time afterwards held the legal title to them. *Pierce v. Bryant*, 5 Allen, 91. *Foquet v. Hoadley*, 3 Conn. 534.

It is not necessary to consider the manner in which the remaining part of Foster's contribution was made. It is sufficient that the certificate, to the extent indicated, contained a statement, which, though made in good faith by him, was a false statement within the meaning of the law. The statute cannot be construed so as to meet the hardships of individual cases. And judgment must be rendered against Foster, according to the agreement of the parties, in both cases.

Judgment for the plaintiffs.

WILLIAM COOK *vs.* HENRY F. SHEARMAN.

In an action on a promissory note, in which a discharge in insolvency is pleaded, and no replication is ordered by the court, the plaintiff may prove a new promise without having alleged it.

A new promise to pay a debt, made after the commencement of proceedings in insolvency, is equally valid, whether made before or after the certificate of discharge.

In an action on a debt barred by a discharge in insolvency, statements in letters from the defendant to the plaintiff that he expects and hopes to pay the plaintiff all that is due to him; that he shall certainly do so as soon as possible; that he hopes to be so situated that he can send him the full amount of his bill with interest; and that he will see that the plaintiff is no loser by him; amount, in law, to a new promise to pay the debt, which cannot be controlled by testimony of the defendant as to his meaning.

In an action on a promissory note, duly stamped, which is barred by a discharge in insolvency, letters from the defendant may be put in evidence as containing new promises to pay the note, although they are unstamped.

CONTRACT on a promissory note duly stamped. Answer, a certificate of discharge in insolvency. No replication was filed.

At the trial in the superior court, before *Morton, J.*, the plaintiff admitted the discharge, and, as evidence of a new promise, offered three letters, written to him by the defendant, two of which were dated after the beginning of the proceedings in insolvency but before the discharge, and one after the discharge. The defendant objected to the admission of any of these letters, on the ground that no new promise had been alleged by the plaintiff; and further, to the admission of the first two letters, on the ground that they were written before the discharge; but the judge admitted them all. The letters, omitting the addresses, signatures, and formal parts, were as follows:

"July 17, 1866. I am in receipt of yours of yesterday. I called twice at your store, while in New Bedford, to pay you something, as I said I would, on account, but I found the store fastened both times; once it was about noon, when I called, and the other time it was about six o'clock in the afternoon. I was very busy indeed the last few days that I was in New Bedford, or I should have tried again to see you. I cannot pay you anything now until next November, when, unless something unforeseen should happen, I expect to pay you all there is due you

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with interest to the time of payment, and I will certainly see to it that you are no loser by me."

"November 23, 1866. Your note dated the 13th instant I have just received. I hope to be situated in a few weeks so that I can send you the full amount of your bill with interest."

"May 30, 1867. Your letter of yesterday has been received and contents noted. Early in July I hope to pay the amount due you, possibly sooner than that. I shall certainly do so as soon as possible. I regret it very much, but could not meet a draft from you on the 3d proximo." In an unsigned postscript to this letter the defendant added: "You have waited long and patiently for your money, and will not have much longer to wait therefor. I shall see to it that you are not the losers for your courtesy."

No evidence as to the defendant's ability was introduced. The plaintiff was allowed, against the defendant's objection, to testify "that the subject matter of the letters referred to the note declared on," and that at the dates of the letters, the defendant was in no way indebted to the plaintiff except on the note. The judge refused to admit "the evidence of the defendant as to the meaning of the expressions contained in the letters;" and no other evidence was offered by the defendant.

The plaintiff contended that the letters were evidence of a promise to pay the defendant's debt. The defendant contended that they were not; and further, that, if the letters contained any agreement, it was invalid for want of an internal revenue stamp upon them.

The judge ruled that it was for the court to determine what was the effect of the evidence introduced, and the proper conclusion to be deduced therefrom; and instructed the jury to return a verdict for the plaintiff, which was done; and the defendant alleged exceptions.

H. F. Shearman, pro se.

W. H. Cobb, for the plaintiff.

GRAY, J. 1. An action upon a debt barred by a certificate of discharge in bankruptcy or insolvency, and revived by a new

promise, counts upon the original debt. The new promise need not be alleged in the declaration; and, at common law, might have been replied or given in evidence in support of the promise declared on. *Way v. Sperry*, 6 Cush. 241. Under the practice act, no replication is required, unless by special order of the court. Gen. Sta. c. 129, § 23. The plaintiff was therefore rightly permitted to prove a new promise, without having alleged it either in his declaration or by way of replication.

2. The certificate of discharge in insolvency takes effect, not from its date, but from the commencement of the proceedings in insolvency. Gen. Sta. c. 118, §§ 75, 76. A distinct and unequivocal promise to pay the debt, made by the debtor after the commencement of such proceedings, whether before or after obtaining his certificate of discharge, is equally binding. *Lerow v. Wilmarth*, 7 Allen, 463. All the letters offered in evidence were therefore rightly admitted.

3. The statements in those letters, that the defendant expects to pay the plaintiff all that is due to him, and hopes to be so situated as to send him the full amount of his bill, with interest, coupled with the assertions in the first and last of them that he will see to it that the plaintiff does not lose by him, amounted to a distinct and unequivocal promise, the legal construction and effect of which could not be controlled by his own testimony as to the meaning of the expressions contained in the letters. The plaintiff's testimony was rightly admitted for the purpose of showing that no other debt was due him from the defendant when the letters were written, and of identifying the claim in suit. The defendant offered no evidence on this point, and did not ask to have the question whether the letters referred to this claim submitted to the jury. There being no contradiction as to the facts, the question whether a new promise was proved was for the court, and was rightly decided in the plaintiff's favor. *Barnard v. Bartholomew*, 22 Pick. 291. *Woodbridge v. Allen*, 12 Met. 470.

4. The note on which the action was brought was duly stamped, as required by the internal revenue act of the United States. The letters did not modify that contract, and were not

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intended to contain within themselves the terms of an agreement between the parties, but were merely evidence to support the action on the contract as originally made, and therefore required no stamp. *Beeching v. Westbrook*, 8 M. & W. 411. *Marshall v. Powell*, 9 Q. B. 779. *Exceptions overruled.*

HENRY RYDER vs. WILLIAM WILCOX.

An agreement between W. W. and H. R., dated October 2, 1865, provided that W. W. should enter into and carry on, for three years from April 17, 1865, the business of manufacturing oils and candles, "under the name, style and firm" of the X. Company, furnish the necessary capital to a limited amount, let the company have the use of his coal land and mining apparatus, with the right to take coal, for which he was to be paid by the company a certain sum per ton, and be allowed interest "on the capital stock invested in said company;" that H. R. should be employed as the general agent and manager of said business, devote himself wholly thereto, receive "in payment for his said services" a certain sum per year and one half of the net profits of the business, let to the company his oil works, tools and apparatus at a certain rent, and allow to the company free of charge the benefit of all trade marks and patents used by him; that annual settlements should be made, and all sums due thereon to H. R. should be paid, or, if not paid, credited to him and interest allowed thereon; that "all the operations of the late limited partnership of H. R. since April 17, 1865, are to be considered as done and performed under this agreement, so far as the business of the company is concerned, and this agreement relates back" to said April 17. H. R., in 1867, brought an action of contract against W. W., the declaration in which set forth the agreement and alleged that the defendant excluded the plaintiff from the management and profits of the business, refused to make annual settlements and payments, and, although continuing the business on the premises and with the tools of the plaintiff, and making large profits, refused to recognize that the plaintiff had any rights under the agreement. *Held*, on demurrer, that the parties were partners, and the action was not maintainable.

CONTRACT. Writ dated July 26, 1867. The declaration was as follows: "And the plaintiff says the defendant made a contract in writing with him, a copy whereof is hereto appended and made part of this declaration, whereby the defendant agreed to enter into and carry on with the plaintiff the business of manufacturing and selling oil and candles in the manner and upon the terms set forth in said written contract; and the plaintiff avers that he has in all respects well and truly performed the promises and agreements on his part to be kept and performed

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under said contract; but that the defendant, without sufficient cause or justification, has failed and refused to perform his promises and agreements in said contract contained, and has violated said contract, in this: that he has arbitrarily, and against the will of the plaintiff, and without sufficient cause or justification, entirely and completely excluded the plaintiff from all participation in the conduct and management of said business and in the profits thereof, and has arbitrarily assumed the exclusive management, control and profit thereof to himself, without regard to the rights of the plaintiff; and that the said defendant has failed and refused to make an annual settlement of account with the plaintiff, and annual payment, in accordance with the terms of said contract; and that, though the defendant has continued said business to the present time upon the premises, and with the tools and appliances of the plaintiff, and has made large profits therefrom, yet he has refused to acknowledge and recognize that the plaintiff has any rights under the contract."

The contract declared on, which was signed by the parties and dated October 2, 1865, was as follows: "The said Wilcox does hereby agree to enter into, establish and carry on the business of manufacturing lubricating and other oils, and paraffine candles, under the name, style and firm of 'The New Bedford and Ohio Oil and Candle Company,' and to furnish the capital necessary for carrying on said business to the amount of \$50,000. The business is to be carried on at New Bedford and also in the state of Ohio, and is to be continued for the term of three years from the seventeenth day of April last past; and the said Ryder is to be employed as the general agent, superintendent and manager of said business. And the said Ryder does hereby agree to take charge of said business as the agent, manager and superintendent of the same, and to devote all his time, attention, skill and knowledge to said business, and to exert his best endeavors to secure the success and prosperity of said business during the said term of three years from the seventeenth day of April last past.

"And it is further agreed by and between the said parties, that the said Ryder shall receive in payment for his said ser-

vices the sum of \$1000 per year during the said term, and one half of the net profits of the said business. Annual settlements are to be made, and all sums due to said Ryder on said settlements are to be paid; or, if not paid, the amount is to be credited to him, and interest is to be allowed him on the same. And the said Wilcox is not to reduce the capital of said company below the sum of \$50,000 during the term of his contract.

"And the said Ryder does further agree to hire to and let to said company his oil works, buildings, fixtures, tools and apparatus for manufacturing oil and parafine candles at New Bedford, at and for the rent of \$1600 per year during the term of this contract. The buildings are to be kept in repair by the said Ryder, but the tools, fixtures, machinery and apparatus are to be kept in repair by the company, and are to be returned to said Ryder in equal value at the end of this contract. The said company are also to have the use and benefits of all trade marks, names and patents now used by said Ryder, free of any charge, during the time of this contract, and the same are to be redelivered to said Ryder at the expiration of this contract, free from any claim or charge.

"And the said Wilcox does further agree that the said company shall have the use of his coal lands, oil works, mining apparatus, &c., in the state of Ohio, and the right to receive coal as much as shall be desired for the use of the company; for which, and the use of his said works and apparatus, he is to be allowed and paid by said company the sum of fifteen cents per ton. All necessary repairs on said works and apparatus are to be made by the company

"All the operations of the late limited partnership of 'Henry Ryder' since the seventeenth day of April last, are to be considered as done and performed under this agreement so far as the business of the company is concerned, and this agreement relates back to the seventeenth day of April last past.

"The said Wilcox is to be allowed interest on the capital stock invested in said company, at the rate of bank interest in Massachusetts."

The defendant demurred because the declaration set forth no cause of action; and the case was thereupon reserved by *Foster, J.*, for the determination of the full court.

T. D. Eliot & T. M. Stetson, for the defendant.

E. L. Barney, for the plaintiff.

COLT, J. It is necessary to determine whether the contract declared on constitutes a partnership, or was only an agreement by which the plaintiff was to take a share of the net profits, not in the character of partner, but as agent, and as compensation for labor and services, or capital contributed.

Where creditors are not concerned, and the question arises between the parties only, the intention as ascertained from all the provisions of the instrument must govern. If payment for services rendered is to be made in proportion to the profits of the business, and the profits are referred to only as a measure of compensation, and if no lien is given upon the property or assets of the business, to the exclusion of other creditors, then the mere fact that a party is, to the extent stated, indirectly interested in the profits, will not make him a partner. In general, a participation in profits is alone sufficient to establish a partnership, unless it appears, from other circumstances and stipulations, that such was not the intention, as where the party who contributes his services, money or goods to the prosecution of a particular business with one or more parties, relies solely on the personal responsibility of the latter, and does not intend to have any title or interest in the resulting property or its proceeds. *Hawes v. Tillinghast*, 1 Gray, 289.

Most of the stipulations in this contract are equally consistent with either theory. In substance, Wilcox agrees, on his part, to go into the manufacturing business, under a certain designated name, style and firm; to furnish the necessary capital to a limited amount, and to let the company have the use of certain coal lands, oil works and mining apparatus, in Ohio, with the right to take coal, for which he is to be paid by the company a certain rate per ton. Ryder, on his part, agrees to devote all his time and skill exclusively to the business, as general agent and manager; to lease certain oil works and personal

property at New Bedford to the company at a stipulated rent and to give the company the use and benefit of his trade marks and patents free of charge. He is to receive for his services a certain sum per year, and one half of the net profits. Annual settlements are to be made, and all sums due Ryder are to be paid or credited. Interest is to be allowed to Ryder on his credits, and to Wilcox on the capital paid in. The word "firm" is used, and the contemplated business is spoken of as that of a "company." The inference is, that the parties to the contract intended to be the members composing it; and that the plaintiff, having a common interest in the stock, looked to the property and business of the concern for his stipulated share, and not solely to the personal responsibility of the defendant. The rights of the plaintiff and defendant to their share of the profits, and the allowances respectively provided for in the agreement, depend upon similar stipulations, and stand on the same ground. And all doubt seems to be removed by the concluding provision, by which all the operations of the limited partnership of Henry Ryder are embraced within its terms, and the contract is carried back to a previous date, in order to cover them. Without further explanation, this last stipulation must be held to carry into the new concern certain previous transactions, in the profits of which, as general partner, Ryder was entitled to participate; and is inconsistent with the interpretation that the only relation he sustained to the new business was that of agency. Upon the whole, we think that the relation created and continued was intended to be, and was, that of partnership. *Williams v. Henshaw*, 11 Pick. 79. *Denny v. Cabot*, 6 Met. 82 3 Kent Com. (6th ed.) 24. Story on Part. §§ 18 & seq.

It remains to consider whether the plaintiff's case comes within any of those rules which permit one partner to maintain an action at law against another, for a violation of the partnership agreement.

It is alleged, in substance, that the defendant has excluded the plaintiff from the management and profits of the partnership business; has refused to make annual settlements, and payments thereon; and, although he has continued the business

upon the premises and with the tools of the plaintiff, and made large profits, has refused to recognize the plaintiff's rights under the contract. The action is brought before the expiration of the time limited for the duration of the partnership, and without any formal dissolution of it. It is not for the recovery of an ascertained general or special balance belonging to the plaintiff. There can be no recovery at law of the profits of the business, so long as it is possible, upon a final settlement and account between the partners, that the plaintiff might be liable to refund. It is not sought to charge the defendant as upon an agreement preliminary to the commencement of business, made for the purpose of launching the partnership, like promises to furnish capital; or upon separate securities given by one partner to another on partnership account; or where there has been a voluntary separation of funds from the partnership stock, and one partner is alone interested in the contract relating to it.

It is said that an action at law for damages for the breach of an express agreement, entered into by one partner in favor of another, will only lie where the action can be properly tried without going into the partnership accounts, and the damages sought will belong exclusively to the plaintiff, and where the plaintiff will not be liable in any contingency, affecting the future joint business, to contribute to his own payment. Lindley on Part. 731, 740.

But, without stopping to inquire whether this action can be maintained without violating these rules, it is sufficient to say that, whatever the nature of the agreement, it must be one in which the defendant binds himself personally to the plaintiff. We cannot find, in the instrument declared on, that the defendant did bind himself personally to make good to the plaintiff any certain sum as his share, if the partnership assets should prove deficient. The stipulations in this regard are to be construed not as personal covenants between the parties as individuals, but rather as provisions defining and regulating the mode in which the business of the company should be conducted and the profits divided. The agreements, on the other hand, for contribution to the partnership funds and property which each is to

make, are made binding by name on each, and would no doubt be classed with those express agreements which may be the foundation of an action. *Venning v. Leckie*, 13 East, 7. *Brown v. Tapscott*, 6 M. & W. 119.

The principles we are considering are illustrated in the case of *Paine v. Thacher*, 25 Wend. 450, where it was held that, if one partner promises another partner to pay him a compensation for personal attention to the business of the concern, this promise may be enforced at law, notwithstanding the existence of the partnership and written articles providing for such payment. Nelson, C. J., says, in this case, that the item for services had been adjusted, and there was an express promise to pay it, and the compensation was to be contributed "as a part of the capital, to be furnished by the defendant in lieu of personal attention."

It is plain that there can be no recovery at law for work and labor for the firm or for contributions to its funds, in the absence of an express agreement of the defendant; and the plaintiff does not aid his case by alleging a willingness to perform, and a prevention by the defendant.

The rights of the parties are regulated by the general principles of the law of partnership, when not changed by special agreement. They are joint owners and possessors of the capital stock, funds and effects of the company. Each has equal right to the possession, and equal right in the conduct and management of the joint business, and is clothed with like authority

In the opinion of the court, upon the case stated in this declaration, no action at law can be maintained. If the declaration could be taken as alleging an entire repudiation by the defendant of the contract and of the relation of partnership, with a claim of damages for such a breach of the contract, instead of compensation for services in conducting the business, and for a share of its profits, such an action might be maintainable. We do not so understand its allegations. A failure and refusal by the defendant to perform his promise and agreement is indeed charged, together with an exclusion of the plaintiff, and a refusal to acknowledge that he has any rights under the con

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tract. But it also alleges a refusal to make the annual settlement of accounts and annual payments, according to the contract, and sets forth a continuance of the business upon the premises and with the tools and appliances of the plaintiff, with large profits therefrom, from a participation in which he has been excluded. The remedy in such cases is in equity, where the power to investigate accounts, to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had.

In *Capen v. Barrows*, 1 Gray, 376, it was held that an action at law to recover damages, brought by one partner against his copartner, for neglect of partnership business, could not be maintained while the affairs of the firm remained unsettled, although it was expressly agreed that each partner should devote his whole time to the partnership business. The principle of that case is applicable here. *Fanning v. Chadwick*, 3 Pick. 420. *Williams v. Henshaw*, 11 Pick. 79. Met. Con. 133. *Holmes v Higgins*, 1 B. & C. 74. *Demurrer sustained.*

WILLIAM CARROLL & another vs. DENNIS SULLIVAN & trustees.

The agreement of a member of a firm with his partner, to be responsible for the price of goods furnished by the firm to A., is a sufficient consideration for an assignment to him by A. of a debt due to A. less in amount than the price of the goods so furnished, as against one who afterwards attaches such debt on trustee process in a suit against A.

CONTRACT. Writ dated January 30, 1868. The defendant was defaulted. The Union Mill Company, who were summoned as trustees, answered that at the time of the service of the writ upon them they had in their hands the sum of \$75.65 due to him, unless the same had been assigned to Jeremiah Kelley, of which assignment they had notice.

Kelley appeared as a claimant of the sum, and, at a hearing in the superior court before *Reed, J.*, proved a written assignment under seal, dated August 19, 1867, to himself by the defendant of all claims for wages which the defendant had or

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might have, against the trustees, up to August 19, 1868; and that this assignment was duly recorded on the day of its date.

It further appeared, from the evidence of the claimant, that, before the assignment, he agreed in good faith with John O'Neil, who was his partner, that he would be responsible to him for the price of such goods of the firm as had been and should be furnished to the defendant; that the assignment was made for the purpose of securing the claimant from loss by reason of this agreement, and in consideration thereof; that, in consequence of the agreement, goods of the firm were furnished to the defendant to the amount of \$88.66 before the service of the writ on the trustees; and that the claimant had no other claim against the defendant.

Upon this evidence, the plaintiffs asked the judge to rule that the assignment was invalid, because the consideration, as proved, was not sufficient to support it; but the judge refused so to rule, allowed the claim, and discharged the trustees. The plaintiffs alleged exceptions.

J. M. Morton, Jr., for the plaintiffs.

J. C. Blaisdell, for the claimant.

MORTON, J. The only question raised in this case is as to the sufficiency of the consideration of the assignment from the defendant to the claimant Kelley. It appears from the bill of exceptions, that Kelley, before the assignment was executed agreed in good faith that he would be responsible for all goods which had been or should be furnished to the defendant by the firm of which he was a member; and that under this agreement goods were furnished to the defendant to an amount greater than the sum in the hands of the trustees at the time of the service of the writ upon him. This was a sufficient consideration to support the assignment. *Goward v. Waters*, 98 Mass 596.

If, as the plaintiffs claim, the effect of Kelley's agreement was merely to make him a guarantor of the debt of the defendant to the firm, yet his agreement to guarantee and his actually becoming guarantor before the service of the plaintiffs' writ, for an amount larger than the sum in the hands of the trustees, would be a sufficient consideration for the assignment. *Gardner v Webber*, 17 Pick. 407.

Exceptions overruled.

CHARLOTTE D. SIMMONS vs. WILLIAM F. ALMY & trustees.

An attorney has no such lien in a cause before judgment as to prevent his client from settling the action with the opposite party without his consent or knowledge.

In an action on a *quantum meruit* for board, the payment, "in settlement of the action," of more than the whole amount alleged in the declaration to be due, is good as an accord and satisfaction, and the action cannot afterwards be maintained for the recovery of a balance of the interest since the date of the writ.

CONTRACT ON AN ACCOUNT annexed, the only item in which was: "To board from November 7, 1864, to January 9, 1866, sixty-one weeks at \$5 per week, \$305.00." Writ dated February 9, 1866. The action was entered in the superior court at March term 1866, the defendant defaulted at that term, and the case continued on questions arising upon the trustees' answer, which were finally decided by charging the trustees, until March term 1869, when the default was taken off by order of court and the defendant answered that the action had been "settled by the principal parties therein, on or about December 31, 1868." At June term 1869, Louis Lapham, the attorney and counsel for the plaintiff, filed a claim as a lien for fees and disbursements in the action against the defendant.

At the trial, before *Wilkinson*, J., the defendant produced a paper dated December 31, 1868, and signed by the plaintiff, acknowledging the receipt from the defendant "by Asa B. Anthony of \$240 in full for the amount due me from said Almy and of any and every claim against said Almy in my favor up to December 31, 1868, and in settlement of the action in my name against said Almy now pending in the superior court." This receipt was given without Lapham's knowledge.

The plaintiff contended that the receipt was obtained from her by misrepresentation and by "legal fraud as it affected the rights of the plaintiff and her counsel," and testified that, at the time of signing it, she said that she would take the sum named 'herein in payment, if the costs were paid by the defendant to Lapham; that the whole claim of \$305 was due to her at the time of bringing the action; and that she had received about

\$100 from the defendant before the payment for which the receipt was given. Anthony, through whom the \$240 was paid by the defendant and the receipt taken, testified that he knew that Lapham was attorney for the plaintiff and had acted for her in this case; but that he did not agree that the defendant should pay the costs. The defendant introduced evidence tending to contradict the plaintiff's testimony, and to show that the settlement was fairly made.

The plaintiff asked the judge to instruct the jury that "no settlement made with a party without the knowledge of the counsel in the suit can operate as a discontinuance of the suit so as to deprive the counsel of his lien for costs therein, and that such a settlement so made is of itself evidence of fraud;" and also that, "if the receipt for \$240 was payment to that amount, it was not a settlement of the action, and the plaintiff was entitled to recover the balance beyond that amount." But the judge declined to give the instructions prayed for, and instructed the jury "that, if the settlement and receipt were fairly obtained, they were binding upon the plaintiff, though without the knowledge of her counsel and for a less sum than was claimed in her writ; that, if the settlement and receipt were obtained by fraud, they were of no validity; that the question of fraud was for the jury to determine from all the facts and circumstances attending the transaction; and that they might consider the amount paid and the absence of counsel, and give them such weight as they might think them entitled to on this question." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

L. Lapham, for the plaintiff.

E. Williams, for the defendant.

COURT, J. The first instruction was asked by the plaintiff on the ground, apparently, that her attorney had such a lien upon, or interest in, the pending suit, that without his consent the plaintiff herself could not settle the action so as to deprive the attorney of his right to look to the avails of the suit, as well as to the personal responsibility of the plaintiff, for his costs. But the case does not show any such lien to have existed at the time

of the settlement. At common law, the attorney has no lien upon the cause for his fees, either before or after judgment. *Getchel v. Clark*, 5 Mass. 309. By the Gen. Sts. c. 121, § 37, he has such lien only when he is lawfully possessed of an execution, or has prosecuted a suit to final judgment in favor of his client; and not then, as against a payment to the judgment creditor without notice of the lien. The plaintiff does not come within the statute. And there is no pretence of any special contract, creating a particular lien in the attorney's favor, of which the defendant had notice before the settlement. The law which gives an attorney a lien, in some cases, upon the papers of his client in his hands, for fees and disbursements, if recognized as prevailing in this Commonwealth, has no application here. *White v. Harlow*, 5 Gray, 463. 2 Hovenden's Suppl. to Ves. Jr., note to *Taylor v. Popham*, 315; 13 Ves. (Am. ed.) 59, 62.

The remaining instruction asked for required the application of the familiar rule that a creditor cannot bind himself, by a simple agreement, to accept a smaller sum in lieu of an ascertained debt of a larger amount, because such contract is without consideration. This rule, it is said, may obviously be urged in violation of good faith, and is not to be extended beyond its precise import; it is never enforced when the technical reason on which it is founded does not exist. *Brooks v. White*, 2 Met. 283. It does not apply when the debt has not been liquidated between the parties; and, in the case of *Wilkinson v. Byers*, 1 Ad. & El. 106, 113, which resembled this, Parke, J., declared that, "if an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, it is a good consideration for a promise by the plaintiff to pay his own costs;" and that "in the great majority of actions of this nature, it is not a specific sum that forms the subject matter of the action, and, unless that could have been shown in the case at bar, there was a good consideration for the promise."

The declaration in this case is upon an account annexed containing an item for board, and is equivalent to the common count upon a *quantum meruit*. It appears from the plaintiff's testimony, that the whole of the item was due at the time of

bringing the action; but it does not appear that that amount was in any sense liquidated between the parties, or that the amount was not in dispute. And the authority above cited, with the decisions of this court in *Donohue v. Woodbury*, 6 Cush. 148, and *Alvord v. Marsh*, 12 Allen, 603, is decisive.

There is another aspect of the case, which may be considered, and which tends to the same result. The amount paid at the settlement was more than enough, with the previous payment, to meet the plaintiff's demand at the date of the writ. By adding interest from that time to the time of settlement, it is claimed that it now appears, by the plaintiff's computation, that there is a small balance of interest unpaid. If this were so, the rule under consideration is not applicable to the state of facts as claimed to exist. The interest unpaid in this case was no part of an ascertained demand, or of a demand capable of liquidation by the terms of the contract alone. The plaintiff had no claim to interest as an incident to or part of the original debt, as where there is an original promise to pay interest or where there is default in the payment of money at the time stipulated. Her claim to interest is by the way of those damages which the law allows for the detention of money, and which, when there has been no demand, are computed from the date of the writ. And where the principal of the debt is paid and accepted, the action cannot be pursued for the interest. Such a demand does not seem to come within the principle which the plaintiff invokes the aid of. *Bank of Brighton v. Smith*, 12 Allen, 243. *Goff v. Rehoboth*, 2 Cush. 473. *Tuttle v. Tuttle*, 12 Met. 551. In the case of *Johnston v. Brannan*, 5 Johns. 268, which was an action on a promissory note payable on time, and therefore stronger for the plaintiff than the case at bar, it was held that the rule ought not to be applied to a case where the payment accepted as satisfaction fell short about two dollars of the whole amount of principal and interest due the court remarking that "in many cases interest is uncertain damages, and ought not to be considered as part of the debt, within the purview of that rigid and rather unreasonable rule of the old law."

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Upon the whole, the case did not call for other instructions than were given, which were sufficiently full and accurate, as the case was presented. *Exceptions overruled.*

SETH H. BRETTUN vs. JAMES H. ANTHONY.

A count in a declaration for slander alleged that B., the plaintiff, owned a certain building and the goods therein; that the building and goods were insured and burned; and that after the burning, the defendant, "speaking with reference thereto," and knowing of the insurance, accused the plaintiff of the crime of wilfully burning the building and goods with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: "B. burned the store." Another count alleged that the plaintiff petitioned to be and was adjudged a bankrupt; and that the defendant accused the plaintiff of the crime of disposing, otherwise than in *bond fide* transactions, within three months before his petition, and for the purpose of defrauding his creditors, of goods bought by him and unpaid for, attempting to account for them by fictitious losses, and doing acts in violation of the bankrupt act, by words spoken of the plaintiff during the pendency of the bankruptcy proceedings, substantially as follows: "B. burned the store;" "the defendant thereby referring" to the burning "referred to in the preceding count," whereby certain accounts and papers relating to the plaintiff's business were destroyed. *Held*, that both counts were bad, because they did not sufficiently show that any crime was imputed to the plaintiff by the words spoken.

TORT for slander. The third count of the declaration alleged that the plaintiff was the owner of a certain building in Raynham, and occupied it, for the purposes of his trade, with goods, wares, merchandise and other chattels, his property, and for a store; that said building, and also said goods, wares, merchandise and other chattels therein, were insured against loss or damage by fire, and were destroyed by fire during the time they were insured; that "after said destruction by fire, the defendant, speaking with reference thereto, well knowing that said building, and also said goods, wares, merchandise and other chattels therein were insured against loss or damage by fire as aforesaid, publicly, falsely and maliciously accused the plaintiff of the crime of wilfully burning said building, and the goods, wares, merchandise and other chattels therein, at the time they were so insured against loss or damage by fire, with the intent to injure the insurers thereof, by words spoken of the plaintiff, substantially as follows: 'Some of the folks up your way think

that Henry' (meaning the plaintiff) 'burned the store.' 'I (meaning the defendant) 'have no doubt but what he' (meaning the plaintiff) 'burned it.' "

The fourth count alleged that the plaintiff petitioned for the benefit of the bankrupt act, and was duly adjudged a bankrupt; that proceedings upon the plaintiff's petition were now pending; that the defendant was a creditor of the plaintiff, and had duly proved his claim in bankruptcy; that "the defendant, well knowing that said proceedings in bankruptcy had been commenced as aforesaid, publicly, falsely and maliciously accused the plaintiff of a crime and misdemeanor; in this, that the plaintiff, with intent to defraud his creditors, within three months before the commencement of the proceedings in bankruptcy on said petition of the plaintiff, did dispose of, otherwise than by *bona fide* transactions in the ordinary way of trade, his goods or chattels obtained on credit and remaining unpaid for; and in this, that the plaintiff did attempt to account for the property, or some part thereof, by fictitious losses or expenses; and in this, that the plaintiff did acts which are offences under, and are in violation of" the bankrupt act; "by words spoken of the plaintiff, during the time of the pendency of said proceedings in bankruptcy, substantially as follows: 'He' (meaning the plaintiff) 'is the biggest rascal off of the gallows. Some of the folks up your way think that Henry' (meaning the plaintiff) 'burned the store. I have no doubt but what he' (meaning the plaintiff) 'burned the store;' the defendant thereby referring to the destruction by fire referred to in the preceding count, by which fire certain memoranda, books, accounts and other papers relating to the plaintiff's trade or business were destroyed; and that the defendant did publicly, falsely and maliciously accuse the plaintiff, in words spoken of the plaintiff as above set forth, of acts, matters and things" whereby the plaintiff's discharge in bankruptcy would be withheld, or, if granted, would be invalidated.

The defendant demurred to these two counts as setting forth no good cause of action; and *Wells, J.*, reserved the case on the demurrer for the consideration of the full court.

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E. H. Bennett, (W. H. Fox with him,) for the defendant.

J. Brown & C. A. Reed, for the plaintiff.

COLT, J. The sufficiency of two counts in the plaintiff's declaration is submitted upon this demurrer. The words actually used, as set forth in these counts, do not alone impute a crime which would render the plaintiff liable to punishment. They are consistent with a burning caused without criminal intent, by carelessness or accident; and additional facts are therefore alleged in each count, from which, it is claimed, the criminal quality of the act appears with certainty. This is to be settled by the familiar rules which govern the pleadings in actions of slander.

Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the bearer a charge of crime. This limited protection to reputation the law attempts to give against indirect verbal imputation. It must however be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated; and the words, when taken in their plain and natural import, must be capable of the meaning attributed to them.

The facts which determine the alleged meaning are usually stated in a prefatory manner, followed by a positive averment, or *colloquium*, that the discourse was of and concerning these circumstances. Whatever the particular order of their arrangement, these averments become material and traversable, and it must appear from them that the words impute the alleged offence. It is a further elementary principle, that the *colloquium* must extend to the whole of the prefatory inducement, necessary to render the words actionable.

An omission in the respect indicated will not be aided by mere innuendoes, whose office cannot add to or extend the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration. *Snell v. Snow*, 13 Met. 278. General allegations, that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular

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crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. Thus, the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of defrauding the insurers, or in violation of the provisions of the bankrupt act. Conversation about such burning, otherwise innocent, or of doubtful import, may be made actionable, if reference was had in it to these special circumstances, in such manner as necessarily to impute the crime. And the declaration is defective, if it does not set this forth by suitable averments.

It is no answer, that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which make the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered. *Fowle v. Robbins*, 12 Mass. 498. *Bloss v. Tobey*, 2 Pick. 320. *Carter v. Andrews*, 16 Pick. 1, 5. *Sweetapple v. Jesse*, 5 B. & Ad. 27.

Under the practice act, these rules of pleading still prevail. No averment need now be made which the law does not require to be proved; but all the substantial facts, necessary to constitute the cause of action, must be stated with substantial certainty. *Tebbetts v. Goding*, 9 Gray, 254. *Chenery v. Goodrich*, 98 Mass. 224.

The plaintiff's declaration, on the counts under consideration, does not in our opinion meet the requirements here stated. The first count avers, in substance, the destruction of the plaintiff's building with the goods therein, and the fact that the building and goods were at the time of the loss insured against damage by fire. It then charges that the defendant, speaking with reference to said destruction by fire, and knowing of the in-

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insurance, accused the plaintiff of the crime of burning with intent to injure the insurer, by the words recited. The difficulty is, that the words thus spoken are, by reasonable construction, connected with only one of the prefatory allegations, namely, the burning of the building, and with the circumstance of the insurance. They do not therefore impute a crime. In other words, the *colloquium* is not coextensive with the whole inducement which the pleader thought necessary to set out.

The other count is open to the same objection, and fails to connect the words with any conversation relating to the plaintiff's bankruptcy, or any acts which are made offences under the bankrupt act.

Demurrer sustained.

LYDIA BURT, executrix, vs. STEPHEN B. ALLEN.

By virtue of the Gen. Sta. c. 131, § 37, and notwithstanding § 34, the admission in evidence of a deposition taken in another state, under a commission, by a magistrate whose certificate states that the deponent swore to the truth of the deposition, but does not state that he was sworn before he was examined, is within the discretion of the court.

GRAY, J. The single exception in this case is to the admission in evidence, at the trial in the superior court, of a deposition taken under a commission from that court, in the state of Maine, upon written interrogatories and cross-interrogatories, before a justice of the peace, who certifies thereon that the deponent "made solemn oath that the within and foregoing deposition by her subscribed contains the truth, the whole truth, and nothing but the truth."

The Gen. Sta. c. 131, §§ 34-36, provide that the deposition of a witness without the state may be taken under a commission from the court, or before a commissioner appointed by the governor for that purpose, "and may be used in the same manner, and subject to the same conditions and objections as if it had been taken in this state;" that every such deposition shall be taken upon written interrogatories and cross-interrogatories

and that the courts may make rules, not inconsistent with the provisions of law, as to the issuing of commissions, the filing of interrogatories, "and all other matters relating to depositions taken out of the state."

Section 37 of the same chapter declares that "depositions and affidavits taken out of the state in any other manner than is prescribed in the three preceding sections, if taken before a notary public or other person authorized by the laws of any other state or country to take depositions, may be admitted or rejected at the discretion of the court; provided, that no such deposition or affidavit shall be admitted unless it appears that the adverse party had sufficient notice of the taking thereof and opportunity to cross-examine the witness, or that from the circumstances of the case it was impossible to give him such notice."

If the deposition in this case had been taken in this state, it would have been inadmissible in evidence, by reason of the omission of the magistrate to certify that the deponent was sworn to testify the truth, &c., "relating to the cause for which the deposition is taken," as required by the Gen. Sts. c. 131, §§ 23, 26. *Simpson v. Carleton*, 1 Allen, 109. *Bacon v. Rogers*, 8 Allen, 146. And it was ingeniously argued that a deposition taken before a commissioner out of the state could only by § 34 "be used in the same manner and subject to the same conditions and objections as if it had been taken in this state;" and that § 37, being limited to "depositions and affidavits taken out of the state in any other manner than is prescribed in the three preceding sections," did not apply to a deposition taken by commission.

But this argument is opposed to a series of decisions by which it has been determined that depositions taken out of the state upon commission, before a person authorized by the law of the place to take them, and with opportunity for cross-examination, may be admitted or rejected at the discretion of the court before which the trial is had, and that no exception lies to the exercise of such discretion. *Amherst Bank v. Root*, 2 Met. 522. *Sabine v. Strong*, 6 Met. 270, 279. *Quinley v. Atkins*, 9 Gray

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370. *Howe v. Pierson*, 12 Gray, 26. *Stiles v. Allen*, 5 Allen, 320. *Bacon v. Rogers*, 8 Allen, 146. *Tyng v. Thayer*, *Ib.* 391. In the first of these cases, the caption was in the very form of that upon the deposition now before us, and the point that the deposition was not taken according to the Rev. Sts. c. 94, §§ 30-32, (which correspond to the Gen. Sts. c. 131, §§ 34-36, as § 33 of those does to § 37 of these,) was made by counsel, and overruled by the court. In the second case, Chief Justice Shaw stated the reasons of the rule more fully, saying, "It is to be considered that these commissions are to go to foreign places, often governed by laws and usages widely different from our own, and therefore some such form of specific instructions is highly expedient, to insure regularity and uniformity in the mode of taking evidence under them. But if they should be regarded as conditions, the more minute and exact the directions, the more difficult it would be to obtain a deposition which would be admissible. If, indeed, there should appear such a considerable departure from the directions as to show a gross neglect or wilful violation of duty, or to indicate any partiality, misconduct or impropriety on the part of the commissioner, it will be the duty of the judge at the trial to reject the deposition."

The construction of the statutes is settled by these decisions to be, that any foreign deposition, taken before an authorized person, and with opportunity for cross-examination, if possible, may be admitted or rejected at the discretion of the court, if taken "in any other manner than is prescribed" in the earlier sections, whether the difference in the manner of taking consists in the magistrate not being a commissioner, in the want of any commission, or in the failure to pursue the prescribed forms in the execution of a commission. The party in whose behalf a foreign deposition is taken is not entitled to use it as matter of right, unless it is taken before a commissioner and with all the forms prescribed in the case of a domestic deposition. But if he attempts to have it so taken, and fails in some particular, by reason of inadvertence or ignorance of the magistrate, or other cause, it is within the discretion of the court to admit the deposition if the magistrate was authorized by the law of his own

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state to take it, and the adverse party had notice and opportunity to cross-examine the witness, if possible.

Exceptions overruled.

G. E. Williams, (E. Ames with him,) for the plaintiff.

C. A. Reed, (J. Brown with him,) for the defendant.

TIMOTHY F. CLARY *vs.* WILLIAM W. THOMAS & another.

In an action on a promissory note, alleged to have been made payable to B. or order and duly indorsed to the plaintiff, the proof was of a note corresponding with the copy annexed to the declaration, save that it bore the indorsement of B., a revenue stamp, and a memorandum of protest. *Held*, no variance.

CONTRACT. The declaration alleged that "the defendants made a promissory note, a copy whereof is hereto annexed, payable to one Betsey S. Besse, or order, and the same was duly indorsed and transferred to the plaintiff." At the trial in the superior court, the plaintiff offered in evidence a note precisely corresponding with the copy annexed to the declaration, save that it bore an indorsement by Besse, and on its face a revenue stamp, and a memorandum of protest and notice, signed by a notary, none of which were in the copy. The defendants objected to its admission on the ground of variance; but *Wilkinson, J.*, admitted it. The verdict was for the plaintiff, and the defendants alleged exceptions. Other exceptions taken by the defendants were waived at the argument.

E. L. Barney, for the defendants.

T. M. Stetson, for the plaintiff, was not called upon.

GRAY, J. The objection of variance between the declaration and the proof, which is the only one argued, is not supported by the case stated in the bill of exceptions. The practice act provides that "all written instruments, except policies of insurance, shall be declared on by setting out a copy or such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action." Gen. Sts. c. 129, § 2, cl. 9. The declaration in this case sets out a copy of the note made by the

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defendant, and the legal effect of its indorsement to the plaintiff. The note and indorsement offered in evidence corresponded with the declaration. *Exceptions overruled.*

CALVIN MARSHALL vs. ISAAC MERRITT.

At the term of the superior court held next after judgment rendered for A. on an *audita querela* to reverse a judgment in his favor, the court has discretionary power, on A.'s motion, to bring forward the original action on the docket and enter judgment therein as of said term.

PETITION to the superior court at March term 1869, that a complaint under the Gen. Sts. c. 149, for flowing land, might be brought forward from December term 1867, and judgment entered as of said March term.

At the hearing, before *Reed, J.*, it was agreed that the petitioner recovered judgment for nominal damages and for costs in said complaint against the respondent at said December term 1867; that on December 23, 1867, the respondent sued out a writ of *audita querela* for annulment of the judgment and stay of execution, and judgment was rendered therein in favor of this petitioner at June term 1868, and exceptions taken by the respondent were overruled in this court in January 1869; that the petitioner did not file his bill of costs in the complaint, taxed with vouchers, for more than a year after the judgment on the complaint at December term 1867; and that such judgment was not rendered by accident or mistake, but upon the petitioner's motion.

The petitioner alleged that he delayed taking out execution on the judgment on the complaint, at the defendant's request, until the *audita querela* could be brought; but this the defendant denied, and no evidence was introduced on the point by either party.

On the facts agreed the judge was of opinion that the court had power to bring the complaint forward; and ordered it

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brought forward and judgment entered thereon as of March term 1869. The respondent alleged exceptions.

E. Ames, for the respondent.

E. H. Bennett, for the petitioner.

CHAPMAN, C. J. The power of the courts to order causes to be brought forward on the docket from a former term, where no continuance has been entered, is well established. *Gile v. Moore*, 2 Pick. 386, and 3 Pick. 194, *nom. Commonwealth v. Moore*, is an example. *Browning v. Bancroft*, 8 Met. 278, and 5 Met. 88, was brought forward in the court of common pleas from June term 1842 to September term 1843. The court say the power to do this is necessary for the proper regulation of the practice of the court from which appeals are made; that when the party whose duty it was to bring the case forward is guilty of gross negligence, he should be held to have discontinued; but of this the court of common pleas are judges. Such a power is also affirmed in *Ely v. Ball*, 8 Pick. 352. See also *Capen v. Sloughton*, 16 Gray, 364.

In *Stickney v. Davis*, 17 Pick. 169, the action was brought forward after the lapse of a year, to correct an erroneous judgment and allow the administrator of the plaintiff to come in. In *Hyde v. Chapin*, 6 Cush. 64, the action was brought forward after it had ceased to be continued in the proper court from December term 1847 to May term 1849. In *Terry v. Briggs*, 12 Cush. 319, the motion to bring the case forward was denied on its merits. It was within the discretionary power of the superior court to order this cause to be brought forward.

Exceptions overruled.

NANCY J. BOWEN vs. GEORGE K. REED.

In an action on a bond reciting that the defendant was the father of the plaintiff's bastard child, and conditioned to support it, but alleged by the defendant to have been obtained by fraud and duress and to be without consideration, the plaintiff testified that she never had intercourse with any man other than the defendant. *Held*, that the exclusion of evidence of the contents of letters of a "vulgar" or "indecent" character from the plaintiff, offered "to contradict the plaintiff and to prove her intercourse with other

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men," afforded the defendant no ground of exception, if it did not appear that they contained admissions or statements of her intercourse with other men at or near the time of the probable inception of her pregnancy.

At the trial of an action on a bond, given out of court, reciting that the defendant was the father of the plaintiff's bastard child, and conditioned to support it, but alleged by the defendant to have been obtained by fraud and duress and to be without consideration, declarations of the plaintiff in the time of her travail, that the defendant was the father of her child, are not admissible in her behalf.

CONTRACT on a bond given, out of court, to the plaintiff, promising to support her bastard child, and containing a recital that the defendant was the father of the child. Answer, that the bond was procured by duress, fraud and covin, and was without consideration, and that the recital was untrue. Trial in the superior court at June term 1869, before *Wilkinson, J.*, who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"In putting in the plaintiff's case, she was called to the stand by her counsel and interrogated as to the paternity of the child; and on cross-examination she stated that she had never had intercourse with any man other than the defendant, and had never written any letters so stating, and she gave other testimony tending to show that the child was the child of no other person than the defendant. Subsequently the defendant testified that the plaintiff had frequently, at or about the time of the alleged intercourse, February 1865, thrown him letters of a vulgar character; and that on reading them he had at once destroyed them, months before any charge of paternity was made against him. His counsel then asked him to state the contents of these letters, for the purpose of contradicting the plaintiff's evidence, and of proving her intercourse with other men. But the judge ruled that the defendant could not now testify as to their contents.

"Nelson Bowen, a witness for the defendant, testified that about four or five years ago, and between August and February, the plaintiff tossed to him a letter of an indecent character and bearing her name at the foot of it, and that on reading it he destroyed it. 'Don't know as she wrote it,' he said. The defendant then asked him to state the contents of that letter, for the purpose of contradicting the plaintiff's evidence aforesaid, and of proving her intercourse with other men. But the judge ruled that the witness could not testify as to the contents.

"The plaintiff called the physician who attended her at the time of travail, and asked him to state what she then said as to the paternity of the child. The defendant objected to statements of the plaintiff not made on the stand, but the judge permitted the physician to state that she then charged the defendant with being the father."

T. M. Stetson, for the defendant.

W. H. Peirce, for the plaintiff.

WELLS, J. Upon the defence of duress, fraud and covin, the innocence of the defendant, if proved, would be a material fact. The plaintiff undertook to prove his guilt, as a part of her case in chief. Having denied, on cross-examination, that she had ever had intercourse with any man other than the defendant, it was competent for the defendant to contradict her by any evidence that she had been guilty of such intercourse at or about the time of the commencement of her gestation; or to offer affirmative proof of such fact independent of the question of contradiction. But evidence of this sort must apply and be limited to a period such as to admit of the possible inference that the child in question derived its paternity from that intercourse. If it be too remote in time to admit of that inference, it is not competent, either as affirmative proof, or in contradiction of the plaintiff denying it. *Eddy v. Gray*, 4 Allen, 435.

It does not appear, from these exceptions, that the evidence offered would tend to establish any competent material fact, or to contradict the plaintiff in any material point. The contents of the letters offered to be proved are stated to be, in one case, "of a vulgar character," and in the other, "of an indecent character." But the plaintiff's case does not proceed upon the theory of her chastity, either in body or in mind, and therefore such evidence is not material or relevant. *Commonwealth v. Moore*, 3 Pick. 194. *Phillips v. Hoyle*, 4 Gray, 568.

It is stated that this testimony was offered "for the purpose of contradicting the plaintiff's evidence, and of proving her intercourse with other men." If by this it was meant that the letters tended to establish the fact or probability of such intercourse and thus also to contradict her, because they were vulgar

and indecent, the evidence was not admissible, for the reason above stated. If it was intended that the contents of the letters included statements or admissions of such intercourse, it was still immaterial testimony, unless the statements referred to a period near the time of the probable inception of her pregnancy. From the statement of the evidence offered, and the purpose declared, it does not appear that anything that was material or relevant was excluded. The cross-examination of the plaintiff, and her denials, were general, not having reference to any particular period. That the evidence offered might tend to contradict her in such general denials is not enough to make it admissible, even for the purpose of contradiction. The letters, testified of by the defendant, were said to have been thrown to him about the time the pregnancy was supposed to have commenced; but that does not serve at all to indicate the time of the intercourse with other men, which it was sought to prove by their contents.

The destruction of the letter by the witness Bowen was not a sufficient reason for excluding proof of its contents; and we are inclined to think that the destruction of the letters by the defendant, at the time and under the circumstances stated, should not properly subject him to such unfavorable inferences as to bring him within the rule applied in *Joannes v. Bennett*, 5 Allen, 169; but it is unnecessary to decide this, as we are all of opinion that the exception fails to be sustained on other grounds.

The testimony of the physician as to the plaintiff's accusation of the defendant "in the time of her travail" was wrongly admitted. That accusation is made evidence only by statute, applicable to a special statute proceeding. Its admission is not in accordance with the general principles of evidence, and has only the statute provision to define the occasion and the conditions upon which it is to be allowed. The question at issue in this case was not whether there was sufficient evidence in the original proceedings for affiliation to charge the defendant; nor was it even the guilt or innocence of the defendant; but simply whether the bond in suit had been obtained by fraud or duress.

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The fact that the plaintiff accused the defendant in the time of her travail was not relevant to that issue, and might have had an improper influence upon the determination of the real question on trial. For this cause the verdict must be set aside.

Exceptions sustained.

ELIZABETH P. YOUNG vs. SYLVANUS MAKEPEACE.

Whether a child was a "full time child" may be testified to by any physician of ordinary experience who attended at its birth.

In a bastardy process, declarations of J. S. that he himself was the father of the child, and acts of J. S. relative to procuring an abortion on the complainant, if not made or done in the presence or with the knowledge of the complainant, are inadmissible to prove a conspiracy between the complainant and J. S., after said declarations, to charge the defendant with being the child's father.

In a bastardy process, the fact that the defendant was the father of the child may be established by a fair preponderance of evidence.

The defendant in a bastardy process contended at the trial that J. S. and not himself was the father of the child; proved that J. S. sent to the complainant a package made up like "doctor's powders;" and then offered evidence to show that, three or four days before sending this package, J. S. received a package of like size, shape and appearance, which contained drugs to produce an abortion. *Held*, that the evidence was admissible, and the question of the identity of the packages was for the jury.

In a bastardy process, testimony as to the dissimilarity in personal appearance between the child and J. S. is inadmissible to rebut evidence introduced by the defendant to show that J. S. and not himself was the father.

After a verdict of guilty in a bastardy process, the court may, under the Gen. Sts. c. 72, § 7, pass the order of affiliation in the absence of the defendant.

An order of court in a bastardy process, after the defendant has been adjudged the father of the child; that he "stand committed" until he gives a bond conditioned to pay to the mother a certain gross sum, to pay a further amount quarterly "until the further order of the court," and to save harmless the parents of the mother and the town of her settlement against all charges for the maintenance of the child; and that the complainant shall recover the costs of suit; is valid under the Gen. Sts. c. 72, § 7.

COMPLAINT under the Gen. Sts. c. 72, charging the defendant with being the father of a bastard child, of which the complainant was delivered May 4, 1868. The defendant gave bond to the complainant, conditioned to appear and answer to the complaint, and abide the order of the court thereon.

Trial in the superior court, before *Pitman*, J., who, after a verdict of guilty, allowed a bill of exceptions in substance as follows :

"The physician who attended at the birth of the child was a witness, and was asked whether in his opinion it was a full time child of the usual period of forty weeks. He answered that it was, and that ordinarily a seven months' child would not be so well developed. To the admission of this evidence the defendant objected as not a matter for an expert's testimony, but the judge admitted it.

"The defendant denied the charge against him, contended that Philander Dean was the father of the child, and introduced evidence tending to show intimacy between the complainant and Dean, (the complainant contradicted the same by other evidence,) during the summer and fall of 1867 and thereafterwards, and of various admissions of the complainant that Dean was the father of her child, and also of other facts tending more or less to establish this defence. Samuel S. Pratt, Jr., a witness for the defendant, was permitted, against the complainant's objection, to testify that, on Friday of cattle-show week, which was the first week in October 1867, and which commenced on Tuesday of that week, he received a small package from Dean to carry and give to the complainant, which he did on the following Monday, she requesting him at the time to keep dark about it, or words of that import. The witness described the package as done up in a piece of newspaper, about two and one half inches long and about two inches wide and fastened with a pin; that he put it in his vest pocket, and on taking it out afterwards he found it had become unfastened and saw several small packages, also of newspaper, like doctor's powders; did not see the contents of these packages, but had frequently seen doctor's powders done up in the same way. The defendant then, against the complainant's objection, offered to prove by Joseph H. Nichols that on the first or second day of the cattle-show he delivered to Dean a package similar in appearance, being of the same size, shape, and done up in the same manner, as the package delivered by Pratt to the complainant; and that the contents of said package were an abortive medicine. The defendant's counsel stated that he did not propose to identify the two packages as one and the same by any other evi

dence. And the defendant contended that whether it was the same package delivered by Pratt to the complainant, and what effect the whole evidence ought to have, were matters for the jury to determine. The judge excluded the evidence of Nichols.

"The evidence tended to show that, prior to January 1, 1868, the complainant had not charged or intimated verbally, or otherwise, that the defendant was the father of the child, or had had connection with her, and the defendant offered evidence which, he contended, showed that on or about December 26, 1867, a conspiracy was entered into between the complainant and Dean to charge the defendant with being the father of the child, and thereby extort money from him; and he thereupon claimed the right to prove, and offered to prove, various declarations and admissions made by Dean, prior to said conspiracy and after the child was begotten, that he was the father of the child; and also offered to prove that Dean procured abortive medicines for the complainant, made application to sundry persons to procure an abortion upon her, and did various other acts relative to procuring an abortion upon her, although such declarations, admissions and acts were not made in her presence or brought home to her knowledge. But the judge ruled that, without considering whether such a conspiracy was established, the evidence offered was not competent upon this issue, and it was excluded."

The mother of the complainant was allowed, against the defendant's objections, to testify "to the complexion, eyes, and color of the hair of Dean, and the features of his face." The defendant afterwards offered evidence upon the same point. Dean was not seen by the jury. The child was shown to them.

The defendant requested the judge to instruct the jury "that the burden of proof, as in criminal cases, was upon the complainant to satisfy the jury beyond a reasonable doubt that the defendant had intercourse with the complainant at the time alleged in the complaint, and that he was the father of the child;" but the judge declined so to do, and instructed them "that the burden was upon the complainant to satisfy them of

these facts by a fair preponderance of the evidence, as in other civil cases."

J. Brown, (*H. J. Fuller* with him,) for the defendant.

S. R. Townsend, for the complainant.

WELLS, J. 1. Whether a child was a "full time child" is not a question for experts, but may be testified to by any physician of ordinary experience, who attended at the birth.

2. The declarations and acts of Dean, not in the presence of the complainant "or brought home to her knowledge," were rightly excluded, as not in furtherance of the common purpose of the alleged subsequent conspiracy. The claim that they were admissible, as a part of the *res gestæ* of the conspiracy, is founded upon a misapprehension of what constitutes the *res gestæ*. The object of the supposed conspiracy was, not to beget the child, or to procure an abortion, for the purpose of charging it upon the defendant; but to charge him with the paternity of a child already begotten, and which their attempts at abortion had failed to remove. The acts and declarations excluded had no reference to the defendant, nor to this alleged common purpose. It is not contended that they were admissible upon any other ground.

3. The instruction in regard to the degree of proof required to sustain the complaint was clearly right. *Richardson v. Burleigh*, 3 Allen, 479.

4. The testimony of Nichols, offered to show the character of the contents of the package delivered by him to Dean, was competent, if the jury should be satisfied that it was the same package which Dean sent by Pratt to the complainant. And we are of opinion that it was for the jury and not for the court to determine the question of its identity. The delivery by Nichols to Dean, on Tuesday or Wednesday "of cattle-show week," was not so remote from the time of the delivery by Dean to Pratt, on Friday of the same week, as to enable the court to say that the jury might not properly find, with the aid of the correspondence in the appearance of the package testified to in each case, that they were the same. If Dean was, at that time, active in procuring means to produce an abortion upon the

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complainant, with her concurrence, it was a strong circumstance in support of the defence set up in this case. The exclusion of this testimony makes a new trial necessary.

5. We think also that the testimony to show points of dissimilarity between the child and Dean should not have been admitted. Even where there is a noticeable resemblance, there may be equally marked points of dissimilarity. Points of dissimilarity, not implying a difference of race, do not tend to disprove paternity. They are, at most, of much less significance than points of resemblance. But proof of resemblance was excluded in *Eddy v. Gray*, 4 Allen, 435. That decision was based, somewhat, upon one in Maine, the reasons for which were considered quite satisfactory. *Keniston v. Rowe*, 16 Maine, 38. In the latter case, however, the evidence excluded was of dissimilarity. Resemblance was held to be properly a matter of consideration by the jury upon this issue, in *Gilmanton v. Ham*, 38 N. H. 108. But in that case the jury had both the child and the putative father before them, and took the fact from their own observation.

There is a still further objection to the testimony admitted in the present case. It instituted a comparison of features, complexion, &c., not between the child and the defendant, but with another party, not charged with the paternity otherwise than incidentally, by way of diverting the force of the evidence against the defendant.

Exceptions sustained.

A new trial was had, and a verdict of guilty rendered, at March term 1870 of the superior court, and at the following September term that court, at a time assigned, of which the defendant was duly notified, but at which he was not present in court nor in custody, passed an order, that the defendant should "stand charged with the maintenance" of the complainant's child with the assistance of the mother as follows: "He shall pay the complainant forthwith \$250 as and for said maintenance from the time of the birth of the child to September 19, 1870; and from and after said September 19, he shall pay the further sum of \$1.50 per week, payable quarter yearly until the

further order of the court;" that the defendant should give to the complainant a bond with sufficient sureties, in the sum of \$1000, conditioned "for the performance of said order of court, and also to indemnify and save harmless against all charges for the maintenance of said child the parents of said Elizabeth F. Young, and also the town of Raynham;" that he should "stand committed" until he gave said bond: and that the complainant should recover against him the costs of suit.

Immediately upon the reading of the order in open court the defendant, by his counsel, alleged exceptions thereto and to the right of the court to pass the same. These exceptions were argued at October term 1870.

J. Brown, for the defendant.

S. R. Townsend, for the complainant.

AMES, J. In proceedings under the Gen. Sts. c. 72, in relation to the support of bastard children, the complaint, the issue of the warrant, the arrest of the party accused, and his summary production before the magistrate, are according to the manner of criminal procedure. At all later stages of the case, until the time of the final order, the course of proceeding is the same as in ordinary civil actions. The defendant insists that, at this stage of the case, it becomes a criminal prosecution again, and the final order of the court is in the nature of a sentence, which cannot be passed unless he is personally present. In *Hodge v. Hodgdon*, 8 Cush. 294, 297, Shaw, C. J., in giving the opinion of the court, says that "on a final judgment, when the court make an order on the respondent for the payment of money, and where he is required by law to give a new bond with sureties, or be committed to prison until he give such new bond, he must be personally present, in order that the latter alternative may be complied with." He also says in substance that there is no provision that the court may issue an execution to enforce its judgment; and that the order that the defendant stand committed presupposes his personal presence. In *Towns v. Hale*, 2 Gray, 199, the court decided that, if the defendant was attending court at the passage of the final order, and surrendered himself to be committed for not complying with it, it was a fulfil-

ment of the condition of the original bond. Mr. Justice Dewey remarks, in giving the opinion of the court, that, "on the final judgment, the party must of course be present and give the required new bond, or be committed to prison until he give such bond."

It is to be remembered, however, that the two cases above quoted were decided under the Rev. Sts. c. 49, and that the statute now in force has made a great change in the law regulating proceedings of this nature. As the law then stood, no order of affiliation could be passed until after a verdict of guilty. *Jordan v. Lovejoy*, 20 Pick. 86. A default was merely a breach of the original bond. If the defendant did not appear, the court could render no judgment, nor make any order, and could only enter his default. The prosecution in that case was at an end, and the complainant's only remedy was upon the bond. But under the present statute, (Gen. Sts. c. 72, § 7,) it is provided that "if the jury find him guilty, or if he is defaulted, he shall be adjudged by the court to be the father," "and shall stand charged with the maintenance," &c., "in such manner as the court shall order, and shall give bond with sureties to perform said order;" "and he may be committed to prison until he gives such bond." Under the present law, therefore, the default is a confession by the defendant of all that could be found against him by a verdict of guilty, and the court is expressly authorized, upon his default, (that is to say, in his absence,) to render judgment and to pass the final order. If the final order is good when the record shows that he is not in court, on the ground that his default is a confession of his guilt, it apparently must be equally good when his guilt is made certain by the verdict of the jury. The case, even at this stage of it, is still a civil action. It is true that the final judgment of the court, from the necessity of the case, differs materially from the ordinary form of judgment at common law in a civil proceeding, and more nearly resembles a decree for alimony in a suit for divorce, or an order for periodical payments in an equity suit. It is hardly correct to say that the order is alternative, in the sense of requiring one of two things, of which one is to be the equivalent of the other

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The substance of the order is, that he give the required bond; and the commitment is merely to compel him to give it. If he were present in court, and the order were that he stand committed, he would be taken into custody, but a *mittimus*, or warrant, or a certified copy of record, would still be necessary to justify his imprisonment, and to show how it might be terminated. It is not easy to see why the court cannot issue appropriate process to compel a compliance with an order, which it can lawfully pass in the absence of the party; or why a party could not as well be arrested, wherever he may be found, under such an order, as he could upon an execution in common form. The statute provision is, not that he stand committed, but that he may be committed, and the order to that effect may be passed upon his default, that is, in his absence. When imprisoned for noncompliance with the order, he has the benefit, after the expiration of ninety days, of the laws for the relief of poor prisoners committed on execution. Gen. Sts. c. 72, § 11.

Under the law as it now stands, we find nothing that renders it indispensable that the defendant should be actually present when the final order is passed. The bond which he is ordered to give is for the benefit of the complainant, and also for the indemnity of other possible parties in certain contingencies, but there is no direction that the bond be delivered to the clerk or made a part of the record of the case. We think therefore that the order passed in this case is valid, and that, although it directs that the defendant stand committed, instead of the statute phrase that he "be committed," this difference of phraseology is unimportant.

The bond which he has been ordered to give appears to be such as the statute requires. In what mode it can be made use of by the town of the complainant's settlement there is no occasion at present to inquire. The payments are of course to be hers until such town may become entitled to claim them. The provision that they are to continue until further order of court is for his benefit, in order that upon proper application he may avail himself of any sufficient legal reason for their reduction or discontinuance.

We see no reason why the complainant, as the prevailing party, should not recover her costs. *Exceptions overruled.*

GARDNER JONES vs. DANIEL McLEOD & another.

In an action for the rent of a tenement alleged by the defendant to have been knowingly let for the illegal sale of intoxicating liquors, the plaintiff is entitled to have the jury instructed that the presumption of law is that sales of liquor made on the premises were legal, although they have been previously instructed that the burden of proof is on the defendant to show that the sales were unlawful.

CHAPMAN, C. J. The action is contract for the use and occupation of a tenement. The defence is that the plaintiff knowingly let it to the defendants to be used for the illegal keeping and sale of intoxicating liquors, and that it was so used with his knowledge. Proof of keeping and selling liquors was offered; and the plaintiff requested the court to rule that, upon the mere proof that intoxicating liquors were sold in the tenement, the presumption of law is that such sales were legal and authorized by law.

This instruction ought to have been given. The general principle applicable at common law is, as stated by Shaw, C. J., in *Hatch v. Bayley*, 12 Cush. 27, that every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involving moral turpitude or legal delinquency must prove it; and as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no such presumption existed. The application of this principle to cases like the present has been repeatedly made, and is well settled. In *Timson v. Moulton*, 3 Cush. 269, where the business of selling spirituous liquors was alleged in defence to be illegal, the ruling was that the presumption of law was that it was lawful. An exception to this ruling was overruled with double costs. In *Wilson v. Melvin*, 13 Gray, 73, which was an action to recover the price of liquors sold, the same doctrine was held. Also in *Brigham v. Potter*, 14 Gray, 522; *Trott v. Irish*, 1 Allen, 481; and *Pratt v. Langdon*, 97 Mass. 97, 100.

A different rule was established by the St. of 1844, c. 102, in prosecutions for selling spirits without license. The legal presumption is declared to be in such cases that the defendant has

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not been licensed. But this statute related to prosecutions only. It did not apply to civil actions, nor even to prosecutions under the nuisance act. *Commonwealth v. Lohy*, 8 Gray, 459. It is not contained in the Gen. Sts. c. 86, because under that act there were no licenses; but was reenacted in broad terms by the St. of 1864, c. 121. The use and occupation in this case was in 1868, while the act of that year was in force. The presumption arising from delivery of liquor, mentioned in the St. of 1869, c. 415, § 35, is limited to cases under the act, and does not apply to this case.

It is true that before the prayer for instructions was made the jury had been instructed that the burden was on the defendants to prove that the sale and keeping were unlawful. But this might lead them to suppose that the same *prima facie* presumption would arise as is provided by statute in respect to criminal prosecutions; namely, that an unlawful sale is to be inferred from mere delivery; and as such prosecutions are frequent, the jury would be likely to understand it so. It was therefore important to the plaintiff that the distinction should be stated, and that the instruction prayed for should be given.

Exceptions sustained.

W. H. Fox, for the plaintiff.

J. Brown, (*C. A. Reed* with him,) for the defendants.

CAROLINE B. HIDDEN vs. JAMES E. HIDDEN & others.

A testator gave all his estate to a trustee and his heirs, in trust to pay annually, out of the rents and profits, \$250 to the testator's wife, and, on the happening of a contingency to convey the estate to the testator's son, for his use during his life, and after his death to his heirs in fee, the said son or his heirs securing to the testator's wife the \$250 a year during her life. On the petition of the widow, under the Gen. Sts. c. 100, and the St. of 1864, c. 168, for a sale of the real estate devised, filed after the contingency had happened, *Held*, that the son was entitled to elect whether he would take the estate on the condition imposed; that if he did take it, the court had no authority to order a sale; that if he did not take it, the court had authority to order the sale, but notice of the petition must be given to the trustee.

PETITION under the Gen. Sts. c. 100, and the St. of 1864 c. 168, praying for the sale of certain real estate in Attleborough, being all the real estate devised by William Hidden in his will, the material provisions of which were as follows: "I give and devise all my estate, real and personal, whereof I may die seised or possessed, to James C. Hidden, to have and to hold the same to himself, his heirs and assigns forever, upon the use and trusts following, namely: Out of the rents and profits of said estate, my trustee shall annually pay the sum of two hundred and fifty dollars to my wife Caroline. Whatever balance may remain in the hands of my trustee after the payment of the aforesaid annuity to my wife, shall from time to time be invested by him, until said investments shall amount to the sum of one thousand dollars, when said trustee shall convey the same to my grandson, George H. Day, to be received by him upon his attaining the age of twenty-one years. If my grandson, George H. Day, should die before attaining the age of twenty-one years, the said investment of one thousand dollars shall be conveyed by my said trustee to my son, James E. Hidden, as also all the remaining portion of my estate, both real and personal, to his use and behoof during life, and after him, in fee simple to his heirs forever: the said James E. Hidden, or his heirs, securing to my wife Caroline the payment of two hundred and fifty dollars per annum during her life."

Notice of the petition was served on James E. Hidden, the testator's son, but it did not appear that notice was served on James C. Hidden, the trustee. A guardian *ad litem*, appointed for the children of James E. Hidden and those persons not in being who might be interested in the estate, assented to the sale prayed for.

At the hearing before *Wells, J.*, it was agreed that since the death of the testator the buildings on the estate had been destroyed by fire; that the petitioner had not, since the fire, received any part of her annuity; that George H. Day had died under age; and that James E. Hidden had two children. The case was reserved by the presiding judge for the determination of the full court.

J Daggett, for the petitioner.

J H. Dean, for James E. Hidden, and those who have the estate after him.

GRAY, J. The principal objects for which the testator put his estate in trust appear by his will to have been the following :

First. That, "out of the rents and profits of the estate," an annuity of two hundred and fifty dollars should be paid to his widow.

Second. That any surplus income, after payment of this annuity, should be invested to create a provision for his grandson, George H. Day, upon his arriving at the age of twenty-one years.

Third. That, upon the death of that grandson under twenty-one years of age, the sum so invested and all the rest of the estate should be paid to the testator's son, James E. Hidden, for life, with remainder to his heirs, provided that he should first secure to the testator's widow the payment of two hundred and fifty dollars yearly during her life.

Upon the death of the grandson, the son was entitled to a conveyance of the whole estate on giving such security. It does not appear that he has had any opportunity to elect whether he will comply with the terms of the condition and take the estate. If he should so elect, there would be no occasion and no authority to order a sale of the estate. If he should not, he would not be entitled to the estate under the will ; the estate would remain in the hands of the trustee ; and if unproductive of income, it would be within the discretion of the court, in the exercise of its jurisdiction in equity, to order the trust estate to be sold and the proceeds reinvested ; in which case the rents and income, not exceeding two hundred and fifty dollars a year, would be payable under the will to the widow for life, and the question of the right to the principal could not be determined till her death.

A petition to this court for such an order may, by the express terms of the St. of 1864, c. 168, be presented either by the trustee or by any other party interested in the trust estate. But the trustee, when not himself the petitioner, must of course be made

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a party, by notice or assent. The cause must therefore stand for a hearing of the widow, the trustee and the respondents before a single justice upon the question of the time to be allowed to James E. Hidden to elect whether he will take the estate, giving the requisite security; and, if he elects not to do so, then upon the further question of the expediency and the manner of a sale of the estate and investment of the proceeds by the trustee or his successor.

Ordered accordingly.

 MOUNT HOPE IRON COMPANY vs. EDMUND BUFFINTON.

An engine was built by A. for B. under a contract which provided that it should be paid for as the work on it progressed, reserving a margin of twenty per cent. until it should be "started in a satisfactory manner;" that it should be delivered at B.'s dock, and transported at B.'s expense to his works; that B. should prepare a foundation for it, and add to it materials and work of his own; and that A. should be required to furnish at B.'s works only the skilled labor required to set it up and start it. The engine was delivered at the wharf, transported to the works, and the whole price paid except the twenty per cent., when it was attached as the property of A. *Held*, that the title to it had passed to B. as against A. and his creditors.

REPLEVIN of a cylinder and bed piece, parts of a steam engine, attached by the defendant, a deputy sheriff, while on premises of the plaintiffs at Somerset, on a writ against the Hope Iron Works of Providence, in the state of Rhode Island.

At the trial in the superior court, before *Reed, J.*, it appeared that the engine was built by the Hope Iron Works under a contract with the plaintiffs, of which the material part was as follows: "The Hope Iron Works, for and in consideration of the contract price to be paid by the Mount Hope Iron Company, agree to build and finish and deliver on the wharf in Somerset, by March 1, 1868, a condensing engine 34 inches diameter of cylinder and five feet stroke, of good materials and first class workmanship in the working parts (all other parts where it is not required to be left plain without finish) except the outboard pillow block, and forging for main shaft, to furnish plans for the foundation, and to send good and skilful mechanics to set up

the same on the foundation prepared by the Mount Hope Iron Company, and start the same into operation, for the sum of \$11,500, to be paid for as the work progresses, except twenty per cent. reserved until the engine is started in a satisfactory manner; also to furnish a Judson valve and governor with the engine. The Mount Hope Iron Company hereby agree to accept said engine according to the foregoing description, and pay for the same upon the terms named; to furnish the outboard pillow block, and forging for main shaft; to receive the engine on their dock at Somerset, make no charge for wharfage, do all the drayage, hauling and handling required in transporting from their wharf and setting up, and furnish all necessary facilities and use of machine shop and tools for that purpose free of charge to the Hope Iron Works; also to furnish the foundation of the engine from plans of the Hope Iron Works, and the long holding-down bolts, and all steam and exhaust pipes; and also to bring the water and connect with the condenser; the Hope Iron Works furnishing at Somerset only the skilled labor required in setting and starting the engine." It further appeared that the engine was landed at the wharf mentioned in the contract, and was transported thence by the plaintiffs to their works, some rods distant; that the plaintiffs had sent to the Hope Iron Works for men to come and set up the engine, and were preparing the foundation at their own works, when the defendant attached the cylinder and bed piece as the property of the Hope Iron Works; that, at the time of the attachment, it would have required about four weeks' labor to set up and start the engine; and that the plaintiffs had paid for the work as it progressed, and had, at the time of the landing and of the attachment, paid the whole price except the twenty per cent. named in the contract.

The only question raised in the case was, whether the title to the engine had become complete in the plaintiffs at the time of the attachment; and the judge, being of opinion that upon the foregoing facts the title had vested in the plaintiffs at that time, directed the jury to return a verdict for them, which was done; and the defendant a'leged exceptions.

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E. H. Bennett, for the defendant, cited *Phelps v. Willard*, 16 Pick. 29; *Williams v. Jackman*, 16 Gray, 514; *Wright v. Tetlow*, 99 Mass. 397; *Andrews v. Durant*, 1 Kernan, 35.

J. C. Blaisdell, for the plaintiffs.

WELLS, J. This case differs in several respects from that of *Phelps v. Willard*, 16 Pick. 29, relied upon by the defendant. In that case there was no payment of the purchase money, and, by the terms of the contract, no part of it was to be paid until the machine should be set up at the works of the purchaser, and made to operate to his satisfaction. The purchaser was not to add to the machine any materials or labor of his own, before it was thus completed; and if not completed so as to work to the satisfaction of the purchaser, the seller or manufacturer was to take it away again. The court held that, although the machine was upon the premises of the purchaser and attached to his mill, the legal title and right of possession did not pass until the terms of the contract had been fulfilled, or the purchaser had accepted the machine so as to become liable for the price.

In the present case, there was, in fact, and by the terms of the contract, payment for the property as the work progressed, reserving a margin of twenty per cent. until the engine should be "started in a satisfactory manner." The contract provided that the engine should be delivered, at a certain date, on the wharf at Somerset; and thereupon the purchasers were to transport it to their works, prepare a foundation for it, and add to it materials and work of their own; the sellers being obligated to furnish towards the work necessary to be done in setting up and starting the engine "only the skilled labor required." It is manifest from the whole tenor and terms of the contract that the delivery provided for, at the wharf in Somerset, was intended to be a delivery which should transfer to the purchasers the possession of the engine, and that it did vest in them the legal right of possession and property. They might perhaps have rescinded the contract and restored the title, upon a subsequent breach of the contract by the other party, or a failure to complete and start the engine in a satisfactory manner. But they might also elect to retain the possession and title, relying upon

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their contract, and the margin of twenty per cent. of the price in their hands, for their indemnity. At the time of the attachment, the plaintiffs were in possession of the engine, including the cylinder and bed piece, with a right of possession and property which was valid and sufficient against the Hope Iron Works and their creditors. The ruling of the court below was correct, and the

Exceptions must be overruled.

CORNELIUS H. SPRINGER *vs.* GUILFORD CROWELL.

Under an allegation, in an action of tort, that the defendant sold a vessel to the plaintiff, and the plaintiff was induced to buy her by the false representations of the defendant, the plaintiff may recover for the whole damage occasioned to him by the false representations, although the record title stood in the names of and was conveyed by others besides the defendant.

In an action for deceit, an allegation that the defendant sold half of a vessel to the plaintiff is supported by evidence of a written agreement to sell the vessel to the plaintiff and H., followed by delivery, and of an agreement between the plaintiff and H. that each should take half.

TORT. The declaration alleged that the defendant sold to the plaintiff one half of a schooner; that the plaintiff was induced to buy the schooner by representations of the defendant that she was sound, and not rotten, and all right so far as he knew; and that the defendant, at the time of the representations, knew that the schooner was badly rotten and unsound. The answer denied all the plaintiff's allegations; admitted that the defendant sold seven thirty-seconds of the schooner to "the defendant and two other parties," and that he then knew that she was to some extent unsound; but denied the representations alleged.

At the trial in the superior court, before *Morton, J.*, it appeared that the plaintiff and Thomas G. Hunt entered into negotiations with the defendant for the sale of the schooner on July 24, 1866, and the defendant, on that date, at the request of the plaintiff, signed an agreement of which the material part was as follows: "I agree, for myself and owners of schooner

John Ponder, Jr., to sell said schooner to Cornelius H. Springer and Thomas G. Hunt for the sum of \$11,000, and to deliver said vessel at the port of New Bedford after performing a voyage to Lynn, for which port the vessel is now loading."

It further appeared that the plaintiff, before the negotiation, had agreed with Hunt and Jonathan Bourne that he was to take such portion of the vessel as he could raise money to pay for, and that Hunt and Bourne were to take the balance; that at the time the above agreement was executed the plaintiff made up his mind to take half of the schooner, and so informed Hunt, but gave no notice to the defendant of the share he meant to take; that the schooner was delivered by the defendant according to the terms of his agreement; and that the defendant, the plaintiff and Hunt went to the office of Bourne at New Bedford, and there, in the presence of the defendant, bills of sale of the schooner were delivered and accepted, and the purchase money paid. The bills of sale were produced in court, and were as follows: of seven thirty-seconds from the defendant to Bourne and Hunt; of two thirty-seconds from Leavitt Hobart and Payson Crowell to Hunt; of seven thirty-seconds from Samuel Crowell, Henry V. Schenck and Seth W. Lewis to Bourne; and of sixteen thirty-seconds from the last three named to the plaintiff. There was no evidence that the plaintiff knew the extent of the defendant's interest in the vessel. There was evidence that one of the crew of the schooner had told the defendant that she was rotten; and other evidence that the defendant knew her to be in bad condition.

The defendant asked the judge to give the jury the following instructions: "1. If the defendant did not, of his own knowledge, know that the vessel was more rotten than a vessel of her age ordinarily would be, he had a right to represent her as sound for a vessel of her age, as far as he knew, notwithstanding the statement made to him that she was rotten. 2. If the defendant conveyed but seven thirty-seconds of the vessel, he can only be liable, under the declaration, for seven thirty-seconds of the damage, although he agreed to convey more. 3. The evidence of the plaintiff's title does not support his declaration that the

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defendant sold him one half of said vessel, and does not support the case as set forth in his declaration."

The judge refused to give the instructions prayed for, but instructed the jury "that the burden of proof was on the plaintiff to show that the representations were made as alleged in the declaration; that they were in fact false; that the defendant knew them to be false; and that the plaintiff was induced by them to make the purchase; and that, if the jury were satisfied that the defendant sold to the plaintiff and the plaintiff bought one half of the vessel, the fact that, when the record title came to be made, the defendant conveyed only seven thirty-seconds of the vessel, would not prevent the plaintiff from recovering in this action to the extent of his interest." The jury found for the plaintiff, and the defendant alleged exceptions.

J. M. Day, for the defendant.

C. T. Bonney, for the plaintiff.

COLT, J. The defendant's first request for instructions was not insisted on at the argument. The instructions given on that head stated the true rule.

The second request was rightly refused. The action is for damages occasioned by the false representations of the defendant in the sale of one half of a certain vessel. The gist of the action is the fraud practised. The ownership of the defendant is not an essential element. If he was acting merely as agent of others, he would be liable. The false affirmation of the defendant, made knowingly, to the plaintiff's loss or his own gain, is enough. *Randall v. Hazelton*, 12 Allen, 412. But under the instructions given, the jury have found that the defendant sold and the plaintiff bought one half the vessel.

As to the last request, there was abundant evidence to go to the jury that the sale was at least of one half the ship. The agreement produced is an agreement for himself and owners to sell the whole to the plaintiff and Hunt.

Exceptions overruled.

WILLIAM H. POTTER *vs.* HEMAN SMITH & another.

A provision, in shipping articles for a whaling voyage, that if any officer or seaman shall be judged by the master incompetent or indisposed to the proper discharge of the duties of his station, the master may "displace him and substitute another in his stead," and that a corresponding reduction of the lay of such officer or seaman, with reference to the duty which he may afterwards perform, shall thenceforth take effect, does not authorize the master to discharge from the vessel one who has shipped under these articles as second mate; and the effect of such a provision cannot be varied by evidence of a usage in the whaling trade never to disrate an officer to a seaman, but, when the necessity for displacing him occurs, to discharge him from the vessel.

CONTRACT to recover the plaintiff's lay in a whaling voyage.

At the trial in the superior court, before *Wilkinson, J.*, it appeared that the plaintiff shipped as second mate on board the defendants' vessel, under articles the sixth of which was as follows: "It is further agreed that if any officer or seaman, after a fair trial of his abilities and disposition, shall be judged by the master incompetent or indisposed to the proper discharge of the duties of his station, the master shall have a right to displace him and substitute another in his stead,—a corresponding reduction of the lay of such officer or seaman, with reference to the duty which he may afterwards perform, thenceforth to take effect; and a reasonable increase of the lay of the individual who may thereupon be promoted to a higher station hall be made on the final adjustment of the voyage."

It further appeared that the plaintiff was discharged from the vessel during the voyage, against his will, by the master, for alleged incompetency and insubordination. "The defendants' counsel stated to the judge that, in the custom and usage of the whaling business, an officer was never disrated to a seaman, and that when the necessity occurred for the displacement of an officer he was discharged from the vessel."

The defendants requested the judge to rule that under the above article the master was the sole judge of the plaintiff's qualifications, and if he acted in good faith, his judgment in discharging the plaintiff was final, and the plaintiff could not recover; but the judge declined so to rule, and ruled that the article did not make the judgment of the master in discharging

the plaintiff final. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. Marston, (*C. W. Clifford* with him,) for the defendants.

T. M. Stetson, for the plaintiff.

MORTON, J. The principal question at the trial was as to the legality of the act of the master in discharging the plaintiff from the ship. The defendants justified this act under the sixth article of the shipping articles, which is set out in the bill of exceptions; and asked the court to rule that, if the master acted in the matter of the discharge in good faith, his judgment in discharging the plaintiff was final and the plaintiff could not recover. The court declined so to do, but instructed the jury that the terms of the sixth article did not make the judgment of the master in discharging the plaintiff out of the vessel final.

This instruction was correct. The sixth article does not give the master the power to discharge an officer or seaman from the ship. Its obvious purpose is, to give the master the right, if he finds an officer or seaman incompetent or otherwise unfit to perform the duties of his station, to degrade or reduce him to a lower station upon the ship. The word "displace" imports this, and the subsequent provision that "a corresponding reduction of the lay of such officer or seaman, with reference to the duty which he may afterwards perform," shall thenceforth take effect, clearly points to this construction, and is inconsistent with the construction claimed by the defendants. The article contemplates that the displaced or degraded officer or seaman is to remain on board in the station to which he may be reduced.

It is clear that the usage alleged to exist in the whaling business cannot avail the defendants. Its effect, if proved, is to control and vary the written contract, unambiguous in its terms, into which the parties have deliberately entered. The authorities are conclusive that evidence of such a usage is inadmissible. *The Reeside*, 2 Sumner, 567. *Ware v. Hayward Rubber Co.* 3 Allen, 84. *Dickinson v. Gay*, 7 Allen, 29, and cases cited.

These views render it unnecessary to consider the other questions presented at the argument. *Exceptions overruled.*

COMMONWEALTH vs. MICHAEL BRENNAN.

The St. of 1869, c. 191, declaring that no license for the sale of intoxicating liquors shall have any validity after April 30, 1869, gives an unlicensed person no right to sell, and is constitutional.

INDICTMENT for keeping a tenement used for the illegal keeping and sale of intoxicating liquors from January 1 to June 17, 1869.

At the trial in the superior court, *Wilkinson, J.*, allowed the Commonwealth, against the defendant's objection, to put in evidence of sales by the defendant after May 1, 1869. The defendant was found guilty and alleged exceptions.

S. R. Townsend, for the defendant.

G. Marston, for the Commonwealth.

CHAPMAN, C. J. The first section of the St. of 1868, c. 141, provides that no person, with certain specified exceptions, shall sell, or expose or keep for sale, intoxicating liquors, unless he is authorized to sell the same in the manner provided in the act. Section 2 provides that the county commissioners may grant licenses for the sale of such liquors; and other sections regulate the granting of licenses. By the St. of 1869, c. 191, the power to grant licenses is taken away, and it is declared that no licenses granted after April 30 shall have any validity. At this period the licenses granted in the previous year were to expire by their terms. It is contended that this statute operates as a repeal of the act of 1868. The argument is, that, as the act of 1868 merely prohibited sales by persons who had not a license, the act of 1869, abolishing licenses, left every person free to sell without a license, and, being repugnant to the former act, repealed it, by implication.

But we cannot perceive that this argument has any force. The first section of the act of 1868 contains a general prohibition to sell without a license. A license conferred a right to sell which was merely exceptional. The exceptional right was abolished, and left the general prohibition in force.

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It is further contended that if the act of 1869 is to receive such a construction as we have here given it, it is unconstitutional, because it violates a contract made by the Commonwealth with its citizens by the provisions of the act of 1868. But a license granted under that act is not a contract. *Calder v. Kurby*, 5 Gray, 597. Much less is there a contract with a person who has no license.

Exceptions overruled.

COMMONWEALTH vs. MARY EAGAN.

At the trial of a married woman for an assault committed in the immediate presence of her husband, the defendant asked the judge to instruct the jury that she was presumed to act under her husband's control; but the judge refused, and instructed them that, if they were satisfied that she did the acts proved, of her own free will, free from the coercion or influence of her husband, they would be warranted in convicting her. *Held*, that the refusal to give the instruction asked for was erroneous.

The omission of the complainant's name from the body of a complaint signed by him does not affect the jurisdiction of the court, and cannot, therefore, under the St. of 1864, c. 250, § 8, be taken advantage of in arrest of judgment.

COMPLAINT "to the justice of the municipal court at Taunton, in the county of Bristol: _____, of Taunton, in the county of Bristol, in behalf of the Commonwealth of Massachusetts, complains" that Michael Eagan, Mary Eagan and John Eagan made an assault and battery on Patrick Saxton. The complaint was signed "Willis Potter," and the clerk indorsed thereon that it was received and sworn to on August 3, 1869. Michael Eagan was acquitted; Mary Eagan, who was his wife, and John Eagan, who was their son, were convicted; and Mary Eagan appealed.

At the trial in the superior court, before *Pitman, J.*, "the evidence showed that, while the defendant's husband and son were using angry words towards Saxton, the defendant, in the immediate presence of her husband, threw a pail of dirty water on Saxton. This was all the material evidence in the case. Upon these facts, the defendant asked the judge to instruct the jury that the presumption was that she acted under the coercion and

control of her husband, and should be acquitted; but the judge declined, and instructed the jury that, if they were satisfied that she did the acts proved of her own free will, free from the coercion or influence of her husband, they would be warranted in convicting her."

The defendant was found guilty and moved in arrest of judgment, "because it does not appear in the body of the complaint who was the complainant, and that such defect is apparent, and is in matter of substance and not of form." The motion was overruled, and the defendant alleged exceptions.

J. Brown, for the defendant.

G. Marston, for the Commonwealth, to the point that the instructions were right, cited *The King v. Stapleton*, Jebb, 93; *Commonwealth v. Lewis*, 1 Met. 151; *Wagener v. Bill*, 19 Barb. 321; 3 Greenl. Ev. § 7.

MORTON, J. The assault of which the defendant was convicted was committed in the immediate presence of her husband. The presumption of law is, that she acted under his coercion. *Commonwealth v. Gannon*, 97 Mass. 547. *Commonwealth v. Burk*, 11 Gray, 437. It was a right of the defendant to have this principle of law stated to the jury. Her counsel asked the court to instruct the jury "that the presumption was that she acted under the coercion and control of her husband, and should be acquitted." If there was evidence in the case to rebut the presumption in favor of the defendant, the court was justified in refusing to instruct the jury that she should be acquitted; but we think that the first part of the instruction requested should have been given. The instructions actually given would have been accurate if the court had also instructed the jury as to the presumption above stated, but by the refusal to do so the defendant was deprived of the benefit of this presumption as one of the elements proper for the consideration of the jury in determining her criminal liability.

The motion in arrest of judgment, being for a cause existing before verdict, and not affecting the jurisdiction of the court, must be overruled. St. 1864, c. 250, §§ 2, 3.

Exceptions sustained.

MORSE TWIST DRILL & MACHINE COMPANY vs. STEPHEN A. MORSE.

A covenant, made by the patentee of a process of manufacture in a business not local in its character, for the purpose of selling the patent to better advantage, and as a part of the transaction of sale, and for one and the same consideration received by him for the patent, to use his best efforts to invent improvements in the process and to transfer them to the buyer, to do no act which may injure the buyer or the business, and "at no time to aid, assist or encourage in any manner any competition against the same," is not necessarily void as in restraint of trade.

CHAPMAN, C. J. As the case comes before us on demurrer to the plaintiff's bill in equity, the allegations of the bill must be taken to be true.

The plaintiffs seek to restrain the defendant from violating an agreement made between the parties June 22, 1864. The defendant covenants therein that he will convey to the plaintiffs two patents which have been issued to him for improvements made by him in "twist drills and collets;" also his machinery and tools; also his rights of renewal and extension of the patents; his rights to letters patent for his machinery and inventions for making drills and collets, or parts thereof, or for any portions of, or principles or combinations used in, such machinery or inventions. He warrants his title to the patents and the property sold, and agrees to make all necessary assignments and conveyances. He also agrees to transfer to them all improvements, new modes of manufacture, inventions and arrangements, relating to any of the premises and the general business of the company, that he may make or invent, and that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company; and he also covenants to do no act that may injure the company or its business, and that he will at no time aid, assist or encourage in any manner any competition against the same. He agrees to serve as the superintendent of the company for three years from July 1, 1864, perform such duties as shall be assigned to him, and give his whole time and efforts for building up the business of the company.

In consideration of these covenants, the company covenants to pay him \$5000 in thirty days; and \$5000 more out of the net earnings and profits of the business after paying certain dividends; and \$1500 per year for the term of three years, payable monthly.

The defendant had obtained his patents and commenced manufacturing the articles; but, being unable to carry on the business successfully, he induced certain persons to unite with him in forming the company and carrying on the business of manufacturing and selling the articles. They proceeded in the business, and this business was not intended to be, and was not, local in its character. They employed him for the three years, and agreed with him to continue in their service for another year. But in December 1868 he resigned his office of superintendent; and though the plaintiffs continue to carry on their business and sell their twist drills and collets, the defendant has transferred his stock in their company, and entered into the manufacture of other twist drills and collets in Newark, New Jersey, which he sells in the same markets, in competition with them, at reduced prices, and to the same persons who dealt with the defendant as the plaintiffs' superintendent, and endeavors to supply the markets with these articles.

The defendant demurs, on the alleged ground that his covenants are in restraint of trade, contrary to public policy, and void, and that therefore he has a legal right to disregard them. The principle on which the defence rests has been much discussed, and, since the case of *Mitchel v. Reynolds*, 1 P. W. 181, it has been well established in England. It is also established in this Commonwealth. See *Taylor v. Blanchard*, 13 Allen, 370, and cases cited. The question now before us is, whether it extends to a case like the present.

It has never been extended to a business protected by a patent. Therefore, so far as any interference with the plaintiffs' patents is concerned, the covenants are not in restraint of trade. But it is not alleged that the defendant does infringe their patents; and thus the case does not rest on that ground.

Nor does it extend to a business which is a secret, and not known to the public; because the public has no rights in the secret. *Bryson v. Whitehead*, 1 Sim. & Stn. 74. *Peabody v. Norfolk*, 98 Mass. 452. All future inventions and improvements which the defendant might make would necessarily be of this character; for if they were not then secret, they would not be new inventions or improvements. Some of them might not be patented, yet the defendant bound himself to use them exclusively for the benefit of the plaintiffs.

The language of the contract implies that, when the plaintiffs joined the defendant in his new business, they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark; and that it was a material part of the consideration for which they paid him so considerable a sum and invested their capital. It was not in restraint of trade, nor contrary to public policy, that the defendant should contract to render to the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated. And although the defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him.

In *Taylor v. Blanchard*, cases were suggested in which the restriction would be valid, if it did not extend beyond the limits of the good will of the business which was the subject of the sale, even if it covered the whole state. In some of the English cases, it had been said that the contract was valid unless it imposed some restriction beyond what the interest of the party required. *Tallis v. Tallis*, 1 El. & Bl. 391. *Mallan v. May*, 11 M. & W. 653, 667. But in these cases the restriction was local. In former times, almost every species of business that was carried on was of a local character; but there are some recent English cases in which the principle has been considered with reference to business which was not local.

Morse Twist Drill & Machine Company v. Morse.

In *Ainsworth v. Bentley*, 14 Weekly Rep. 630, the plaintiff had in 1851 purchased of the defendant "Bentley's Miscellany," which was then an established magazine. He took an agreement that the defendant would not publish another periodical of a like nature. In 1865, the defendant entered into an arrangement to become the publisher of "Temple Bar," a periodical of a like nature, and within the restriction. It was objected that the agreement was void, being in restraint of trade and unlimited, and that magazine publishing was a trade of itself. But Vice Chancellor Wood granted an injunction against violating the contract.

In *Stiff v. Cassell*, 2 Jur. (N. S.) 348, the defendant agreed with the plaintiff to write two tales for a periodical paper, and that he would not write for any other publication which should be sold for less than a certain price, for the space of a year. The restriction was held to be valid, though it had no limitation as to space.

In *Ingram v. Stiff*, 5 Jur. (N. S.) 947, a weekly periodical was sold, with an agreement by the vendor not to publish, either alone or in partnership, any other periodical of a nature similar to it. This agreement was held to be valid, and was enforced by injunction.

In these cases, the restriction, though extending through the whole kingdom, was obviously no greater than the interest of the vendee required; and, by giving it, the vendor had been able to obtain an enhanced price for what he sold.

In *Leather Cloth Co. v. Lorrison*, Law Rep. 9 Eq. 345, a company had been formed for the purpose of working a certain process of manufacture, introduced into Great Britain from America. They purchased the right, with an agreement of the vendors that they would not, directly or indirectly, carry on, nor would they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions therein manufactured in the business or manufacture of the vendors, and would not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing

company of the benefits agreed to be purchased. It was held that the restraint was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers; and it was enforced against the vendors. The decision acknowledges the principle that contracts are void, if their object is to deprive the state of the benefit of the labor, skill or talent of a citizen. But the court say that, on the other hand, public policy requires that when a man has, by skill or other means, obtained something that he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and, in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction is not unreasonable. He may not have any more restraint than is necessary for the benefit of the purchasers, but to that extent he may have it.

In this country, there are periodical publications that have a very wide circulation; and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value, unless he can obtain from the vendor a valid restriction against competition, which restriction shall be as extensive as his interest requires, though it may cover the whole of a state, or the whole country. The same would be true as to some books. For example, the author of a popular school book could not sell its proprietorship for its full value, unless he could bind himself not to prepare another book which should be used in competition with it.

The same would be true as to some manufactured articles. The present case furnishes an illustration. The defendant could not have obtained the consideration which was paid him, if it had been understood that this contract which he has violated had no validity. He is appropriating to himself a part of that which he has sold to the plaintiffs, and which is valuable property to them. It is unlike the cases where the prohibition extends beyond what the interests of the purchaser require, or is in any way unreasonable. The court are of opinion that the contract is valid.

Demurrer overruled.

P. E. Tucker, (B. W. Harris with him,) for the defendant.

T. D. Eliot & T. M. Stetson, for the plaintiff.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF ESSEX, NOVEMBER TERM 1869,
AT SALEM.

PRESENT :

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE. HON. HORACE GRAY, JR., HON. JOHN WELLS, HON. JAMES D. COLT, HON. MARCUS MORTON,	}	JUSTICES.
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**ELIZA J. MARKEY vs. MUTUAL BENEFIT LIFE INSURANCE
COMPANY.**

Oral testimony will not legitimately establish a proposition of fact which cannot, by any mode of interpretation, be deduced from the words themselves when written; whatever may have been the appearance, look, manner, mode of answering, emphasis, accents and gesticulations of the witnesses.

A: an interview with an applicant for a policy of insurance on his own life for his wife's benefit, an agent of the insurance company said that he had brought the policy, and the applicant replied that he was glad of it and that he had been expecting it for some time, took it from the agent, looked at it, passed it to his wife, saying "Here, wife, here is your policy," and she then took it and looked it over. The applicant then said to the agent, that he was not well enough to attend to the business that day, but had made arrangements with J. S. to "do it" for him, or to "take the policy;" and to his wife, that there was money due to him in the shop where he worked, and J. S. would "pay it for him" or "make arrangements to get it for him." After some more words between the appli

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agent and the agent, the latter arose to leave, saying that he should go to J. S.; and the wife, saying that he might want the policy if he was going to J. S., passed the policy to him, and he took it, withdrew with it, and, without applying to J. S. in relation to it, returned it to the general agent of the insurers, through whom he had received it from them, and on whom the next day the applicant made a demand for it, with a tender of the premium, which was refused. *Held*, that evidence of these facts would not warrant a finding of a delivery of the policy, either actual or constructive, and a waiver or postponement of payment of the premium; or of an open and continuing proposal to contract with the applicant by means of that policy, accepted by his tender and demand.

On an issue of the binding force on the defendants, who were a foreign mutual life insurance company, of transactions had by agents of the company in this Commonwealth with the plaintiff and her husband, in reference to a policy of insurance on his life for her benefit, for which he had applied to the company, instructions and rules of the company, not referred to in the application or the policy, nor notified to him or to her, are inadmissible to prove limitations of the agents' authority.

Power to make contracts or declarations to bind generally a foreign mutual life insurance company is not within the apparent scope of the authority of a sub-agent employed by the general agent of the company in this Commonwealth to solicit and receive applications for insurance and forward them to the company, and to deliver policies issued by the company and collect premiums thereon; nor is to be inferred by virtue of the St. of 1861, c. 170, or the St. of 1864, c. 114.

CONTRACT on a policy of insurance by the defendants of the life of the plaintiff's former husband, James W. Hoyt, in the sum of \$3000 payable on his death to the plaintiff. The answer denied the completion of any contract of insurance. This is the same action a previous stage of which was reported 98 Mass. 539, under the name of *Hoyt v. Mutual Benefit Insurance Co.*, the plaintiff having originally sued under her name of Eliza J. Hoyt, but now being remarried.

At the new trial, before *Lord, J.*, the following facts appeared, on the evidence, not to be in dispute: The defendants were a mutual life insurance company under the laws of New Jersey and having their principal office at Newark in that state. William H. S. Jordan was in 1865 their general agent in Massachusetts, and accepted his agency with power to appoint sub-agents and subject to certain written "instructions and rules of the company, for agencies," established by the directors. Charles F. Wells was a sub-agent appointed by Jordan to solicit and receive applications for insurance and forward them to the company, and to deliver policies issued by the company and collect premiums thereon. By the solicitation of Wells, James W. Hoyt, the plaintiff's husband, under date of September 21,

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1865, made application through Wells to the defendants for such a policy as the one in suit. This application was forwarded by Wells, through Jordan, to the defendants' office in Newark, from which office, in reply, the policy in suit was sent to Jordan, who early in November handed it to Wells, and Wells on November 4 or 5, having it in his possession, had an interview with Hoyt and the plaintiff, at Ballardvale, at which no other person was present. Hoyt was then ill with typhoid fever, and was lying on his bed. At the close of the interview, Wells withdrew with the policy in his possession, and afterwards returned it to Jordan, who sent it back to the defendants. On the day after the interview, a tender of the premium and demand for the policy were made in Hoyt's behalf at Jordan's office in Boston, and were refused on the ground of Hoyt's illness. He died of the fever on November 23. The plaintiff contended that at the interview there was a valid delivery of the policy to the assured, and an agreement, by Wells, as the defendants' agent, to defer payment of the premium and to apply for it to Francis L. Banks, the foreman of the room in a file-factory in which Hoyt was a workman. But it did not appear that Wells ever made such an application to Banks. The plaintiff testified, as a witness, to what occurred at the interview; and Wells gave conflicting testimony in behalf of the defendants. The substance of the testimony of both of them, and the language of the material part of the plaintiff's testimony, are stated in the opinion. There were several other witnesses, including Jordan.

In the course of the trial the judge ruled "that, *prima facie*, under the circumstances, Wells was agent of the company, with power to contract in their behalf and act in their behalf; that any limitation of that agency must be shown either by some reference to it in the application or policy, or by some communication of the fact to the party previous to the contract being entered into." The defendants afterwards "offered in evidence a paper containing the appointment of Jordan by the company as agent, also the 'instructions and rules of the company, for agencies,' the copy of which Jordan had signed and agreed in

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writing to comply with upon accepting the agency. The judge asked the defendants' counsel whether it was claimed that the application and policy contained any reference to any limitation of authority on the part of the agent, or whether the plaintiff had in any manner notice of any limitation, remarking that if there was any such limitation he should admit the evidence, but in the absence of all such notice he should regard the statutes of the Commonwealth respecting agents of foreign insurance companies as making them [namely, Jordan and Wells] at least *prima facie* authorized agents to do what they did in behalf of the company. The counsel stated that there was no limitation in the application or policy, except the recital of payment of premium, and there was no notice to the plaintiff of any limitation. Thereupon the judge refused to allow evidence of limitations of the power of an agent."

At the close of the evidence, and before the arguments of the counsel, the judge said: "I shall rule in this case that there is no evidence to warrant the jury in finding that there was any other agreement between the parties than that of a contract of insurance in the ordinary mode by a policy of insurance;" and "I shall then rule that, in order to constitute a valid contract, there must be either a delivery or its equivalent; that, in the absence of that, there must have been a tender of the premium, and a demand for the policy, at a time within a reasonable time, under the circumstances, from the acceptance by the company of the proposition of the assured for insurance; that if, within a reasonable time, under the circumstances, after their acceptance of that policy, with nothing new transpiring which they had not full knowledge of, if the party tendered the premium and demanded a policy, that vested the right of the policy in the assured. I think there is evidence on these two questions to go to the jury."

The judge afterwards refused a request of the defendants for a ruling "that there was no sufficient evidence upon which the jury could find a verdict for the plaintiff;" and submitted the case to the jury under instructions substantially as follows:

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"The question which you are to pass upon is, whether the plaintiff is entitled to recover at all. Upon that matter I instruct you, as matter of law, that she is not entitled to recover, unless there was a policy made and delivered within the lifetime of Hoyt, or such acts done as are in law equivalent to a delivery of the policy.

"Under the law of this Commonwealth, in my view, a person soliciting applications for a foreign insurance company, with the knowledge of the company, is to be deemed to be an agent of the company, with authority to do the acts which he does; but this authority may be limited by the company, if either the application or the policy contains any notice of that limitation, or if the party with whom the agent contracts is in any way notified of the limitation. In the absence of any such reference to the limitation of his authority, in the absence of any such communication to the party, or, rather, in the absence of any such knowledge, on the part of the contracting party, of such limitation, he is to be taken to be authorized to do what he does.

"The plaintiff claims that, after this application had been made and approved and the policy had been made, for the purpose of delivery under it, (about which facts no controversy is made,) there was in point of fact a delivery. If there was a delivery, then the policy is valid and the plaintiff is entitled to recover. The mere passing of the paper to Hoyt, and his passing it to his wife, does not, in law, of itself constitute a delivery. If it was passed for the purpose of giving the property to the assured, and accepted as such, that is a delivery. If it was originally put into the hands of the assured, without any purpose of passing the property; if while in her hands an arrangement was made by which the parties understood that the property was from that time forward to be in her, and the policy to be subject to her power, control and disposal, that would make a valid delivery in law. Where a contract of this kind is made, the presumption is, that the consideration for it, (which is the premium, in this case,) and the delivery of the policy, are dependent upon each other. But although there is that presumption in the law, yet the parties may act differently from that

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and if the authorized agent intends to deliver and does deliver the policy into the hands of the assured; or if, it being in her hands, he intends that she retain it, and she does retain it as her own, without a cash payment of the premium, then the policy becomes a valid contract, even although the cash premium be not paid. If the policy is obtained, or the retention of it is allowed, upon a statement of the assured in relation to the mode in which payment of a premium can be recovered, which is not true, and the party makes the delivery, or suffers it to be retained, supposing it to be true, then, when he ascertains, or if the fact is, that it is not true, there is not a delivery of the policy. But if the party understandingly permits the policy to go into the hands of the assured, for the purpose of vesting the property, he knowing at the time that he is to look elsewhere for the payment of it, the delivery is a valid delivery, in the absence of all misrepresentation, or fraud, or falsehood. Now I do not propose to intimate to you in the slightest degree whether I think the evidence in this case is plenary for you to find a delivery, nor whether I think the evidence is altogether too slight for you to find it. It is your province to settle, first, what the evidence is; next, what are the proper and reasonable deductions which you are to make from that evidence; and, it being your province, I do not propose to interfere with it. If upon these principles the evidence satisfies you that there was a delivery of that policy at that time, then the plaintiff is entitled to recover. If it does not so satisfy your minds, then upon this branch of the case she is not entitled to recover; and it will be necessary for you to go further.

“ I have stated what I understand, by the law of this Commonwealth, to be the power of an agent of a foreign corporation. And inasmuch as it is not claimed here that there was any limitation of the agency, within the principle which I have stated, then you will deal with Wells’s conduct as with the conduct of an authorized agent of the company. And if, that authorized agent of the company having notified the assured that the policy was made and ready for delivery, the assured declined to take it, there is an end of the contract, and the party

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cannot recover upon it under any circumstances whatever that are proved in this case. But if, having notified the assured that the policy was ready, and if, on an interview between them, it was mutually understood that it was not convenient on that day to consummate the contract by the payment of the premium on delivery of the policy, but that the contract had not been abandoned by either party, and both parties understood that it was still a contract which might be completed, if then, within a reasonable time — and in law the next day would be a reasonable time — if then, within a reasonable time, there being in the mean time no change whatever in the circumstances, if the party had not become sicker, or the risk increased, or any other fact transpired which changed at all the condition of things from what it was the day before, then a tender of the premium and demand of the policy upon the duly authorized agent of the company will be sufficient to vest the right of the policy in the plaintiff. Whether there is any such proof is for you to determine; or rather, not whether there is any — whether there is any sufficient proof, it is for you to determine. Because, if there was no evidence whatever on the subject, I should rule as matter of law that it was not a matter to be submitted to you. But there being evidence which bears upon that subject, I submit it to your consideration. If it satisfies your minds that it establishes the right of the plaintiff, then you will return a verdict for the plaintiff for the amount claimed.

“ You will then upon all the evidence in the case determine whether, upon either of the grounds I have named, the plaintiff has shown that she has a right to recover under this policy. If she has a right to recover at all, it is the amount of the policy, with interest. But if she has failed — and the burden is upon her — if she has failed to satisfy your minds reasonably upon either of the propositions, then it will be your duty to return a general verdict for the defendants.”

The jury found for the plaintiff, and the defendants alleged exceptions on three questions specified as follows :

“ Was there evidence proper to submit to the jury upon the question whether there was a delivery of the policy ? ”

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"Was there evidence proper to submit to the jury upon the question whether, after an agreement had been entered into by application on the one side, acceptance of the application and making of the policy on the other, there was, within a reasonable time, a tender of the premium and demand for the policy which would vest the right to the policy in the plaintiff?"

"Was it competent to the defendants to show the nature, extent or limitations of the agent's authority, as offered?"

The bill of exceptions contained a stenographic report of all the testimony, following which was this paragraph:

"The above may be regarded as all the language used by the witnesses in giving their testimony; but the presiding judge does not deem it to be all the evidence. There was a question of mutual intent between two of the witnesses, under circumstances which at the time were very different from those which existed at the time of the trial. On many questions, but especially on the question of mutual intent, the presiding judge is of opinion that not only are the words of the witness evidence, but that the appearance, look, manner, mode of answering, emphasis, accents, gesticulations, &c., are all proper matters of evidence to the jury, which no attempt is made to report, and which cannot be reported, and therefore the presiding judge does not report the foregoing as all the evidence. In his own opinion, the facts stated, taken in connection with the appearance, bearing and manner of the witnesses, were proper to be submitted to the jury for their decision."

W. C. Endicott & C. W. Loring, for the defendants.

J. W. Perry & D. Saunders, for the plaintiff.

WELLS, J. This case was presented to the jury, in the superior court, under instructions that, as matter of law, the plaintiff "is not entitled to recover, unless there was a policy made and delivered within the lifetime of Hoyt, or such acts done as are in law equivalent to a delivery of the policy." Previously to the arguments of counsel, the judge had announced his rulings, "that there is no evidence to warrant the jury in finding that there was any other agreement between the parties than that of a contract of insurance in the ordinary mode by a policy of in-

insurance;" and that, "in order to constitute a valid contract there must be either a delivery or its equivalent." The questions raised upon the exceptions must therefore be considered here entirely in reference to that aspect of the case.

1. Upon the point of delivery of the policy, either actual or constructive, the questions presented differ in some respects from those at the former hearing in this court. 98 Mass. 539. There was then no evidence of any change of manual possession of the policy. As there was no evidence or pretence of any understanding, on either side, that the policy was to be delivered without payment of the premium, it was held that instructions could not be sustained, which authorized the jury to find that an agreement of Wells, at the request or suggestion of Hoyt, that he would go to another person at another place in order to obtain the money for the premium, with an understanding by both "that nothing more was to be done by Hoyt, and nothing remained except for Wells to call for the premium from Banks," and the neglect of Wells thus to call for the premium, were equivalent to a delivery of the policy. Upon a careful revision of that case, we are entirely satisfied with the conclusion to which we then came. Regarding Wells as the agent of the defendants "to all intents and purposes," yet the particular service which he undertook, by virtue of the supposed agreement, was in behalf of Hoyt, and to enable him to complete the contract on his part. It was not an undertaking within the apparent scope of his business as agent of the insurance company. We are not prepared to say that, if he had been principal instead of agent, the result would have been different as the question was then presented.

So far as the case depends upon the arrangement in regard to procuring payment of the premium from Banks, it stands now less strongly, upon the testimony, than at the former trial. That arrangement is therefore material only in its bearing upon the question whether there was a delivery to Hoyt or his wife, at their own house, upon credit; or a waiver of the immediate payment of the premium as a condition of the transfer of title to the policy.

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Upon this question, the instructions given to the jury at the last trial are full, explicit and clear in their terms. We see no ground of exception to them, on account of anything which they contain. But it is not enough that the instructions are complete and accurate in themselves, as a statement of law, if they permit a jury to return a verdict upon facts which will not in law justify such a verdict. The correctness of instructions must be tested by the facts to which the jury are required to apply them. *Brightman v. Eddy*, 97 Mass. 478. *Pond v. Williams*, 1 Gray, 630. Besides, the question whether there was sufficient evidence to warrant a verdict for the plaintiff was distinctly raised at the trial. It is necessary therefore to determine that question by an examination of the testimony.

The only witnesses, whose testimony bears upon this point, are the plaintiff herself, and Wells, the insurance agent. No one else was present at the time of the alleged delivery, except Hoyt, the deceased. Whether there was a delivery, understood by both and intended to pass the title in the policy presently to Mrs. Hoyt, and a postponement of the payment of the premium until some indefinite future time, or until Wells should call upon Banks for it, must depend upon the facts and occurrences of that interview as narrated by these witnesses. In such an inquiry we must take the testimony as the jury would have a right to regard it, giving to all the statements of Mrs. Hoyt the construction most favorable to her; and, in case the testimony of Wells conflicts with hers, rejecting it altogether, or considering it only so far as it may, in any particular, seem to support the positions of the plaintiff's case.

We are to keep in mind that we have before us only the bare words in which the testimony of the witness was given; whereas the living witness was before the jury, affording them the opportunity to judge, not only of the credit to be given to the witness, but also of the force of the words used, and the precise meaning they were intended to convey, so far as the tones and inflections or the voice, the manner and appearance of the witness, and his or her mode of testifying could affect the force and meaning of the words uttered. This consideration always has weight in

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determining whether a verdict ought to be sustained upon the testimony reported. But the language of the witness is the proper vehicle of his thought. Much may be inferred against an adverse witness, different from the obvious meaning of his words. But an affirmative proposition of fact, which a party is bound to establish, will not be presumed to have been established without some testimony tending directly to its support. Testimony delivered orally will not legitimately establish a proposition of fact which cannot, by any mode of interpretation, be deduced from the words themselves when written. Although "the appearance, look, manner, mode of answering, emphasis, accents, gesticulations, &c., are all proper matters of evidence to the jury," (that is, to aid in the interpretation of the testimony,) and although these cannot be reported, yet when the report does contain "all the language used by the witnesses in giving their testimony," the question of law is properly raised whether the verdict can stand upon that testimony.

Recurring to the testimony, the statement of the plaintiff in regard to the interview between Wells, Hoyt and herself, when the policy is claimed to have been delivered, is, in brief, this. "He came in; my husband was on the bed; he (Wells) made some commonplace remark, and then said to my husband, 'I have brought your policy.' My husband said he was very glad of it; he had been expecting it for some time. He took it and looked at it, and passed it to me and said, 'Here, Eliza, here is your policy.' I took it in my hands and glanced it over; and he then said, 'Mr. Wells, I am not feeling well enough to attend to this business to-day; but I have made arrangements with Mr. Banks to do it for me.' Well, Mr. Wells said that he would go. They had some more conversation. I could not justly remember about the other things; and he arose to go, and I passed him the paper as he arose to go out of the room, and he went over there, or said he would go to Mr. Banks." To the question, "What was said when you passed him the policy?" she answered, "He took the policy, and said he should go to Mr. Banks." Q. "Did you say anything?" Ans. "I passed him the policy, and said I, 'You may want the policy if you

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are going to Mr. Banks.' And he took the policy." Q. "Did he ask for it?" Ans. "No, sir, he did not." Q. "Did your husband state to him what arrangements he had made with Mr. Banks about the policy?" Ans. "No, sir, anything more than that he had made arrangements with him to take the policy." Q. "Was anything said about paying for the policy?" Ans. "Oh, yes." Q. "What was said about it?" Ans. "Well, he told me that there was money, — that his money was in the shop, his money that he hadn't drawn, and Mr. Banks would pay for it for him." Q. "That is, he said that there was money for him in the shop that he hadn't drawn?" Ans. "Money owed to him." Q. "Owed to him, and Mr. Banks would make arrangement to get it for him?" Ans. "Yes, sir."

The cross-examination does not add anything to the force or significance of the plaintiff's direct testimony, as above given.

The obvious purport of this testimony, and, as we think, the only legal conclusion that can properly be drawn from it, is, that the policy was handed to Hoyt and his wife for their inspection only, to enable them to determine whether to accept it and pay the premium. At most, it was a mere proffer of the instrument which contained the contract; requiring, upon the other side, acceptance and payment of the premium to give it legal operation and effect as a contract. The judge rightly instructed the jury that the presumption of law was that the payment of the premium and the delivery of the policy were dependent upon each other. To our minds, the testimony utterly fails to show, or to give the jury any ground for inference, that Wells intended, or that either Hoyt or his wife understood, that the policy became her property by reason of what occurred at that interview. The mere act of passing the manual possession, under the circumstances, does not vest the legal possession in her, nor prove that it was intended to do so; and the jury could not find a verdict for the plaintiff from that fact alone. *Commonwealth v. O'Malley*, 97 Mass. 584. *Phelps v. Willard*, 16 Pick. 29.

This being so, the burden is upon the plaintiff to show, by some affirmative evidence, that the real intention and understanding was so to pass the legal title and possession without or

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before payment of the premium. Not only do the acts and words of the parties, at this interview, fail to furnish such affirmative evidence, but, as it appears to us, they exclude such an inference. Hoyt, feeling too unwell to attend to the business himself, refers Wells to Mr. Banks to do it for him. Wells takes the policy and leaves the house. We cannot conceive of any emphasis, gesticulation or other indication in the appearance and manner of the witness upon the stand, which can make the plaintiff's testimony, containing this statement, convey or consist with the idea that the parties intended or understood that the delivery of the policy was nevertheless complete and absolute and only the payment of the premium postponed.

The testimony of Wells is in utter denial of any delivery, or any arrangement about going to Banks for the premium; and asserts that Hoyt declined to take the policy. We can discover in it nothing which tends to support the plaintiff's case; and the utmost effect of his appearance upon the stand would be to discredit his statements altogether.

Upon these considerations, the court are clearly of opinion that the jury were not warranted by the testimony in returning a verdict for the plaintiff upon the ground of a delivery, actual or constructive, of the policy; and that the instructions permitting them so to return a verdict were, for that reason, erroneously given.

2. There is another ground upon which the verdict may have been rendered, and which may become important at another trial. It is necessary, therefore, to consider it now. The judge instructed the jury, in regard to the proffer of the policy by Wells and the subsequent tender of the premium, as follows: "If, having notified the assured that the policy was ready, and if, on an interview between them, it was mutually understood that it was not convenient on that day to consummate the contract by the payment of the premium on delivery of the policy, but the contract had not been abandoned by either party, and both parties understood that it was still a contract which might be completed; if then, within a reasonable time — and in law the next day would be a reasonable time — there being in the

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mean time no change whatever in the circumstances, if the party had not become sicker, or the risk increased, or any other fact transpired which changed at all the condition of things from what it was the day before, then a tender of the premium and demand of the policy upon the duly authorized agent of the company will be sufficient to vest the right of the policy in the plaintiff."

This instruction seems to imply that there was evidence from which the jury might find that there was a contract to insure, independent of the policy, which, if not abandoned by the plaintiff, or forfeited by refusal or neglect to pay the premium, would bind the defendants to insure and to deliver a policy of insurance upon such payment or tender of payment. But the judge had previously ruled that there was no evidence to warrant the jury in finding such a contract. The case had been argued to the jury by the counsel, upon the basis of that ruling. We have no occasion, therefore, to examine the testimony to see whether there was in fact such evidence or not. If the jury understood the instruction in this sense, as we think they were liable to do, its tendency would be to mislead them in their conclusions.

That previous ruling must be held to exclude also the proposition that a contract, binding upon the defendant, had arisen from the acceptance of the plaintiff's application for insurance, such acceptance being proved by the making of the written policy, sending it to Wells for delivery, and the offer of delivery by him.

We are inclined, however, to interpret this instruction as intended to be in conformity with the previous ruling. In that view, the proposition we suppose to be substantially this, namely, that the proffer of the policy by Wells, he being fully aware of the condition of health in which Hoyt then was, and not withdrawing it at that interview or then intending to withdraw it, remained an open and continuing proposal to contract by means of that policy, which entitled the plaintiff to accept it within a reasonable time, and, by paying or tendering the premium, to demand the policy; and that such payment or tender and demand would be equivalent to an actual delivery.

We cannot so hold the law to be. There being previously negotiations, but no contract, and no purpose to contract otherwise than by a policy made and delivered upon simultaneous payment of premium, the proffer of a policy, even if intended as an offer which was to continue open for acceptance within a reasonable time, would become a contract only by acceptance before it was withdrawn. And it might be withdrawn at any time before it was actually accepted, whether the reasonable time had elapsed or not. One party is not bound by such a proposal until the other is bound by its acceptance.

The return of the policy by Wells to the general office in Boston, of which it is apparent that the plaintiff had knowledge, was evidence of such a withdrawal, competent at least to be submitted to the consideration of the jury upon that question. But, further than that, we see no evidence that the offer of the policy by Wells, at the interview in Hoyt's house, was to remain open for acceptance after that interview was ended, except under the special arrangement for doing the business with Banks, of which Mrs. Hoyt testifies; and that arrangement was terminated by the failure of Wells to renew the offer to Banks. In the absence of anything in the terms or mode of the offer to indicate that it contemplates a future acceptance, the presumption is that it terminates with the interview at which it is made.

In the aspect of the case upon which it was submitted to the jury, we think that the instructions in regard to the effect of a tender of the premium in Boston to vest the right of the policy in the plaintiff were not correct.

3. We have considered the questions thus far without regard to any supposed limitations upon the authority of the agents, Jordan and Wells. The defendants proposed to show such limitations by certain "instructions and rules of the company, for agencies." It not being shown or claimed that the application or policy contained any reference to such limitations, or that the plaintiff had in any manner notice thereof, the court properly excluded the evidence. The authority of an agent must be determined by the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private

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or undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers.

On the other hand, it does not follow, from the fact that a man is shown to be agent for another or for a corporation, that his principal is bound by all that he does. There are limitations which grow out of the very law of agency. In the first place, the act must appear to be an act of agency, that is, done in behalf of the principal. In the case of corporations created for a special purpose or engaged in a special business, the authority of the agent will be presumed to be limited by the nature of that purpose or business. So, too, the authority of every agent will be presumed to be limited by the apparent scope of the particular employment or branch of the general business of his principal in and for which he is engaged; and all who deal with him in that relation are affected by such apparent limit of employment and powers.

In this case, the authority of Jordan must be taken to be limited to the business of insurance; and, within that business, by whatever of restriction the fact that his principal is a mutual insurance company may properly impose. The authority of Wells may be still further restricted by the known fact that he was only a sub-agent, employed to receive applications for insurance and forward them to the company, and to deliver policies issued by the company, and collect premiums thereon. It is not within the apparent scope of the employment of such an agent to make contracts or declarations to bind the company generally; and therefore we think the defendants may show the actual extent and limit of his authority.

In the case of *Harrison v. City Insurance Co.* 9 Allen, 231, it was distinctly held that the St. of 1861, c. 170, did not affect the power of insurance agents to bind their principals, or change in any respect the rules of the common law upon the subject of agency. The St. of 1864, c. 114, affords even less reason for the supposition that it was designed for that purpose. The statute applies only to the persons who assume to act as agents. It

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has no reference to or bearing upon the corporations themselves directly. It declares that such persons shall be held to be agents "to all intents and purposes," that is, to all intents and purposes for which the statutes apply to agents of insurance companies. But it does not undertake to set forth their powers as agents; nor can it be supposed that it was the intention of the legislature to clothe every person who should solicit insurance in behalf of any foreign insurance company, or transmit the application of any other person for insurance, with the full powers of a general agent of such company. The instructions of the court below assumed a different construction of the statute, which we think was erroneous.

For the several reasons above stated, the verdict must be set aside.

Exceptions sustained.



WILLIAM JENKINS & others vs. INHABITANTS OF ANDOVER & others.

A town has no authority independently of statute law; nor, under the eighteenth article of amendment of the Constitution of the Commonwealth, can take authority by statute; to raise by taxation and appropriate money to support a school, as a public school, which is founded by a charitable bequest that vests the order and superintendence of it in trustees, who, though a majority of them are to be chosen by the inhabitants of the town, yet are limited to be members of certain religious societies.

The St. of 1869, c. 396, is unconstitutional and invalid, so far as it purports to authorize the town of Andover to raise by taxation and appropriate money to aid the trustees of the Punchard Free School to build a school-house "to be used and occupied in place of a high school for said town," and to aid in defraying the annual expenses of said school.

This court has not jurisdiction to restrain or regulate the proceedings of towns in granting and voting, under the Gen. Sts. c. 18, § 10, such sums as they judge necessary for burying grounds.

PETITION filed under the Gen. Sts. c. 18, § 79, by ten and more taxable inhabitants of Andover, for an injunction to restrain such officers and committees of the town as the court should order, and the trustees of the Punchard Free School in said town, from doing or attempting to do anything under or by virtue of the following votes passed at a town meeting July 6

1869, which votes the petitioners alleged to be in excess of the lawful authority of the town :

"Voted, That it is expedient that the town aid in rebuilding the Punchard Free School."

"Voted, That the town aid the trustees of the Punchard Free School in rebuilding their school-house recently destroyed by fire, to an amount not exceeding the sum of twenty-five thousand dollars, said aid to be furnished said trustees under the direction of a committee of five to be appointed by the selectmen, who shall see that the rights of the town in the property of said house be sufficiently secured."

"Voted, That the money hereby appropriated be raised by loan, and paid in instalments by taxation of not more than five thousand dollars and the interest in any one year, unless the town shall otherwise order."

"Voted, That the land owned by the town on the east side of the old railroad highway be designated as 'Mt. Carmel Cemetery,' and set apart for all time as a burial place for the dead of this town, and that the same be committed to the care of a committee of seven, to be chosen at this meeting, who shall be authorized to purchase the whole or a part of the adjoining lands, (alluded to" in a report made by a committee to the meeting,) "at an expense to the town not exceeding three thousand dollars."

"Voted, That they be authorized to draw their warrant on the town treasury for the necessary expenses to carry out the foregoing vote."

The defendants, in their answer, alleged that the votes, and all their acts done under or by reason of them, were lawful and valid. Issue was joined on the answer; an interlocutory injunction was granted; and the case was heard by *Wells, J.* At the hearing, the petitioners offered to prove, as to the votes relating to the burying ground, "that nearly or quite fifty acres of land are to be appropriated to said cemetery, of the value of three thousand dollars; that the population of said town is about six thousand inhabitants; that there are already in said town, inclusive of the Roman Catholic burial grounds, five places of pub-

lic burial, and a burial ground at the Theological Seminary that the costs of fencing said premises, making approaches and ways thereto, paths through the same, reducing it to such levels, and raising it in such elevations, with the other preparation and ornamental cultivation, as are usual and proper to cemeteries, will require an expenditure and taxation unreasonable and disproportionate; with other facts of a similar tendency." The judge ruled "that the facts, if proved as stated, would not render the proposed taxation for the purpose of a cemetery illegal," and that, so far as the bill related thereto, it could not be maintained. But he reported this ruling, and reserved the whole case for the determination of the full court; that part of the case arising on the votes relating to the Punchard Free School being reserved on the pleadings and a statement of agreed facts, the substance of all which appears in the opinion. No objection was taken to the bill for multifariousness.

N. W. Hazen, for the petitioners.

A. A. Abbott, for the respondents.

CHAPMAN, C. J.* 1. The principal object of the bill is to restrain the officers of the town of Andover from proceeding to raise money under a vote of the town relating to the Punchard Free School, which vote is alleged to be illegal because it is in violation of the eighteenth article of amendment in the Constitution, which is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own school."

In order to comprehend the spirit and intent of this article, it is necessary to advert to our early history. The founders of the colony appreciated the importance and necessity of providing

* This case was argued before all the judges but MORTON, J.

for the universal education of the people, at a very early period; and, to make it secure, they felt the necessity of placing it under the control of the people in each municipality. Accordingly the colonial act of 1647 required each town containing fifty householders to maintain a school in which the children should be taught to read and write; and each town containing one hundred householders to set up a grammar school, with a master able to instruct youth so far that they might be fitted for the university. The teachers were to be paid, "either by the parents or masters of the children, or by the inhabitants in general by way of supply, as the major part of those that order the prudentials of the town shall appoint." Anc. Chart. 186. Thus they laid the foundation of a system of common schools, which has been modified and improved from time to time, but has always retained its fundamental character and purpose. It provided free education in the elementary branches of learning to the children of every town, in schools to be managed and controlled by the authorities of the town, and supported by taxation of the inhabitants, unless sufficient contributions are received from other sources; and in the larger towns, which are sufficiently populous to make it desirable and reasonable, similar schools are to be maintained for the education of the more advanced pupils in higher branches of learning. The Constitution of the Commonwealth, part 2, c. 5, § 2, requires the legislature and the magistrates, among other things, to "cherish" "public schools and grammar schools in the towns," clearly referring to the schools above mentioned, and solemnly testifying to their importance in maintaining a system of popular government, which shall secure not only peace and order, but individual freedom and elevation of character.

"Public schools," as those words are used in the Constitution and laws of Massachusetts, are not limited to schools of the lowest grade. The addition of "grammar schools," in the article of the Constitution just quoted, is rather by way of specifying one kind of public schools, than by way of contradistinction. In the general laws of the Commonwealth, for years before the adoption of the eighteenth amendment of the Constitution, the

words "public schools" were used as including all schools, from those lower than grammar schools to those commonly known as high schools, established and maintained in the several cities and towns as part of the general system of popular education. All these are included under the head of "public schools" in the twenty-third chapter of the Revised Statutes. See also Rev. Sts. c. 23, §§ 10, 13, 62; Sts. 1838, c. 159, § 1; 1842, c. 42; 1849, c. 215, § 1; 1852, cc. 123, 240; 1854, c. 314. The words "public schools" are synonymous with "common schools," in the broadest sense, as used in this constitutional amendment, and in the statutes concerning the board of education and the distributions of the school fund. Sts. 1837, c. 241; 1849, c. 215. Rev. Sts. c. 11, § 13; c. 23, § 67. Sts. 1839, c. 56; 1840, c. 7; 1841, c. 17; 1846, c. 223; 1854, c. 300.

In *Cushing v. Newburyport*, 10 Met. 511, Chief Justice Shaw says: "The establishment of schools for the education, to some extent at least, of all the children of the whole people, is not the result of any recent enactment; it is not the growth even of our present constitutional government, or the provincial government which preceded it, but extends back two hundred years, to the early settlement of the colony. Indeed, the establishment of popular schools is understood to have been one of the objects for which powers were conferred on certain associations of persons living together in townships, enabling them to regulate and manage certain prudential concerns in which they had a common interest."

It was held in that case, that towns had power, under the Revised Statutes, then in force, to raise money by taxation for the support of other schools than the law required; the school in question being a girls' high school for the purpose of teaching bookkeeping, algebra, geometry, history, rhetoric, mental, moral and natural philosophy, botany, the Latin and French languages, and other higher branches of knowledge than were then taught in the grammar schools of the town. Yet the court was of opinion that schools supported by taxation must be town schools, and designed for the general education of all the people, and that what are understood by town schools must be determined

by an honest application of the rules of good sense in ascertaining the meaning of these well known terms, by long established and approved usage, and the well known policy of the legislature.

It is not necessary that these schools should be maintained by the inhabitants of a single town exclusively. The St. of 1848, c. 279, reënacted in Gen. Sts. c. 38, §§ 3 *et seq.*, authorized any two adjacent towns, having not more than two thousand inhabitants each, to form one high school district; and the Rev. Sts. c. 23, §§ 49-56, reënacted in the Gen. Sts. c. 39, §§ 42 *et seq.*, authorized contiguous school districts in adjoining towns to unite and form one district. See also St. 1868, c. 278. But such schools are of the same character with other town schools, in being established for the common benefit of the people of the towns, and kept under the control of the authorities of the towns; and the modifications are merely for the local accommodation of particular neighborhoods, or of the smaller towns.

Nor can the term "public schools" be confined to those supported exclusively by municipal taxation. Town schools have been for many years in part supported by legislative grants out of the school fund of the Commonwealth, as the constitutional amendment in question recognizes. Nor can they be limited to schools wholly supported by the public; for the original statute of 1647, as we have already seen, provided for the support of the schoolmaster, at the discretion of the selectmen, by a contribution from the parents of the scholars, or the masters of such as were under apprenticeship, instead of by a uniform tax upon all the inhabitants of the towns; and they may, in later times, derive support from voluntary contributions, as is shown by the provisions of the Rev. Sts. c. 23, § 64, which required the annual school returns from the towns to state what amount of money was raised by taxation, and what by voluntary contribution. See also *Allen v. School District in Westport*, 15 Pick. 35.

These are the schools to which the eighteenth article applies, — schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education, and which are open and free to all

the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; and the article is evidence that experience had convinced the people of the necessity not only of preserving this system of common schools, but of guarding it against perversion and abuse, by means of an express constitutional provision.

This class of schools does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality.

We now come to the consideration of the present case. Benjamin H. Punchard, an inhabitant of Andover, made the following bequest in his last will: "The residue of my property, not exceeding fifty thousand dollars, I give and bequeath to the town of Andover, for the purpose of founding a free school, forty thousand dollars for a permanent fund for the support of said school, and ten thousand dollars for the necessary buildings, &c., providing, that, at my decease, if there should not be the said amount of fifty thousand dollars, after paying the amounts first devised, then the said balance to be kept at interest till the amount is fifty thousand dollars. Said school shall be under the direction of eight trustees, of whom the rector of Christ Church to be one, also the ministers of the South Parish and West Parish Congregational Societies to be members also, the remaining five to be chosen by the inhabitants of Andover in town meeting, to serve for three years, two of whom to be taken from Christ Church Parish, two from the South Parish Society, and one from the West Parish Society; said school to be free for all youths resident in Andover, under the restrictions of the trustees as to age and qualifications; no sectarian influence to be used in the school, the Bible to be in daily use, and the Lord's prayer, in which the pupils shall join audibly with the teacher in the morning at the opening; the said trustees to have the sole direction and power also to determine and decide whether the school shall be for males only, or for the benefit of

both sexes; said school to be located in the South Parish of Andover, but free to all the parishes equally."

The will was proved in 1850. The persons designated in it as trustees were incorporated by the St. of 1851, c. 7, and they have held the fund and established a school under this act. They built a school-house, which was in use till December 1868, when it was destroyed by fire. The St. of 1856, c. 77, passed upon the petition of several of the inhabitants of Andover, exempted the town from its obligation to maintain a high school after the opening of the Punchard Free School. The purpose was, that it should be to the people instead of a high school, such as our system of common education requires in such a town.

After the school-house was burned, the inhabitants, by vote passed in town meeting, procured the enactment on June 12, 1869, of the St. of 1869, c. 396. It authorizes the town to raise by taxation and appropriate twenty-five thousand dollars to aid the trustees of the school in erecting a school-house, to be used and occupied in place of a high school for the town; also to raise and appropriate annually a sum not exceeding two thousand dollars in any one year, to aid in defraying the annual expenses of the school.

This act provides that the town shall hereafter have the right to choose a majority of the board of trustees, and that the school shall be under the order and superintendence of the trustees, and they shall perform all the duties and exercise all the powers in relation to the school, now performed and exercised by the general school committee in relation to the public schools of the town; that the school shall be open at all reasonable times to the general inspection and examination of the general school committee, that they may ascertain its condition and management, and they shall include a report thereof in their annual report to the town. They shall also have the right to recommend for admission to the school such pupils of the public schools as they may deem qualified therefor.

But the school is not "under the order and superintendence of the authorities of the town." The will requires that it shall

be under the direction of eight trustees: three of them to be clergymen of three of the religious societies in the town, and the other five, though chosen by the inhabitants in town meeting, to be members of those societies. All the other inhabitants of the town are ineligible to the office of trustee; and the authorities of the town, as such, have no control over the school. It would be inconsistent with the terms of the will to give them any such control; and the terms of the act of 1869 are in careful conformity with those of the will. If the school-house shall be built, the legal title to it will be in the trustees, and they will select the teachers, determine their compensation, and regulate the school according to their own discretion, in conformity with the directions of the testator. Yet money raised by taxation of the inhabitants to maintain the school, or to build the school-house, which is a mere incident of the school, will be, within the intent of the eighteenth article, money raised for the support of public schools; because this school is designed to stand, for the town of Andover, as a part of our system of common education; it is to be, for the children and youth of the town, the high school or grammar school, and it is, by the very terms of the statute of 1869, to be in place of a high school for the town; and, if maintained in whole or in part by taxation, it will practically exclude any other high school, and make it necessary for those of them who desire free instruction in the higher branches to resort to this school. If a school can possibly exist which is not under the control of the town authorities, and yet can be called a common or public school within the meaning of the eighteenth article, this is such a school. The fact that it is not under the control of the town authorities is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support. This feature constituted the principal reason why the town could not, under the general laws, raise money by taxation for its support, but found it necessary to procure a special act. But the act of the legislature, though it might confer any constitutional authority not contained in the general laws, could not confer a power

repugnant to the Constitution; and, so far as it purports to do it, is invalid; for legislative acts are themselves controlled and limited by the Constitution.

It is contended that the vote of the town is sustained by the decision in *Merrick v. Amherst*, 12 Allen, 500. The money raised by the town of Amherst was to be applied to aid the trustees of the Agricultural College in the erection of buildings; and the motive of the inhabitants was to induce the trustees to locate the college within the town. But the college was to form no part of the system of common education within the town. Its trustees resided elsewhere, and were not amenable to the town; its students were to come from other parts of the state, and from without the state, as freely as from Amherst; and its purpose was to teach special branches of learning. The institution was as distinct from the schools which belong to the system of common education, and which are contemplated by the eighteenth article, as any of the colleges or incorporated academies, or the school of technology. In discussing the question whether the town could, under a special act of the legislature, raise money by taxation to aid the trustees of that college, this was the point to which the attention of the court was directed; and it was not necessary to consider, so fully as it is in this case, what schools are, within the intent of that article, common or public schools. The question whether they must be wholly supported by taxation, or must of necessity be limited to a single town, did not arise. There is nothing in the decision of that case that tends to sanction the raising of money by taxation for the support of the Punchard Free School; and we think those of the inhabitants who object to being taxed for the support of this school are clearly entitled to restrain the town from raising money for that purpose. To hold otherwise would render the article nugatory as to one of its leading purposes.

2. The bill further seeks to restrain the town from purchasing land for a cemetery; alleging that it is to be such a cemetery as is contemplated by the Gen. Sts. c. 28; that it is unnecessary; and that the expense will be disproportionate and unreasonable. All objections to the bill for multifariousness are waived.

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The language of the Gen. Sts. c. 18, § 10, authorizing towns to provide burial grounds,* is very broad, and leaves them to judge what sum shall be raised, what quantity of land shall be appropriated for the purpose, and how it shall be fenced, laid out, arranged and managed, without any specified restriction. There is no more jurisdiction conferred upon this court to regulate their proceedings, than there is in regard to the cost, number, size and style of school-houses to be built by a town. And towns are not prohibited in respect to burial grounds, any more than in respect to school-houses, from making them beautiful and attractive instead of unsightly and repulsive. The exercise of their judgment extends to matters of taste in respect to both.

The cemeteries mentioned in the Gen. Sts. c. 28, are owned by private corporations, the authorities of the town having but a limited control over them. The votes of the town do not show that a cemetery of this character was intended. In other respects, the words "burial ground" and "cemetery" seem to be used in the statutes synonymously.

Injunction made perpetual as to raising money in aid of the Pynchard Free School; and dissolved as to raising money for the cemetery.

INHABITANTS OF HAVERHILL vs. JOHN G. GALE.

Towns and cities are not authorized by law to open their schools to children whose parents or guardians reside in another state; and, if they do so, no promise, express or implied, of the parents or guardians, to pay for the tuition, can be enforced.

The provisions of the Gen. Sts. c. 41, § 7, that, with the consent of the school committee first obtained, children between certain ages may attend school in towns or cities other than those where their parents or guardians reside, apply only to children whose parents or guardians reside in Massachusetts.

CONTRACT on an account annexed for the tuition of Emma S. Gale and Channing Gale in the plaintiffs' high school during

* "They may, at legal meetings, grant and vote such sums as they judge necessary for the following purposes: For the support of town schools; . . . for burial grounds; . . ."

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1867 and 1868; submitted to the judgment of the superior court, and, on appeal, of this court, upon a statement of agreed facts, of which the following is the material part.

"The defendant is, and always has been, a resident of Newton in New Hampshire. His minor children, named in the declaration, attended the school in Haverhill in Massachusetts during the time claimed; coming from Newton Monday mornings, and occupying rooms which the defendant had hired for them; and returning to Newton on Friday evenings, and spending their Sundays and vacations at home. The plaintiffs made a demand before bringing their suit. The said children were attending school with the knowledge and consent of the school committee."

J. J. Marsh, for the plaintiffs.

E. J. Sherman & J. K. Tarbox, for the defendant.

MORTON, J. The laws of this Commonwealth for the establishment and maintenance of public schools are designed to provide schools in each town or district for the benefit of the inhabitants thereof, and not for the benefit of residents in other towns or districts. It is only in a few exceptional cases, specified by statute, that the inhabitants of one town can send their children to the public schools in any other town; and, except in such cases and upon such conditions as are thus provided by law, towns have no authority to open their schools to children of the inhabitants of other towns. If they do receive children from other towns, in violation of law, they cannot maintain any action against the parents of such children for their tuition, even if there is an express contract to pay it. Such a contract, being founded upon illegality, cannot be enforced. The plaintiffs concede these general principles; but contend that this case falls within the provisions of the Gen. Sts. c. 41, § 7.*

* "With the consent of school committees first obtained, children between the ages of five and fifteen years may attend school in cities and towns other than those in which their parents or guardians reside; but whenever a child resides in a city or town different from that of the residence of the parent or guardian, for the sole purpose of attending school there, the parent or guardian of such child shall be liable to pay to such city or town, for tuition, a sum

It might be a sufficient answer to this claim, to say that it does not appear, by the agreed statement of facts, that the children of the defendant, who attended school in Haverhill, were between the ages of five and fifteen years. But the more satisfactory answer is, that the provisions in question do not apply to the children of parents who reside out of the Commonwealth. This section is to be construed in connection with the system of legislation of which it forms a part; and applies only to the children of parents who reside within the Commonwealth. It follows that, upon the agreed facts, the plaintiffs are not entitled to maintain this action, and there must be

Judgment for the defendant.

WILLIAM S. BALCH vs. COUNTY COMMISSIONERS OF ESSEX.

The record of an adjudication of the county commissioners, on the application of the selectmen of a town, under the St. of 1866, c. 112, that it is necessary to take adjoining land to enlarge a burying ground, need not set forth the facts which the statute requires in order to entitle the selectmen to make the application; but it is sufficient if such facts are alleged in the application itself.

The incapacity of a landowner to sell his land is a sufficient refusal to sell it, within the meaning of the provision of the St. of 1866, c. 112, that, in order to entitle the selectmen of the town to apply to the county commissioners for an adjudication of the necessity of taking the land to enlarge a burying ground, he must refuse to sell it, or demand for it a price which they deem unreasonable.

The right of a town to take adjoining land to enlarge a burying ground, by proceedings under the St. of 1866, c. 112, is not affected by the manner in which the title to the land is limited among its owners, whether in possession or expectancy.

Whether the actual occupation, by private proprietors, for the uses of burial, of land adjoining and needed for the enlargement of a burying ground existing in and belonging to the town, can, in any case, be held to exclude the right of the town to take it for that purpose by proceedings under the St. of 1866, c. 112, *quaere*.

On application of the selectmen of a town, under the St. of 1866, c. 112, to the county commissioners, for an adjudication of the necessity of enlarging a burying ground existing in and belonging to the town, by taking two adjoining parcels of land, the first of which was conveyed, more than a hundred years before, to a parish in the town, "for the use of a burying place," and ever since used by the inhabitants of the parish for purposes of burial, and the second was and for thirty years had been held in trust and on condition to be by the original grantees and their associates "laid out and allotted or assigned for public or private use as they shall find most convenient for improving, preserving and

equal to the average expense per scholar for such school for the period the child shall have so attended."

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using the same for an addition to" the first parcel, "and to be used by them, their associates and assigns, for that purpose only forever," the commissioners laid out and declared both parcels "to be a part of the public burying ground of the town, and to be forever kept as such," "reserving to the proprietors of lots, and also to the families of the parish, all of the rights that they now possess." *Held*, that this judgment of the commissioners was valid.

To an adjudication in good faith of county commissioners, under the St. of 1866, c. 112, of the necessity of enlarging a burying ground by taking a parcel of adjoining land, it is no objection that there is no purpose on the part of the town to make burials in the parcel, but that it is to be left open as part of a passageway giving access to the burying ground from a public street.

PETITION for a writ of *certiorari* to quash proceedings of the county commissioners of Essex, under the St. of 1866, c. 112, enlarging the public burying ground of Groveland upon the application of the selectmen of that town.

The substance of the statute is as follows: The first section provides that, when there is a necessity for the enlargement of any burial ground now existing in and belonging to any town, and the owner of the adjoining land needed for such enlargement refuses to sell the same, or demands a price which the selectmen deem unreasonable, they may, with the approval of the town, make application to the county commissioners. The second section obliges the commissioners to fix a time and place for a hearing, and give notice to the landowner. The third section provides that they shall hear the parties, "and, as soon as may be after the hearing, shall consider and adjudicate upon the necessity of such enlargement, and upon the quantity, boundaries, damages, and value of the land adjudged necessary to be taken for that purpose." The fifth section gives the town the right thereupon to take and hold the land, "as a part and parcel of the burial ground of such town," upon payment or tender of payment of the amount of damages to the landowner. And the sixth and last section secures to the landowner the right to have his damages assessed by a jury, if he feels aggrieved by the award of them by the commissioners.

The petitioner alleged that, on August 5, 1867, the selectmen of Groveland made an application to the county commissioners of Essex, which represented that there was "an urgent necessity for the enlargement of the burial ground now existing in and

belonging to said town of Groveland, and the owners of the adjoining lands needed for such enlargement refuse to sell the same;" and the applicants, with the approval of the town, therefore requested the commissioners to fix a time and place for a hearing and give due notice thereof, and "consider and adjudicate upon the necessity," &c. (quoting the language of the third section of the statute); and which specified that "the owners of the adjoining land necessary for the above enlargement," so far as known to the applicants, were, first, the "East Parish in East Bradford, now Groveland;" secondly, "those who may now be living, and the heirs of such as may be deceased, of the grantees" in certain deeds to Gardner B. Perry and others; and thirdly, the petitioner.

He further alleged that, on this application, the commissioners proceeded to make an adjudication, described in their record, which he set forth and made part of his petition, and the substance of which was as follows:

"Commonwealth of Massachusetts. Essex, ss. Court of County Commissioners. October term, A. D. 1867. On the petition of the selectmen of the town of Groveland, representing that there is an urgent necessity for the enlargement of the burial ground now existing in and belonging to the said town of Groveland. It having been made to appear that all persons and corporations interested therein had been duly notified of the time and place of meeting, we, the county commissioners for said county did, on the twenty-fifth day of September, A. D. 1867, proceed to view the land described in said petition, and hear all parties interested, and did adjudge that the public necessity required such enlargement in manner following:" [Here followed a description by metes and bounds, beginning and ending on Main Street in Groveland, of land to be taken for the enlargement.] "Including, within the above described limits, the ancient burying ground of the Parish of East Bradford, now included in the town of Groveland; also a tract of land purchased for a cemetery by Gardner B. Perry and others, and held in trust for burial purposes; reserving to the proprietors of lots, and also to the families of the East Parish in East Bradford, all

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of the rights that they now possess. And we hereby lay out and declare the several parcels of land, included within the above described bounds, to be a part of the public burying ground of the town of Groveland, and to be kept forever as such. For a more particular description reference is to be had to the plan on file herewith, and which is adopted as a part of the above order." The only award of damages was "to William S. Balch the sum of fifty dollars, in full satisfaction for all claims and demands for damages for the aforesaid premises, to be paid by the town of Groveland."

Applying to the plan the description by metes and bounds, it appears that the burying ground of the town lay more than forty-two rods northwest of Main Street, and the land taken covered the intervening distance and connected it with that street, by the annexation, first, of the tract "purchased for a cemetery by Gardner B. Perry and others, and held in trust for burial purposes," which immediately adjoined on the southeast the burying ground of the town, and was more than seventeen rods wide on the line of junction; second, of the "ancient burying ground of the Parish of East Bradford," which immediately adjoined on the southeast the Perry tract, and was ten rods wide on the line of junction; and third, of a narrow piece of land, only two rods wide, running from the southeastern boundary of the "ancient burying ground of the Parish of East Bradford," about ten rods, to the street. A strip of this last named piece was land taken from the petitioner; and its situation in relation to the other parcels of land above named is hereinafter more fully set forth.

The petitioner alleged that he was interested in the "ancient burying ground of the Parish of East Bradford," "owning a lot in the same in which deceased members of his family are buried;" and was also interested in the Perry tract, "being one of the original proprietors to whom the same was conveyed;" and that "both are inclosures appropriated to the burial of the dead, and neither of said burying grounds are needed or wanted to enlarge the burying ground belonging to the town of Groveland, but were included in the application of the selectmen in order

that they might reach the other land included in said application, belonging solely to this petitioner, which they desired to obtain for a road and not for enlargement." And he denied the right or authority of the commissioners to enlarge the public burying ground of the town by the annexation of either of said two inclosures; because the owners of them "had never been requested by the selectmen of said town, and had never refused to sell the same, nor had they ever demanded therefor any price deemed by the selectmen of said town unreasonable, and upon these points the commissioners made no adjudication, as by their record appears;" and also because each of them, "being an inclosure used and appropriated to the burial of the dead, could not be thus taken for public uses without the consent of the owners and proprietors first obtained, unless authority to that effect had been specially granted by law;" and he denied any such special grant of authority.

He then further alleged that he was the sole owner of all the other land taken; and that his said land was not "adjoining land" to the public burying ground of the town, within the meaning of the statute, being separated from it by the "ancient burying ground" and the Perry tract. And he denied the right or authority of the commissioners to set off his said land, for that reason, and also for the reason that the record of the commissioners did not show that he had refused to sell it, or had demanded an unreasonable price for it.

The commissioners filed a general answer, justifying all their acts as in conformity with the statute, and denying all allegations to the contrary; and the case was heard by *Wells, J.*, and reserved for the determination of the full court on a report of which the following is the substance:

At the hearing, it appeared that the "ancient burying ground of the Parish of East Bradford" was used for purposes of burial as early as about 1722, and in 1752 was conveyed to three persons named, as "a committee in behalf of the East Parish in Bradford," by a deed reciting "that the conveyance was made to said persons in their aforesaid capacity, and by them unto the East Parish in Bradford for the use of a burying place."

with the privilege of a convenient way to it from the country road for passing and repassing as there shall be occasion ;' that this ground was used for burial purposes by the inhabitants of said parish, with a narrow passageway to the same from the public road near by, and this passageway was not fenced but there was a gate opening to it from the highway, and it led to another gate at the burying ground ; that these premises were thus used until 1838, when it became necessary to have enlarged accommodations for burial purposes ;" and that in 1838 the Perry tract was bought and conveyed to Gardner B. Perry and eight others, one of whom was the petitioner, by two deeds of the same date, each covering a separate part of it.

" Both deeds were dated June 23, 1838, and conveyed ' unto them, the said committee, their associates and their assigns forever ;' and added : ' The condition of this sale is as follows, viz : to the above named committee in trust, to be by them and their associates laid out and allotted or assigned for public or private use as they shall find most convenient, for improving, preserving and using the same for an addition to the burying ground, and to be used by them, their associates and assigns, for that purpose only forever. The land being the same that has lately been fenced in with the burying ground by said committee, &c.' One of said deeds conveyed to Gardner B. Perry and others, in connection with other land adjoining, a portion of the narrow piece of land, represented on the plan, nearly in the middle of the same, the precise width of which does not appear either by said deed or plan, but it extended from the highway the whole length of the passageway to the burying ground, between the land of the petitioner on the east, and the land which was afterwards conveyed to the town of Groveland for a passageway on the west, and described as the same ' fenced in with the burying ground by said committee, &c. ; ' and this was then fenced in as a passageway.

" The town of Groveland, incorporated in 1850, is now composed of parts of the towns of Boxford and Bradford, including most if not all of the East Parish in Bradford.

" These grounds continued to be used for burial purposes until in 1852 the town of Groveland purchased land in the rear and adjoining the old burying grounds, and in 1866 purchased another parcel of land adjoining the same. After the purchase of the first land by the town of Groveland for a burying ground in 1852, namely, on May 6, 1853, the town took a conveyance of a narrow strip of land, being the westerly side of the narrow piece represented on the plan, extending from Main Street to the burying ground. This strip, thus conveyed to the town, is twelve links and a half in width and about ten rods in length, and is bounded in the deed southerly by the highway, and easterly by the then 'present passageway,' being the strip of land which was purchased and fenced in by Gardner B. Perry and others in 1838. The consideration in this deed to the town of Groveland is expressed as follows, namely: 'In consideration of one dollar paid by the Inhabitants of the Town of Groveland, and for the desire I have to improve and ornament the burying ground in this place,' &c.; and the deed further provides as follows: 'The aforesaid premises to be used for the purpose of widening and ornamenting said passageway, and on the condition that said inhabitants build and maintain a good and sufficient fence on the land against my land forever.'" At the close of the covenants to defend the premises there is inserted the following proviso: 'Provided said premises are used for the aforesaid purposes.'

" The town of Groveland, desiring to have this strip of land thus used for a passageway still wider, made an arrangement with the petitioner for him to allow the fence upon the westerly line of his land to be moved back about seven or eight feet, so as to include that strip of his land in the passageway, without prejudice to his title to the fee in the same; he having the right to use the same as a passageway to pass and repass to and from his land on the easterly side of the same. The town fenced said passageway, and the petitioner continued to pass and repass to and from his land through the same, until after the proceedings complained of in this case.

" Prior to the purchase of the last named land, in 1866, by the town of Groveland, there was on April 3, 1866, a town meeting, at which it was voted 'that the selectmen be authorized to purchase what land may be necessary for enlarging the burying ground, and also such land as may be necessary for a road to the ground,' and 'that the selectmen be authorized, provided they cannot agree with the owners of the land to be purchased for enlarging the burying ground, and road to the same, to call on the county commissioners to adjudicate the whole matter.' Under this vote, the selectmen proceeded to purchase the land which was added in 1866. They also entered into negotiations with the petitioner for the purchase of his narrow strip of land on the easterly side of the passageway, but a purchase of the same was not effected. At a town meeting on April 20, 1867, it was voted 'to rescind all votes passed April 1, in relation to enlarging the burying ground; to enlarge the burying ground; and that, provided the owner or owners of the adjoining land needed for such enlargement refuse to sell the same, or demand therefor a price deemed by the selectmen unreasonable, the selectmen be authorized and requested to petition the commissioners of the county of Essex to take so much as they may judge necessary to enlarge the burying ground belonging to said town.' Under this vote there was further negotiation with the petitioner. He was willing that his land should be used, as it had been, as a passageway, with a right for him to pass and repass, or that it should be laid out as a highway to the burying ground, but declined to sell the same on terms satisfactory to the selectmen, so as to extinguish his right to pass and repass over the same to and from his land, and a house which he had placed on said land in October 1866. The selectmen then proceeded to present the petition to the county commissioners, and the proceedings were had which are complained of in this case.

" On these facts, the petitioner contended that the county commissioners could not legally proceed to lay out and declare the two old burying grounds to be a part of the burying ground of the town of Groveland; that they have not undertaken to transfer them so that they shall be 'taken and held forever,' by

said town, but have reserved to the East Parish, and the proprietors of the other cemetery, 'all the rights they now possess; that, if said burying grounds are not legally taken and transferred, then the petitioner's land is not 'adjoining' and cannot be taken; that, under the statute, the county commissioners may take land only in case of a necessity for enlargement and not for a road or passageway to a burying ground; and that it is evident, on the face of the whole proceedings, that the petitioner's land is taken merely for a road and passageway, and the plea of a necessity for enlargement is but a pretence, which is sought to be covered up by the worse than useless ceremony of taking the two old burying grounds in order to reach the land of the petitioner.

"If, upon the foregoing statement, the proceedings by which the strip of land belonging to the petitioner was taken and appropriated to the uses of the cemetery as therein set forth, were without authority of law, then a writ of *certiorari* is to issue; otherwise the petition to be dismissed, or the court to pass any other order that the justice of the case may require."

H. Carter, for the petitioner.

J. C. Perkins, for the respondents.

WELLS, J. The proceedings for laying out and taking the land in question, for the purpose of enlarging the burial ground belonging to the town of Groveland, were all regular and sufficient, in form. The case finds a refusal by this petitioner to sell his land for the purpose; and that the only other owners held by such title as gave them no power to sell. That fact, of incapacity to sell, is a sufficient refusal to answer the condition of the statute in this behalf. It appears also that the application of the selectmen to the county commissioners was made with the approbation, and in compliance with the vote, of the town. These facts are sufficiently set forth in their application. The record of the county commissioners shows notice to all parties interested; and an adjudication upon the necessity of the enlargement, and upon the quantity and boundaries of the land adjudged necessary to be taken; and also the damages occasioned to the petitioner.

The objections to these proceedings mainly turn upon the question of the right of the town to take, for the purposes of a burial ground, under the St. of 1866, c. 112, lands already appropriated to a like purpose by private grant. The statute is applicable to any "adjoining land needed for such enlargement." The right to take such land cannot depend upon the state of the title, however it may be limited among the owners, whether in possession or in expectancy. It can make no difference that the legal title is in one, and the equitable title in others, or in an indefinite class of *cestuis que trust*. The title or interest of the "East Parish in Bradford," and of the various persons who, as members of that parish, or by individual contract, had acquired rights in the "ancient burying ground," so far as the same is regarded as a right of property, or title in the land, is just as much subject to this power of public appropriation as is the title of the sole owner of an absolute fee. The objection then must rest, if at all, in the purposes to which the land had previously been appropriated.

All inclosures appropriated for the burial of the dead, whether for public or private use, are protected by law against desecration and improper intrusions. Whether the actual occupation of ground by private proprietors for the uses of burial might, in any case, be held to exclude the right of the town to convert the same into, or include it within the limits of, a public cemetery, and subject it to the control of the town authorities, is a question which we have no occasion to decide in the present case. The "ancient burying ground" was a public "burying place," to the extent of that parish; and the "land bought by Gardner B. Perry and others" was in trust to be "allotted or assigned for public or private use" as found most convenient. By the terms of the laying out, there were reserved "to the proprietors of lots, and also to the families of the East Parish in Bradford, all of the rights that they now possess." So far as individual rights of burial are concerned, they have not been disturbed. On the other hand, the reservation of those rights is in no manner inconsistent with the purpose contemplated by the statute conferring this power. The character and purposes of

the appropriation, under the statute, are the same with those upon which the land was previously held. The only change is in the legal title of the general proprietors; and in the supervision, so far as that supervision depended upon proprietorship. We are satisfied that there is no legal objection to the enlargement, on account of the character and previous appropriation of these adjoining lands.

This disposes also of the objection of the petitioner, that the strip, taken from his separate land, was not "adjoining land" to the burial ground of the town. The commissioners adjudicate upon the quantity and boundaries of the land adjudged necessary to be taken. This adjudication has no reference to boundary lines between proprietors of lands; and need not be in any manner affected by them. Those lines only become of importance in the adjustment of damages for land taken.

The only remaining objection arises upon the allegation of the petitioner that the strip of land, taken from his private estate, was taken for a road, and not in reality for the purposes of a burial place. We think we ought to regard it as having been made to appear that, in fact, there is no purpose, on the part of the town, to cause burials to be made upon that specific portion of the enlargement; but that it is to be left open as a part of a passageway by which the cemetery is reached from Main Street upon that side. The statute does not authorize the taking of land for the purposes of a road or passageway. But it does not preclude the appropriation and use of portions of land, taken for enlargement, to the subordinate and incidental purposes of walks, avenues and passage or drive ways. Neither the subsequent use in that mode, nor the previous purpose so to appropriate portions of the land, would invalidate a laying out which was made in good faith as a needed enlargement of an existing burial ground. The circumstance that the avenue or passageway, or a portion of it, is upon the exterior boundary of the enlargement, and is taken from land of a proprietor from whom no and is taken except that covered by the way, serves to present the question in its most formidable aspect. But the propriety and legality of the laying out cannot be affected by any acci-

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dental circumstance arising from the manner in which the lines of individual titles may happen to intersect the land adjudged to be necessary for the enlargement. No part of the land is laid out as a highway, town way, or private way. The laying out affixes no character, and imposes no easement or burden, upon the strip of land in question, different from that which applies to the whole tract taken. The objection of the petitioner is, in substance, that, inasmuch as the strip taken from his land is to be used as part of an avenue, and not specifically for interments therein, the taking and laying out of that strip is shown to have been for other purposes than the enlargement of the burial ground of the town; and thus without the authority of the statute. We think this is a question upon which the decision of the commissioners, acting in good faith, must be held to be conclusive. Their authority covers the adjudication not only of the necessity, but of the extent and boundaries of the land required. We see no reason in this case to hold that they have exceeded or departed from their legitimate authority.

Writ of certiorari refused.

INHABITANTS OF WENHAM vs. INHABITANTS OF ESSEX.

If the action of one town against another, on the Gen. Sts. c. 70, to recover the expenses of supporting a pauper, is settled by the payment by the defendants of the claim and costs, and nonentry of the writ by the plaintiffs, that is not, under § 18, "a recovery" by the plaintiffs which will bar the defendants from disputing with them the settlement of the pauper in a future action for his support.

Overseers of the poor, in answering in writing under the Gen. Sts. c. 70, § 18, a written notice of the overseers of another town, under § 17, for the removal of a pauper, need not expressly refer to the notice.

An assertion by the overseers of the poor of one town, in answering under the Gen. Sts. c. 70, § 18, a notice given by such overseers of another town, under § 17, for the removal of a pauper, that he has not any legal settlement with them and therefore they shall not remove or support him, is a sufficient statement of their objections to his removal to authorize their town to contest the question of his settlement in an action thereupon brought by the second town for his support.

CONTRACT to recover the expenses of supporting Clara Williams, a pauper, from April 24 to July 25, 1868. Writ dated

July 27, 1868. The defendants, in their answer, denied that the pauper ever had a settlement in their town, or that they were otherwise chargeable with her support.

At the trial in the superior court, before *Lord, J.*, these facts appeared in evidence: The pauper having fallen into distress and been relieved by the plaintiffs, the overseers of the plaintiffs' poor, by a letter dated April 2, 1867, gave notice thereof to the overseers of the defendants' poor, and requested them to remove her. The defendants' overseers failed to answer the notice; and on April 24, 1868, the plaintiffs began an action of contract against the defendants to recover their expenses in supporting the pauper to that date, which action was settled, without the entry in court of the writ therein, by the payment to the plaintiffs by the defendants on May 6, 1868, of the sum sued for and the costs of the suit. The pauper, however, was not removed, but continued to receive support from the plaintiffs.

On May 19, 1868, the plaintiffs' overseers sent another written notice, bearing that date, to the defendants' overseers, that "Clara Williams, whose legal settlement is in your town, but now residing in Wenham, being in needy circumstances, has applied to this board for relief, which we have granted and charged to your town, and shall continue to do so until you remove or otherwise provide for her support; and you are requested to remove said pauper from this town." A letter, bearing date of May 23, 1868, signed by the defendants' overseers, and addressed to the plaintiffs' overseers, was afterwards received by the latter, containing this statement: "Clara Williams has not any legal settlement in the town of Essex; we therefore shall not remove or otherwise provide for her support."

On August 28, 1868, a month after the beginning of this action, the plaintiffs removed the pauper to the defendants' poor house.

"The plaintiffs asked the judge to rule that the defendants, having failed to answer the first notice, could not now set up the defence that the pauper had no settlement in Essex; and that, if a new notice was necessary after the settlement of the first action, the letter of May 23 was not such a reply to the

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letter of May 19 as the statute required. But he declined so to rule, and added, as to the second point, that he should leave it to the jury on the evidence to say whether the letter of May 23 was sent and received as an answer to that of May 19." The jury found for the defendants; and the plaintiffs alleged exceptions. The provisions of the statute touching the case are printed in the margin.*

W. C. Endicott & H. L. Hadley, for the plaintiffs.

J. C. Perkins, for the defendants.

CHAPMAN, C. J. If the plaintiffs, after giving their first notice, had prosecuted their action to final judgment, the defendants would afterwards have been barred from contesting the settlement of the pauper. Gen. Sts. c. 70, § 13. But the action was settled without judgment; and, in order to entitle themselves to recover for the further support of the pauper, it was necessary for the plaintiffs to give a new notice. *Attleborough v. Mansfield*, 15 Pick. 19. *Palmer v. Dana*, 9 Met. 587. They gave

* By the Gen. Sts. c. 70, § 12, overseers of the poor "in their respective places, shall provide for the immediate comfort and relief of all persons residing or found therein, having lawful settlements in other places, when they fall into distress;" "the expenses whereof, incurred within three months next before notice given to the place to be charged," "may be recovered by the place incurring the same, against the place liable therefor, in an action at law."

§ 13. "A recovery in such action shall bar the place against which it shall be had from disputing the settlement of such pauper with the place so recovering, in any future action brought for his support."

§ 17. "The overseers of any place may send a written notification, stating the facts relating to any person actually become chargeable thereto, to one or more of the overseers of the place where his settlement is supposed to be, and requesting them to remove him," &c.

§ 18. "If such removal is not effected by the last mentioned overseers within two months after receiving the notice, they shall within said two months send to one or more of the overseers requesting such removal a written answer, signed by one or more of them, stating therein their objections to the removal; and if they fail to do so, the overseers who requested the removal may cause the pauper to be removed to the place of his supposed settlement," "and such place shall be liable for the expenses of his support and removal, to be recovered in an action by the place incurring the same, and shall be barred from contesting the question of settlement with the plaintiffs in such action."

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such new notice ; and, within a few days afterwards, the defendants wrote them a letter which must be regarded as a reply to it, though it makes no reference to it. It declares that the defendants will not remove the pauper, because she has not any legal settlement in the town of Essex. This is a sufficient statement of the objections to the removal, within the eighteenth section of the statute, to authorize them to contest the settlement.

Exceptions overruled.

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of Essex.

The legislature, in exercising the right of eminent domain, may (as by the St. of 1868, c. 309, § 8) require county commissioners to take and lay out a bridge as a highway, and to determine and apportion between the county and the benefited towns and cities the damages to be paid therefor.

If one of the board of county commissioners, who were required by the St. of 1868, c. 309, § 8, to lay out certain bridges as highways, resided in a town or city in which one of the bridges was situated in whole or in part, such a residence disqualified him to act in the case of that bridge, unless the board could not otherwise be organized; and the other members might substitute for him a special commissioner, under the Gen. Sta. c. 17, § 12.

Under the St. of 1868, c. 309, § 8, which required county commissioners to lay out certain bridges as highways "in the manner now provided by law for the laying out of highways, and according to the provisions of" the St. of 1867, c. 296, "so far as the same are applicable," and to determine and decree what proportion of the damages sustained by the bridge proprietors should be paid respectively by the county and the several cities and towns benefited, all the damages are to be paid, in the first instance, from the county treasury, and an adjudication by the commissioners, which leaves the bridge proprietors to enforce against the cities or towns their liability for the proportion on them assessed, is erroneous; but the whole proceedings of the commissioners are not necessarily avoided by such error, but may be amended by the judgment of this court on *certiorari*, under the Gen. Sta. c. 145, § 9.

In awarding, after due notice, what proportion of the damages sustained by the proprietors of a bridge laid out as a highway under the St. of 1868, c. 309, § 8, should be paid respectively by the county and a city thereby benefited, the county commissioners specified the sums payable by each, but omitted to provide that both sums should be paid in the first instance from the county treasury. The proprietors demanded such total payment from the county, and, upon its refusal to pay more than the sum apportioned to it, sued out writ of *certiorari* against the commissioners. *Held*, that, in correcting the error, under the Gen. Sta. c. 145, § 9, the court might charge the county with payment to the petitioners of interest on the sum apportioned to the city from the time of said demand, and charge the city with reimbursement of such interest to the county.

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PETITION for a writ of *certiorari* to quash proceedings of the respondents in laying out the petitioners' bridge as a highway, under the St. of 1868, c. 309, § 8, which became a law June 5, 1868, and provided that "the county commissioners of the county of Essex" should, within sixty days thereafter, "lay out as and for highways" certain bridges over the Merrimack River, including "Haverhill Bridge, between the towns of Haverhill and Bradford," "in the manner now provided by law for the laying out of highways, and according to the provisions of" the St. of 1867, c. 296, "so far as the same are applicable," and that "the said commissioners shall also determine and decree what proportion of the amount of damages sustained by the proprietors of said bridges, or of either or any of them, by such laying out, shall be paid respectively by the county of Essex and by the several cities and towns which the said commissioners shall determine are benefited by such laying out."

The petition alleged that, in the court of county commissioners, on August 4, 1868, a report, signed by two of their number, and by Nathaniel H. Griffith, a special commissioner in the place of Jackson B. Swett, the third of their number, was filed, accepted and ordered to be recorded, "that the said bridge may be known as a public highway forever;" the material part of which report is as follows:

"Whereas, by an act of the legislature of Massachusetts, approved June 5, 1868, and being chapter three hundred and nine of the acts of said year, it was ordered and directed that the county commissioners of the county of Essex should, within sixty days from the passage thereof, lay out as and for highways the several bridges named in the eighth section of said act, including therein the bridge known as Haverhill Bridge, between the towns of Haverhill and Bradford in said county; and whereas further, in pursuance of said act, said county commissioners duly notified all parties interested, and did, on the 29th day of July 1868, proceed to visit said bridge and hear all parties interested. Now, on this 4th day of August 1868, we do lay out said bridge, known as the Haverhill Bridge, between the towns of Haverhill and Bradford in said county, as and for a

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public highway. And, having heard all parties interested therein, we do estimate the damages sustained by the proprietors of said Haverhill Bridge at the sum of \$23,000, to be paid in the manner hereinafter set forth. And, in pursuance of the duty imposed upon us by said act, we do adjudge and decree that, of said sum. \$10,000 shall be paid out of the county treasury; \$9000 shall be paid by the inhabitants of the town of Haverhill; and \$4000 shall be paid by the inhabitants of the town of Bradford. All of which sums shall be payable to said proprietors by said county and towns as aforesaid, upon the laying out of said bridge as a highway as aforesaid."

The petitioners alleged that these proceedings of the county commissioners were illegal and void, for the following reasons :

1. "Because the provisions of the St. of 1868, c. 309, under which the aforesaid action of said commissioners was claimed to be taken, in so far as the same purport to direct and provide for the laying out of said bridge as aforesaid, and the taking of the property and franchise of the petitioners in the premises, are wholly inoperative and void, and contrary to the provisions of the Constitution of this Commonwealth; in that they direct a judicial body to do a judicial act without the exercise of any discretion on its part, and suspend the general standing law by a special enactment for the case, and provide that property of individual citizens may be taken for public use without adequate remedy for their compensation, and deprive them of the privilege of submitting the same to the determination of a jury."

2. "Because there was no adjudication by said commissioners as to the common convenience and necessity for laying out said bridge."

3. "Because a special commissioner was called in at the hearing, and acted in the laying out of said highway and appraisal of damages, in the place of one of the county commissioners."

4. "Because the said commissioners have decreed that a part only of the amount estimated and appraised by them as compensation to the petitioners, and damages occasioned by the

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said laying out of their bridge for a highway, shall be paid from the county treasury, and the remainder by different towns in the county, whereas the whole amount should have been payable to the petitioners from the county treasury."

5. "Because no way is provided to the petitioners for the collection of those portions of the damages appraised which are decreed to be paid by the inhabitants of Haverhill and Bradford, and the petitioners are without adequate remedy for the collection and enforcing payment of the same, the said inhabitants of Haverhill and of Bradford having neglected and refused to pay the same when requested."

The respondents, answering, admitted "that the matters of fact stated in the petition are correctly stated," and, "as to the special claim that a special commissioner was called in," alleged "that Jackson B. Swett, one of their number, being an inhabitant and taxpaying citizen of Haverhill, which was one of the towns in which said bridge was situated, and which was interested in the question to be decided, the respondents adjudged that he ought not to act as one of the board in reference to said bridge, and called in a special commissioner, as they deemed it their duty to do;" and they submitted their proceedings to the court, alleging "that they were in all respects formal, regular and conformable to law, and that the same ought not to be quashed or in any way interfered with."

At the hearing, before *Coll, J.*, "no facts were in dispute, the allegation in the answer in regard to the special commissioner being admitted;" and the case was reserved for the determination of the full court.

G. F. Choate, for the petitioners.

S. B. Ives, Jr., (*J. C. Perkins* with him,) for the respondents.

*COLT, J.** The St. of 1868, c. 309, imperatively requires the county commissioners to appropriate the property and franchise of the petitioners to the public use by laying their toll bridge out as a highway. It is objected that its provisions violate the Constitution of the Commonwealth. The court are of opinion

* *MORTON, J.*, did not sit in this case.

that, under this statute, construed according to the manifest intent of the legislature, the power existing in the supreme authority of the state, to take private property for the public use, may be lawfully exercised.

It belongs to the legislature to determine, in view of the general welfare, whether an exigency exists which justifies the exercise of this right of eminent domain. Ordinarily, as in the case of the laying out of highways, provisions are made by general laws for the exercise of the power; and the necessity for its application in particular instances is left to the adjudication of certain designated officers or tribunals. But there can be no doubt that the power, which may thus be delegated, may, when occasion requires, be exercised by the legislature itself. In such case, its decision is final; no discretion is given to the agents employed to make the appropriation and fix the compensation to be made; and neither the agents nor the courts have power to revise the decision. Under this statute, therefore, the county commissioners had no authority to adjudicate upon the question of common convenience and necessity; and in this respect there is no error in their proceedings.

The action of the commissioners in substituting a special commissioner, in place of the one who was an inhabitant of one of the towns in which the bridge was located, is not irregular. Under the Gen. Sts. c. 17, § 12, the commissioner so situated could not act in the premises, unless it was found impossible to organize a board without him.

The doings of the commissioners are further charged to be irregular and void, because only a portion of the damages estimated and appraised as compensation to the petitioners are decreed to be paid from the county treasury; the balance having been ordered by them to be paid by different towns, with no provision made for its collection, and no adequate remedy for enforcing its payment.

The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount.

Payment need not precede the seizure ; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay. If this statute, as it seems to have been understood by the commissioners, instead of providing for payment, gives only a right of action against certain towns in the county for a substantial portion of the damages assessed, with no process pointed out by which the right may be enforced without unreasonable delay, there would be force in the objection now urged against it on constitutional grounds. But this is not the true construction. The commissioners are required to lay out the bridge as a highway, in the manner provided for the laying out of common highways, and according to the provisions of the St. of 1867, *c.* 296, so far as the same are applicable ; and also to determine and decree what proportion of the amount of damages sustained by the proprietors shall be paid, respectively, by the county, and by the several cities and towns which they shall determine are benefited by such laying out. The statutes relating to the laying out of highways provide that all expenses and damages allowed, and all sums allowed as indemnity, shall be paid, by order of the commissioners, by the county. Gen. Sts. *c.* 43. And where turnpikes are laid out, with the assent of the corporation, as common highways, damages allowed shall be paid out of the county treasury, with power in the commissioners to order a portion to be refunded by the cities or towns through which the road passes, and to issue a warrant for its collection against delinquent towns. Gen. Sts. *c.* 62, §§ 14, 15 ; *c.* 43, §§ 49, 50. The proceedings attending the conversion of a turnpike into a common highway are, in most respects, analogous to the contemplated taking of the petitioners' toll bridge, and its conversion into a highway ; and are referred to in the statute, as indicating the mode to be pursued. They clearly imply that the damages assessed are to be paid in the first instance from the county treasury. This construction is confirmed by the provisions of the St. of 1867. This act authorized the commissioners, in their discretion, to lay out this bridge, giving to the several cities and towns power to contribute to the county such sums as they might see fit toward

the payment of damages. It is plain that, if the bridge had been taken under this statute, the petitioners' damages would all have been payable from the county treasury, and would have included the sums so contributed. No action was in fact had under it; but its provisions, so far as applicable, are incorporated into the subsequent St. of 1868, and imply that the amount to be paid by the towns under the assessment must go into the county treasury, as the contribution would have gone before. *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.* 2 Gray, 1, 37.

The proceedings of the commissioners, as presented upon this record, therefore were only erroneous in failing to order the payment of all the damages sustained by the petitioners to be made in the first instance from the treasury of the county, and requiring the towns named to refund to the county the amounts awarded to be paid by them. But this defect does not require that the whole proceedings should be set aside. Under the Gen. Sts. c. 145, § 9, this court may now enter such judgment as the court below should have rendered, and make such judgment or decree in the premises as law and justice require. *Lowell v. County Commissioners*, 6 Allen, 131.

The writ of *certiorari* must therefore issue in this case, in order that, when the record is brought up, it may be corrected in conformity with the opinion here stated.

Writ of certiorari to issue.

The petitioners sued out the writ of *certiorari*, which was duly served and returned, and the record of the proceedings of the respondents was certified and brought into court as therein commanded, at April term 1870, when a decree was passed by *Ames, J.*, of which the following are the material parts:

"It is ordered and decreed that so much of said record as provides for the payment directly to the petitioners of any portion of the damages awarded them to be made by said towns of Haverhill and Bradford, or either of them, be quashed and annulled and rendered of no effect; and, it being made to appear that, of the sum of \$23,000 awarded by the respondents as damages

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sustained by the petitioners, as appears by said record, the sum of \$10,000 in said record ordered to be paid out of the treasury of said county has been duly paid, and that the balance of the amount so awarded, being the sum of \$13,000, was duly demanded by the petitioners to be paid from said county treasury on the 11th day of August, A. D. 1868, and payment thereof refused, it is further ordered and decreed that said sum of \$13,000 be paid to the petitioners out of the county treasury of said county of Essex, with interest thereon from said 11th day of August, and that the petitioners shall also have and receive their costs of suit." "And the respondents are hereby ordered and directed forthwith to draw their proper order for the payment of the said sum of \$13,000, and interest and costs as aforesaid, to the petitioners, out of the county treasury of said county of Essex; and it is further ordered, as to said portion of the damages, including interest as aforesaid, awarded to the petitioners, so decreed and ordered to be paid out of the county treasury, that the same shall be refunded to the said treasury by the city of Haverhill, which has by law succeeded to the rights and assumed the obligations of said town of Haverhill in the premises, and by the town of Bradford, in the proportions of \$9000 by said city of Haverhill, and \$4000 by said town of Bradford, instead of the payment to the petitioners by said town as is ordered in said record; and notice hereof and of the doings of the respondents shall be given by the respondents to said city and town, stating the proportions which they are respectively required to pay; and if either said city or town shall refuse or neglect to pay its proportion, including interest as aforesaid, the same proceedings shall be had to enforce the payment as are provided by law in cases of expenses of making highways by the county commissioners, where cities or towns neglect to make the same."

Therenpon, at said term, "by consent of court, the city of Haverhill, by its attorney, appeared and appealed from so much of said decree as applies to said city;" and the questions of law arising on the appeal were argued at November term 1870.

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J. J. Marsh, for the city of Haverhill, argued that so much of the decree as directed the payment by that city of interest on \$9000 from August 11, 1868, was unauthorized: 1st. because the delay in the receipt of the \$9000 by the petitioners was owing to no fault of the city, but to the error of the county commissioners; 2d. because there could be no sufficient demand on the city to pay \$9000 until after the correction of that error; and 3d. because the city was not a party to the original suit, and had no opportunity to show therein why interest should not be decreed against it; and cited to the first point, *Oriental Bank v. Tremont Insurance Co.* 4 Met. 1; *Hubbard v. Charlestown Branch Railroad Co.* 11 Met. 124, 128; *Bruere v. Pemberton*, 12 Ves. 386; and to the second point, *Dodge v. Perkins*, 9 Pick. 368; *Lee v. Munn*, 8 Taunt. 45.

J. C. Perkins & S. B. Ives, Jr., for the county of Essex, argued that the city had no right of appeal; and also to the merits.

AMES, J. Upon the correction of the error and the entry of the proper judgment, it became necessary to provide for the payment by the county not only of so much of the damages as remained in arrear, but also of the interest which had accumulated in the mean time. The delay was owing to no fault on the part of the bridge proprietors, and if interest should not be allowed them they would not receive the full indemnity intended in the original award. In making this payment, the county advances money for the two municipal bodies specially benefited, and has a right to call on them to refund at least their respective proportions of the sum originally awarded. The only question raised by this appeal is, whether they are liable also for interest. Without going into the question whether they had a right of appeal in this form and at this stage of the case, we are satisfied that the judgment from which they have attempted to appeal was correct and just.

The accumulation of interest was the unavoidable result of litigation, without any misconduct or neglect of duty on the part of the county or any of its officers. The county paid at once the full proportion of the damages intended to be the ulti-

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mate charge upon its own treasury, towards the purchase of the bridge. Nothing was in arrear except the portion intended to be finally chargeable to the two towns. It is difficult to see why the county's share of the expense should be increased and made more burdensome because the course of events has been such that the two towns have had an opportunity to delay their contribution to the general purpose for somewhat over two years. They have had all the benefit of the delay. They had notice of the hearing before the commissioners, and cannot be supposed to have been ignorant of the award. The principal error in the proceedings was, that the bridge proprietors were left without adequate means of enforcing the collection of so much of their damages as was to be paid by the two towns. The litigation apparently was made necessary by their refusal to pay their share, and it would be unjust that the delay which they have occasioned, and which has been beneficial only to them, should be allowed to throw an additional burden upon the only contributor to the general object which was not in fault, namely, the county of Essex. *Appeal dismissed.*

COMMONWEALTH vs. CITY OF NEWBURYPORT.

In the laying out of a bridge as a highway, by county commissioners, under the St. of 1863, c. 309, § 8, and according to the provisions of the St. of 1867, c. 296, § 4, that they should "determine and fix the relative proportions of expense for maintaining" the bridge, "to be borne by said county, and any of the cities or towns lying near to, or contiguous to" the bridge, "as in their judgment may be just and equitable, which said proportion of expense so determined" "shall become obligatory upon said county and upon said cities and towns as aforesaid, to pay in the manner and at the times prescribed by said county commissioners," the commissioners were authorized, but not required, to impose part of the expense for maintaining the bridge upon the county, or upon the cities and towns lying near but not contiguous to the bridge; and might lawfully impose the whole maintenance of the bridge on the several towns or cities within which it was situated, and determine and fix the relative proportions in which they should respectively bear the expense thereof, by assigning to each a specific part of the bridge to be maintained by it exclusively.

INDICTMENT on the Gen. Sts. c. 44, § 24, found and returned at January term 1869 of the superior court, and averring that,

on November 1, 1868, and from that time to the time of the finding of the indictment, there had been, and still was, a highway in Newburyport, leading from that city into the town of Salisbury; "and that a certain part of the same highway, situate, lying and being within the city of Newburyport aforesaid, to wit, so much of said highway as is covered by the bridge known and called by the name of the Newburyport Bridge, and as lies southerly of a line drawn three quarters of the whole distance from the southern end of said bridge, being three fourths of said bridge next adjoining to said Newburyport, and containing in length, divers, to wit, two hundred rods, and in breadth, divers, to wit, four rods, on the said first day of November was, and from that time until the day of the taking of this inquisition hath been, and still is, full of holes, without sufficient railing, rough, uneven, and without sufficient planking, covering and support, ruinous, broken, and in great decay, for want of necessary reparation and amendment of the same," so that it was unfit for travel; "and that the inhabitants of the said city of Newburyport, during all the time aforesaid, in their corporate capacity, the said highway ought of right to have kept in repair and amended, when and so often as it should or shall be necessary, but have neglected, and still neglect so to do."

At the trial, before *Lord, J.*, "the defendants admitted that the bridge, throughout its entire length, was, at the time of the finding of the indictment, defective, out of repair, and unsafe for travellers, and the attorney for the Commonwealth read to the jury the St. of 1867, c. 296, the St. of 1868, c. 309, § 8, and the record of the proceedings of the county commissioners of Essex," laying out the bridge as a highway.

The St. of 1867, c. 296, in its first section "authorized and empowered" the county commissioners "to lay out as and for highways" certain bridges across the Merrimack River, including "the Newburyport Bridge between the town of Salisbury and the city of Newburyport," and in § 4 provided that, "upon the laying out of any of said bridges as highways as aforesaid the said county commissioners shall determine and fix the relative proportions of expense for maintaining, keeping in repair

and supporting any of said bridges, and for raising the draws in said bridges, if any, to be borne by said county, and any of the cities and towns lying near to, or contiguous to said bridges, or any of them, as, in their judgment, may be just and equitable, which said proportion of expense, so determined upon by said county commissioners, shall become obligatory upon said county and upon said cities and towns as aforesaid, to pay in the manner and at the times prescribed by said county commissioners."

The St. of 1868, c. 309, § 8, which was passed June 5, 1868, provided that the county commissioners "shall, within sixty days after the passage of this act, lay out, as and for highways, the several bridges named" in the previous statute, including the bridge in question, "in the manner now provided by law for the laying out of highways, and according to the provisions of" the previous statute, "so far as the same are applicable."

The material part of the record of the county commissioners, after a preamble referring to the last named statute, and to the facts of notice to and hearing of all interested parties, was as follows:

"Now on this 4th day of August 1868, we do lay out said Newburyport Bridge between the city of Newburyport and the town of Salisbury as and for a public highway, in conformity with the requirements of the acts of the legislature of said year 1868. The charter of said Newburyport Bridge having expired, no damage is to be awarded. It is hereby ordered, adjudged and decreed that so much of said bridge as lies southerly of a line drawn three quarters of the whole distance from the southern end of said bridge, being three fourths of said bridge next adjoining to said Newburyport, shall be maintained, kept in repair and supported, and the expense thereof, and of raising the draw in said bridge, shall be paid by said city of Newburyport; and that the remainder of said bridge, being one fourth part thereof lying next to Salisbury aforesaid, shall be maintained, kept in repair and supported, and the expense thereof shall be paid, by said town of Salisbury."

No further evidence was introduced at the trial, and "no attempt was made to show where the dividing line between

Newburyport and Salisbury would intersect the bridge." It was agreed that the charter under which the bridge was erected expired in September 1867.

The judge therefore ruled that "the defendants were liable by law to keep that part of the bridge described in the indictment in repair;" and, after a verdict of guilty, reported the case for the revision of this court.

H. W. Paine, for the defendants. The legislature did not contemplate charging any city or town with the maintenance of any part of the bridge. It contemplated the payment of money required to keep the bridge in repair, in fixed proportions, in the manner and at the times prescribed by the county commissioners; and it intended that the whole expense of maintaining the bridge should not be borne by the cities and towns lying contiguous, but that the county should contribute its proportion, to be ascertained and fixed by the commissioners. The proceedings set out in the record were not in conformity with the requirements of the statute. The commissioners laid out the bridge as and for a public highway, and ordered that three fourths thereof in length be maintained, kept in repair and supported by the city of Newburyport, and the remaining one fourth by the town of Salisbury. They have not fixed the relative proportions of expense of the city or town; and they have charged the county with no part of the expense. Whether three fourths of the length of the bridge lies in Newburyport or extends into Salisbury does not appear. The commissioners have omitted to do what they were empowered and required to do, and have undertaken to do what they had no authority to do. It may be much more expensive to keep in repair a given number of feet of one end of the bridge than the same number of feet of the other end. As they have undertaken to impose a burden on the city which they were not authorized by law to impose, their doings are void, and it is not necessary to proceed by *certiorari* to quash them. *Wales v. Willard*, 2 Mass 120. *Hunt v. Hapgood*, 4 Mass. 117. *Sumner v. Parker*, 7 Mass. 79.

S. B. Ives, Jr., for the Commonwealth.

WELLS, J.* The St. of 1867, c. 296, authorized, and that of 1868, c. 309, § 8, required, the Newburyport bridge over tide water, between Newburyport and Salisbury, to be made a highway. The county commissioners, acting under that authority and direction, have laid it out "as and for a public highway." The result of these proceedings, if legal and properly conducted, is, to impose upon the city of Newburyport and the town of Salisbury the obligation to maintain and keep in repair so much of this bridge as lies within their respective limits, if "other provision is not made therefor." Gen. Sts. c. 44, § 1. If other provision has been made therefor, then their obligations are modified accordingly; and each corporation is liable to indictment for neglect to repair any part of the bridge "which it is by law obliged to keep in repair." Gen. Sts. c. 44, § 24.

Several objections are taken to the validity of these proceedings.

1. It is argued "that the legislature intended that the whole expense of maintaining the bridge should not be borne by the cities and towns lying contiguous, but that the county should contribute its proportion." We do not think this to be the true construction of the statute. There were several bridges, in different parts of the county, to which the same words of the statute applied. The commissioners were empowered to impose some part of the expense of maintaining any of said bridges upon other towns "lying near to," as well as upon those "contiguous to," said bridge; or to impose a part thereof upon the county. But they were required only to impose upon such towns, or upon the county, so much of the expense "as, in their judgment, may be just and equitable." And if, in their judgment, it should not appear "just and equitable" that any part of the expense should be apportioned to a town lying near, or to the county, the statute does not require it to be done as an essential condition of a legal exercise of the power. The judgment of the county commissioners is conclusive upon the pro-

* This case was argued at Boston, November 25, before all the judges but COLT, J.

portions to be fixed; the statute is imperative only in directing that they shall make the apportionment.

2. It is contended that the county commissioners have not fixed "the relative proportions," as required by the statute; and therefore that no legal responsibility results from their action. This argument proceeds upon the ground that such proportion necessarily implies a mathematical ratio, or a comparison of mathematical ratios. We do not think the statute is to be so narrowly interpreted. The "relative proportion" is to be fixed with reference to all the circumstances of benefit to the respective municipalities affected, and to their population, extent, and ability to bear the burden. Such a comparison does not require an absolute mathematical ratio for the other branch of the proportion. We are of opinion that it was within the power of the county commissioners to fix the proportion by assigning to each town a specific part of the bridge, if in their judgment that was just and equitable; and that such an apportionment was proper and reasonable.

3. It is urged that the statute contemplated the payment of money "in the manner and at the times prescribed" by the county commissioners, and not the charging of any city or town with the maintenance of any part of the bridge. This might appear to be so upon the mere letter of the statute. But there is no provision in the statute for the collection and expenditure of the money, and the care of the bridge. It is not charged upon the county commissioners. They are only to prescribe the manner and times of payment; and this is to be done as a part of the adjudication by which they "determine and fix the relative proportions." They are not to supervise the repairs, nor to continue to prescribe the manner and times for contributing to the expenses, from time to time, as occasion shall require. This duty is not imposed upon them by these special statutes, nor is it any part of their official duty under the General Statutes. The statute must fail of effect, if the commissioners may not prescribe the manner of payment by directing that the towns within which the bridge is situated, shall make the necessary expenditures to keep the bridge in repair, receiving from the

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county, or other towns near to the bridge, such sums, if any, as may be fixed for their proportion of the expenses so incurred and paid. This we think is clearly within the intent of the statute; and a necessary implication to enable its provisions to have the practical operation it had in view. The order once made becomes obligatory upon all parties, to define and determine their rights and duties in respect to the maintenance of the bridge. So far as relates to the manner of making the necessary expenditures, this construction makes the statute accord with the provisions of Gen. Sts. c. 44, § 2.

These considerations are sufficient for the determination of the present case. The city of Newburyport and the town of Salisbury are liable to conviction upon indictment, for the want of repair of so much of the bridge as each was bound to repair within their respective limits; and it is admitted that the bridge was so defective throughout its entire length. As the dividing line between them is stated to intersect the bridge, some part of it must be within each. It did not appear that the whole of the three fourths part of the bridge, apportioned to Newburyport, was in fact included within the boundaries of that city. The jury were instructed that it was the duty of the city to keep that part of the bridge described in the indictment in repair. We suppose it was intended to apply this ruling to such part of the bridge as lay without the limits of Newburyport, as well as that within its limits, if there were any such part assigned by the commissioners to be kept in repair by that city. And we think the ruling was correct in this respect. The duty to keep ways and bridges in repair, imposed by Gen. Sts. c. 44, § 1, relates only to such as are situated within the city or town; but the liability to indictment under § 24 extends to any of the ways or bridges which the town is by law obliged to keep in repair. Although the general law provides for the maintenance of all roads and bridges, by imposing the duty upon each town to support those that are within its limits, yet the legislature may undoubtedly, by general provision or by special statute, modify this general rule, in particular cases, in order to make the distribution of the burden more equal than it might other-

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wise prove to be in its operation. This it does by authorizing or requiring the county to assume a part of the expense of certain roads or bridges; thus indirectly imposing upon all the other towns in the county a part of the burden which, by the general rule, would fall upon the town within which the road or bridge was situate; or by authorizing a part of such expense to be imposed upon particular towns near to or benefited by such road or bridge. The power to impose the burden by way of contribution in money involves the right to do so by making it the duty of the town to keep its portion of the way or bridge in repair. And from this duty to maintain and repair flows the liability for defects, whether by action for damages or by indictment. *Malden & Melrose Railroad Co. v. Charlestown*, 8 Allen, 245. *Judgment on the verdict.**

BETSEY WILSON & others vs. INHABITANTS OF BEVERLY.

In construing the verdict of a jury summoned on petition under the Gen. Sts. c. 43, § 73, reference may be had to the petition and to the legal limitations of the authority of the jury.

It is no objection to the verdict of a jury summoned under the Gen. Sts. c. 43, § 73, on the petition of the owner of land taken for a town way praying for an alteration of the way on his land, that the alteration prayed for and granted will lessen the width of the way.

PETITION under the Gen. Sts. c. 43, § 73, to the county commissioners of Essex, by the owners of land taken for a town way by the selectmen of Beverly, praying for a reassessment of their damages and an alteration of the way so as "to carry it a considerable distance to the north of its present location," and for a jury to determine the matter of their complaint. A jury was ordered accordingly, and returned into the superior court a verdict reassessing the damages and altering the way. The respondents filed a motion to set aside the verdict, which the court overruled and accepted the verdict; and the respondents appealed. The case is stated in the opinion.

* A similar decision was made in the case of COMMONWEALTH vs. INHABITANTS OF SALISBURY, argued at the same time by the same counsel.

W. D. Northend & H. P. Moulton, for the respondents.

S. B. Ives, Jr., & S. Lincoln, Jr., for the petitioners.

CHAPMAN, C. J. The petitioners pray for an increase of damages, and for an alteration in the way by carrying it a considerable distance to the north of its location by the selectmen of Beverly. The jury would have no authority to remove the road, or any part of it, to the land of another proprietor. They could only make minor alterations, limited to the land of the petitioners, and thus render the way less burdensome to them by avoiding buildings, wells, orchards, gardens, or the like. *Merrill v. Berkshire*, 11 Pick. 269, 275. *Gloucester v. County Commissioners*, 3 Met. 375, 377. The jury have, in their verdict, made an alteration in the way, west of Lothrop Street, and on the petitioners' land, "to wit, that the southerly line thereof shall begin at a point on the westerly side of Lothrop Street, five feet from the line as located by the selectmen, and shall run thence in a straight course to a point on said southerly line as located at the boundary of said petitioners' land, on the westerly side thereof, being about one hundred and fifty-three feet from Lothrop Street." The verdict does not state whether the point of beginning shall be five feet south, or five feet north of the line established by the selectmen; but as the petition prays for a removal to the north, and would not authorize a removal to the south, the verdict must be interpreted as a removal to the north. Nor does the verdict state whether the way is thereby to be narrowed; but, as the land on the opposite side was owned by other proprietors, upon whose land the jury had no right to remove it, the verdict must be interpreted as narrowing the way. Such an alteration is within the authority of the jury, by a fair construction of the statute. In other respects the verdict appears to be sufficiently definite.

Judgment affirmed.

ATTORNEY GENERAL *vs.* CITY OF SALEM.

An information in the nature of a *quo warranto* will not lie against a municipal corporation to enforce performance of a duty imposed on it by law.

The attorney general cannot maintain a bill in equity to prevent or redress a private wrong. In disregard of the provision of the St. of 1864, c. 268, § 13, that the city council of Salem should establish such rates for the use of water introduced into the city under that statute "as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest and not less than one per cent. of the principal of" the debt contracted by the city in building the waterworks, the city council, with intent to distribute the water free, and tax the property and polls of the inhabitants to maintain the waterworks and pay said interest and percentage, established water rates merely nominal. *Held*, that this was not a grievance remediable upon an information in the nature of a *quo warranto*, or upon a bill in equity filed in the name of the attorney general.

MORTON, J. This is an information in the nature of a *quo warranto*. The defendants have demurred; and the only question before the court is, whether upon the facts stated in the information it can be sustained.

Under the St. of 1864, c. 268, "for supplying the city of Salem with pure water," the said city has constructed works for supplying the inhabitants with water at an expense of a million dollars or more, and has issued scrip or bonds to that amount. The thirteenth section of said act provides that "the city council shall establish such price or rents to be paid for the use of the water, as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest, and not less than one per cent. of the principal of the 'city of Salem water loan,' and shall determine the manner of collecting the same. The net surplus income and receipts, after deducting all expenses and charges of distribution, shall be set apart as sinking fund, and applied solely to the principal and interest of said loan until the same is fully paid and discharged."

The information alleges, in substance, that the city, disregarding these provisions of law, has established merely nominal rates and rents to be paid for water, with the fraudulent intent and purpose to distribute water free to all its inhabitants and to all its business men and corporations, and to tax the property and polls of the inhabitants to pay said interest upon the water

loan and the expenses of operating the works and the said one per cent. upon the principal of said loan. The prayer of the information is, that the city may be made to answer to the Commonwealth by what warrant it claims to do the acts and to exercise the rights and powers aforesaid; and that said city and its officers may be enjoined from supplying water at nominal rates, and from making contracts to that effect, and from taxing its inhabitants to pay said interest and the expenses of operating the works and the one per cent. towards the capital of the water loan.

An information in the nature of *quo warranto* has, in modern practice, taken the place of the ancient writ of *quo warranto*, which was in the nature of a writ of right for the king against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. 3 Bl. Com. 262. 6 Dane Ab. 360. Cole on Informations, 110. Such information lies when the party proceeded against has usurped some office, franchise or liberty, to which he has no right; or when, having an office or franchise, he has by nonuser or abuse forfeited it, and the information is brought for the purpose of enforcing such forfeiture. *People v. Bristol & Rensselaerville Turnpike Co.* 23 Wend. 222. But it is not the appropriate remedy when the object is to enforce the performance of duties imposed by law.

The judgments upon an information in the nature of a *quo warranto* are adapted to the purposes above stated. The judgment may be, that the franchise usurped or abused be seized and forfeited to the Commonwealth, if the Commonwealth can enjoy it; or, if the Commonwealth cannot enjoy it, the judgment is ouster and fine. Such judgment, in either form, is clearly inapplicable, where the purpose of the proceeding is to compel the performance of a duty which the defendant neglects or refuses to perform, or to restrain the improper use of a franchise or power, clearly granted, which does not work a forfeiture of the whole franchise.

In the case at bar, upon a careful analysis of the allegations in the information, it is plain that the grievance complained of

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is not that the defendants have usurped a franchise not granted but that they neglect to perform a duty imposed upon them by law in the exercise of a legal franchise. Their alleged default is, that they do not establish such rates or prices to be paid for the use of water as to provide annually, if practicable, from the net income thereof, for the payment of the interest and one per cent. of the principal of the water loan, and the expenses of operating the works. Although this results in distributing the water free, or for a merely nominal price, it cannot be properly said to be a usurpation of a franchise. At the most, it is an improper use or abuse of power in the exercise of the franchise conferred upon them by the act of 1864. It is impossible to regard the act of establishing water rates, from time to time, as the exercise of an independent franchise.

Upon this information, if any judgment is rendered against the defendant it would be a judgment of forfeiture of and ouster from the whole of the franchise. This the plaintiff does not claim. *People v. Bristol & Rensselaerville Turnpike Co.* 23 Wend. 222. *People v. Bank of Hudson*, 6 Cowen, 217. This information does not allege such forfeiture, and does not pray for a judgment of forfeiture or ouster. Upon the whole, we are of the opinion that this information cannot be sustained.

We have not felt called upon to consider whether, under our political system, an information in the nature of a *quo warranto* can under any, and, if any, what, circumstances, be maintained against a city, town or other municipal corporation.

But the plaintiffs urge that this proceeding may be treated as a proceeding for general relief on the equity side of the court. If the necessary amendments were made to change it into an information or a bill in equity, we are of opinion that still it could not be sustained. Whether, in this state, in the absence of any express grant of equity jurisdiction, the attorney general can bring a bill in equity to redress any public wrong or grievance, need not be decided. It is clear that such a bill cannot be sustained for relief against a private wrong. In this case, the grievance complained of is not a public wrong, in which every subject of the state is interested; and therefore cannot be re-

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addressed by a public prosecution or proceeding. *Wesson v. Washburn Iron Co.* 13 Allen, 95. *People v. Clark*, 53 Barb. 172. *Demurrer sustained.*

S. Bartlett, (*J. A. Gillis* with him,) for the defendants.

J. W. Perry, (*W. C. Endicott* with him,) for the Attorney General.

OLIVER CARLTON & others vs. CITY OF SALEM & others.

The Gen. Sta. c. 18, § 79, give no right to ten or more taxable inhabitants of a town or city to maintain a suit or petition in equity to enjoin it or its officers against doing or omitting to do acts with the purpose of voting in the future to raise money by illegal taxation to defray expenses or meet liabilities to be incurred by such doing or omission.

Except under the Gen. Sta. c. 18, § 79, the equity jurisdiction of this court does not extend to compelling the performance of a duty by a municipal corporation or its officers upon the suit of individual inhabitants.

In disregard of the provision of the St. of 1864, c. 268, § 13, that the city council of Salem should establish such rates for the use of water introduced into the city under that statute as to provide annually, if practicable, from the net income thereof, for paying the interest and part of the principal of the water loan; and with the purpose of distributing the water free, and raising by illegal taxation money to maintain the waterworks and meet the liabilities above named; the city council established water rates merely nominal, and the water commissioners made contracts to supply the water at nominal prices. *Held*, that this court had no jurisdiction in equity to remedy this grievance upon the suit or petition of individual inhabitants of the city.

PETITION by ten and more taxable inhabitants of the city of Salem, alleging that the city council, in disregard of § 13 of the St. of 1864, c. 268, had by an ordinance established merely nominal rates for the use of the water introduced into the city from Wenham Pond under that statute, and that a board of water commissioners, established by another ordinance of the city council, had made certain contracts under the first named ordinance to supply families and manufacturing corporations with the water at merely nominal prices; that it was the intention of the city by these acts "to distribute and supply water to the inhabitants of said city substantially free, or at such small and colorable rate that only a trifling amount will be raised from the rents and prices of water, and that all the balance of the interest

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on the water loan, and the expenses of operating the water-works, are to be raised by taxation upon the property and polls of the citizens and taxpayers, whether they use said water or not, or whatever quantity of water they may use;" that the ordinance first named and the proceedings of the water commissioners "are a virtual vote and attempt to raise by taxation, or pledge of the credit of the city, or to incur liability and pay from its treasury, money which it has no legal right or power to raise or pay in such a manner;" that "the whole proceeding under and including said first named ordinance is a violation and abuse of the legal rights and powers of said city, and of said city council, and of said water commissioners;" and that "by these proceedings the petitioners are injured by having unjust, unequal and illegal burdens cast upon them and their property, and have no adequate remedy at law." The prayer was for an injunction on the city and the water commissioners against supplying the water at such nominal rates, and that the city might be required and decreed to charge and receive such rates for the water as were prescribed in said § 13 of the St. of 1864, c. 268. The defendants demurred for alleged want of jurisdiction; and the case was thereupon reserved by *Gray, J.*, for the determination of the full court.

S. Bartlett, (J. A. Gillis with him,) for the respondents.

J. W. Perry, (W. C. Endicott with him,) for the petitioners.

MORTON, J. We are of opinion that the court has no jurisdiction in equity in this case, and that the demurrer must be sustained.

The Gen. Sts. c. 18, § 79, provide that "when a town votes to raise by taxation or pledge of its credit, or to pay from its treasury, any money, for a purpose other than those for which it has the legal right and power, the supreme judicial court may, upon the suit or petition of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint, hear and determine the same in equity." Assuming that all the facts alleged in the bill are true, yet the plaintiffs have not brought themselves within the provisions of the statute. There is no allegation that the city of Salem has voted to raise by taxation, or by a pledge of its credit, money for an illegal purpose, or tha

It has voted to pay from its treasury any money for such purpose. The allegations of the bill are, in substance, that the city has passed certain ordinances and made certain contracts in regard to the distribution of water, and the establishing of rates therefor, which must lead to taxation in the future for an illegal purpose, and that the city intends to raise money hereafter by taxation or pledge its credit for such purposes. These facts are not sufficient to bring the case within the statute. By its plain provisions, it is not until a town or city votes to raise money by taxation or a pledge of its credit, or votes to pay money from its treasury for an illegal purpose, that the right of ten or more inhabitants to maintain a suit in equity arises.

But the plaintiffs' counsel contend that this bill may be sustained under the general equity jurisdiction of the court, independently of the statute. No authority is produced to sustain this position, and we are unable to see any principle of equity jurisdiction under which the bill can be maintained. The only ground suggested is, that the city and its officers are trustees for the management of the waterworks; but the case of *Hale v. Cushman*, 6 Met. 425, seems decisive against this view; for, although the equity jurisdiction of the court has been enlarged since that case was decided, it has been by extending it to other subjects, and the court then had full jurisdiction in relation to the enforcement and regulation of trusts.

The cases of *Simmons v. Hanover*, 23 Pick. 188, and *Cooley v. Granville*, 10 Cush. 56, cited by the plaintiffs, were brought under the St. of 1839, c. 60, which expressly conferred jurisdiction in such cases. This statute and the seventy-ninth section of chapter eighteen of the General Statutes create a strong implication against the existence of the general equity jurisdiction claimed in this case. These statutes, enacted for the purpose of conferring jurisdiction, were unnecessary, if the court already had jurisdiction of the subjects embraced in them. The object of the bill in this case is to compel the city of Salem and its officers to perform a duty imposed by law. We are of opinion that a bill in equity by one or more of the inhabitants, to enforce this duty, cannot be maintained.

Demurrer sustained.

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ZACHARIAH F. SILSBEE & others vs. CITY OF SALEM.

On a petition under the Gen. Sts. c. 134, §§ 49, 50, to quiet the title to land, the respondents answered, claiming title, and a decree was made for them to bring an action in the superior court "to try their title" to the premises, "and that the same be duly prosecuted to final judgment." They thereupon brought such an action; but, when it came on for trial, they produced no evidence, the superior court ordered a nonsuit, and they alleged no exceptions. *Held*, that the respondents had disobeyed the lawful order of the court, and the petitioners were entitled to a further decree that the respondents "be forever debarred and estopped from having or claiming any right or title, adverse to the petitioners," in the land.

PETITION filed December 8, 1866, under the Gen. Sts. c. 134, §§ 49, 50,* to quiet the title to a parcel of land on Forrester Street in Salem, of which the petitioners alleged that they were in possession and were seised in fee simple. The answer denied their seisin and possession; and alleged that on the contrary the respondents were seised and possessed of the land.

On a hearing at April term 1868, a decree was made, that, "it appearing to the court that the petitioners were, at the time of the commencement of said petition, in possession of the

* § 49. "Any person in possession of real property, claiming an estate of freehold or an unexpired term of not less than ten years, may file a petition in the supreme judicial court setting forth his estate, whether of inheritance, for life, or years, describing the premises, averring that he is credibly informed and believes that the respondent makes some claim adverse to the estate of the petitioner, and praying that he may be summoned to show cause why he should not bring an action to try the alleged title. Thereupon the court shall order notice to be given to the respondent; and, upon return of the order of notice, duly executed, if the respondent so summoned makes default, or, having appeared, disobeys the lawful order of the court to bring an action and try the title, the court shall enter a decree, that he be forever debarred and estopped from having or claiming any right or title adverse to the petitioner, to the premises described. If the petitioner prefers, such a petition may be inserted like a declaration in a writ, and served by copy like a writ of original summons."

§ 50. "If the respondent appears and disclaims all right and title adverse to the petitioner, he shall recover his costs. If he claims title, he shall by answer show cause why he should not be required to bring an action and try such title; and the court shall make such decree respecting the bringing and prosecuting of such action as may seem equitable and just."

premises described in said petition, claiming an estate of freehold therein, and that the respondents claim a title therein adverse to said title of said petitioners, it is ordered and decreed by the court, that said respondents be and they are hereby required to bring an action to try their title to said described premises; and it is ordered that in said action the said respondents shall count upon their own seisin of said premises and shall allege a disseisin by said petitioners; and that said action be brought by writ returnable to the superior court for the county of Essex, and be commenced before the first day of August next; and that the same be duly prosecuted to final judgment;" and for the continuance of the petition meanwhile.

On a further hearing at April term 1869, it appeared that "prior to August 1, 1868, a writ of entry in common form was brought by the respondents against the petitioners, to recover the land in question, returnable at the next (September) term of the superior court, and, at the March term of said court, the case coming on for trial, and no evidence being produced by the plaintiff, the court ordered a nonsuit." The petitioners thereupon moved for a further decree "that the respondents be forever debarred and estopped from having or claiming any right or title adverse to the petitioners, to the said premises;" and *Coll, J.*, reserved for the determination of the full court the question whether this motion should be granted.

S. B. Ives, Jr., for the petitioners.

J. A. Gills, for the respondents. 1. Admitting that the court had power to pass the original decree, the statute does not provide for the case which has arisen. Gen. Sts. c. 134, §§ 49, 50. The respondents appeared, claimed title, and subsequently brought action and tried the title so far as they were able to do so when the case was reached. It does not appear that they "disobeyed" the order of the court, and it is only in the case of such disobedience that a decree can be made estopping them from further claim. It is no answer to say that the petitioners' title is not quieted. That fact will not cure a defect in the statute.

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2. But such a decree as is asked for can only be made in case a "lawful" order of the court is disobeyed; and the original decree was not such a lawful order. The respondents, being required to bring a writ of entry, are obliged to admit that they are disseised and out of possession, whereby they might be greatly prejudiced, and perhaps obliged to give up their whole case in advance, as for instance in a case where neither party might have any other title than possession. Gen. Sts. c. 134, § 2. It is not enough that the question of possession has been passed upon by a justice of this court. The respondents have a right to submit this question to a jury.

CHAPMAN, C. J. The respondents have obeyed the order of the court so far as to bring an action; but they have not proceeded to try the title. The case came on for trial, and, as they produced no evidence, the court ordered a nonsuit. According to our practice, such an order against a party in court was irregular; but, as no exception was taken, the respondents must be regarded as having assented to it. *Motion granted.*

JOHN J. MARSH & another vs. EDWARD A. HAMMOND.

If a messuage recovered on a writ of entry was, at and after the time when the demandant's title accrued, subject to a right of homestead in the demandant's grantor and his family, and occupied in part by such grantor's wife under a claim of the homestead right without the same being set off, the rentable value of that part during her said occupation is not to be included in estimating, under the Gen. Sts. c. 134, § 15, "the clear annual value of the premises" for which the tenant in the action is liable as rents and profits.

Land demanded on a writ of entry was subject to a lease and a mortgage when the demandant's title accrued. The demandant forbade the lessee to pay rent to the tenant in the action; and the lessee refused to do so. The mortgagee entered for the purpose of foreclosure and advertised the land for sale under a power in his deed. The demandant and the lessee thereupon agreed with him that if he would not proceed with the sale the rents should be paid to him; and he withdrew the advertisement. The lessee remained in occupation, but paid no rent to any one; and the demandant, after recovering judgment, sold the land to him, subject to the mortgage, for a sum which he paid "in full for all rent or other claims upon him for the occupation" of the land. *Held*, that the demandant was estopped to recover damages for the rents and profits of the land from the tenant in the action.

WRIT OF ENTRY, dated June 20, 1864, by the assignees of the estate of George W. Lee in insolvency, to recover four parcels of land in Haverhill. Plea, *nul disseisin*. On June 30, 1866, judgment was entered for the demandants; (11 Allen, 483;) and on November 24, 1866, a writ of possession was issued in their favor, and by agreement of the parties an assessor appointed "to ascertain the sums due to the demandants for the rents and profits of the demanded premises, and report the same." The portions of his report relating to two of the parcels, known respectively as the "Lee place" and the "Kimball farm," (which are the only portions now material,) were substantially as follows:

"The demandants claimed rents, profits and damages for the occupation and withholding by the tenant of the several parcels from June 1863 to November 1866."

"The assessor finds and reports the following facts in relation to the eastern half of the Lee place: It was admitted that in 1861 George W. Lee, the tenant's grantor, had and occupied a homestead under the homestead exemption laws. When said Lee made the mortgage deeds to the tenant, which were in controversy in this action, [and under which the tenant had claimed his title,] his wife did not join with her said husband to release the said rights of homestead and her inchoate rights of dower. The assignees took possession of all of said Lee's real estate in 1861, but Mrs. Lee continued to occupy the eastern half of the said home place, and refused to pay rent or to give up the occupation, claiming to occupy the same under the homestead exemption laws. The tenant entered in 1863 into all the real estate mortgaged to him, in the presence of two witnesses, and put his entry upon record; but Mrs. Lee made the same claim against him that she made against the assignees, and continued to occupy till November 1866, and never paid rent to the tenant. The part of the house occupied by her was worth more than \$800; but how much more there was no satisfactory evidence before the assessor. Neither the assignees, nor the tenant, nor other person took any steps to set out the homestead according to the statute. After judgment for possession entered in this

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case, in November 1866, the assignees made a full and final settlement with Mrs. Lee and paid her \$5000 for her release of homestead and dower in this and other real estate of said Lee; but whether compensation for her occupation up to that time entered into the settlement did not appear from the evidence. Upon these facts, the assessor determines as matter of law that the tenant was not liable to pay for rents, profits and damages for the eastern half of the house so occupied by Mrs. Lee under the homestead exemption laws. The assessor finds that the rents, profits and damages for which the tenant is liable, if in law he is liable, are the sum of \$450."

"The assessor finds and reports the following facts in relation to the Kimball farm: At the date of Lee's mortgage to the tenant, and at the date of the appointment of these assignees, John S. Lamprey was in the occupation of the farm under a written lease from Lee for a term of years at the annual rent of \$200, and also under some kind of an agreement of sale to said Lamprey. The tenant entered under his mortgage in June 1863, and notified Lamprey to pay rent to him. The assignees forbade Lamprey to pay rent to the tenant, and Lamprey refused to pay. In the winter of 1864 the tenant seized the hay upon the farm, and Lamprey paid \$200 (the rent of 1863) to the tenant; which sum is assessed against him. Afterwards Hazen Kimball, who held a first mortgage upon the farm, entered under his mortgage to foreclose the same, and notified Lamprey to pay the rent to him. He at the same time advertised the farm for sale under a power of sale contained in said mortgage. Thereupon the assignees and Lamprey agreed with Kimball that, if he would not sell the farm under his mortgage, the rent or interest should be paid to him by them. The advertisement was withdrawn, but the record of possession to foreclose continued in force. The tenant received no rent for the farm except the \$200 aforesaid. Lamprey remained in occupation, but paid no rent or interest to any one. After the assignees took possession under the judgment for possession, in November 1866, they sold the farm to Lamprey for \$1000, Lamprey to pay the mortgage and all the interest due thereon to Kimball

The demandants called Lamprey as a witness for them, and he testified that, during his occupation, after June 1863, he spent \$2000 in repairing the buildings upon the farm and in cultivating it; that, expecting to purchase it under his agreement with Lee, he expended all the products and crops of said farm upon it; and that it was constantly improving and increasing in value. There was other evidence to the same effect. Lamprey further testified that, if he had paid rent for the farm, and had cultivated it in the ordinary method of a tenant paying rent for a farm, it would not have been worth enough, and could not have been sold for enough, in November 1866, to pay Kimball's mortgage and interest. Lamprey further testified that he understood that the \$1000 which he agreed to pay to the assignees was in full for all rent or other claims upon him for the occupation of the farm, and that neither the assignees or the tenant had any further claim upon him for rent since 1863. The assessor determines as matter of law, upon these facts, that the tenant is not liable for the rents of the Kimball farm beyond the sum of \$200, which is already assessed against him. If he is in law liable, then the assessor finds that he is liable in the sum of \$500."

J. J. Marsh, for the demandants.

D. Saunders, for the tenant.

MORTON, J. Two questions of law are raised in this case.

1. The assessor ruled that, upon the facts found by him, the tenant was not liable for rents and profits of the half of the house occupied by Mrs. Lee under the homestead exemption laws. This ruling was correct. Section 15 of c. 134 of the General Statutes provides that the rents and profits for which the tenant is liable shall be "the clear annual value of the premises for the time during which he was in possession thereof," deducting taxes and assessments paid by him and the necessary expenses of cultivating the land or of collecting the rents and profits of the premises. This does not make the tenant liable for the gross rentable value of the premises, but for their annual value free from charges and deductions. *Pelham v. Middleborough*, 4 Gray, 57.

In determining this value, regard must be had to the nature and extent of the estate of the tenant, and the character of his possession. If the estate in controversy is an absolute one, free from charge and incumbrance, the gross rentable value of the whole estate is a fair test and measure of its clear annual value; but if it is a qualified or limited one, and subject to a charge or claim which impairs its rentable value, the rule is different. Thus, suppose the premises in question had, before the mortgage, been leased for a term of years, and the rent paid in advance; while the lease continued, the clear annual value of the premises claimed by the demandants and constructively occupied by the tenant would be little or nothing. In the case at bar, the demandants were entitled to, and the tenant was in possession of, an estate subject to the right of homestead exemption in favor of the insolvent debtor and his family, and not an absolute estate. Mrs. Lee being in possession, and occupying the house as a homestead, neither of them had a right of exclusive possession as against her, no steps having been taken to have her homestead set off to her. Until this was done, she remained rightfully in possession, her relation to the assignees, or to the mortgagee who had entered to foreclose, being substantially that of a tenant in common. *Silloway v. Brown*, 12 Allen, 30. The claim of a homestead asserted by Mrs. Lee diminished the clear annual value of the house to the extent of her claim and occupancy, and therefore the tenant is not liable for the rent of the part occupied by her. This view renders it unnecessary to consider the effect of the settlement made by the demandants with Mrs. Lee.

2. The ruling of the assessor, that the tenant is not liable for the rents of the Kimball farm beyond the amount received by him, was correct, upon several grounds. The acts of the demandants themselves prevented the tenant from receiving any part of the rents now claimed, and they are estopped to claim them against him. Kimball, the first mortgagee, having entered to foreclose, had a superior right to the rents, and received them, or had the benefit of them, by virtue of an arrangement with the demandants and Lamprey. And further, it appears

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that the assignees have made a full settlement with Lainprey, and thus have received the benefit of these rents, and cannot now claim them of the tenant.

The result is, that judgment must be entered for the amount found by the assessor to be due, with interest.

Ordered accordingly.

CORNELIUS MCCORMICK vs. STEPHEN CARROLL & wife.

On a writ of entry under the Gen. Sts. c. 103, § 48, to recover an undivided portion of a parcel of land, set off to the demandant by levy of an execution thereon under § 10 it is discretionary with the court to permit an amendment of the return of the levy so as to recite that the parcel could not be divided without damage to the whole, which was more than sufficient to satisfy the execution.

On the trial of a writ of entry brought in the superior court under the Gen. Sts. c. 103, § 48, to recover an undivided portion of a parcel of land, set off to the demandant by levy of an execution thereon under § 10, the return of which omitted to recite that the parcel could not be divided without damage to the whole, the judge ruled that the levy was invalid by reason of the omission, directed a verdict for the tenant, and reported the ruling to this court, together with a motion of the demandant, made after the verdict, for an amendment of the levy. *Held*, that the questions whether the verdict should be set aside, and the levy amended, should be heard and decided in the superior court before a decision in this court on the ruling made at the trial.

WRIT OF ENTRY under the Gen. Sts. c. 103, § 48,* to recover two undivided third parts of a parcel of land in Lynn. Trial in the superior court, before Lord, J., who made the following report to this court :

"It appeared that the demandant had in a former action recovered judgment against the tenant Stephen Carroll for a debt due, and in that suit had made a special attachment of the land of which the demanded premises were an undivided part, as

* Gen. Sts. c. 103, § 48: "When the execution is levied on lands or rights, the record title to which fraudulently stands in the name of a person other than the debtor," "and such other person is in possession claiming title thereto, the levy shall be void unless the judgment creditor to whom the land is set off, or the purchaser of the right of redemption, whichever the case may be, commences his suit to recover possession thereof within one year after the return of the execution."

then standing in the name of Patrick Cullen. Carroll had conveyed the whole of said lot to Cullen a few days before the attachment; and Cullen conveyed the same to Catharine Carroll, the other tenant in the present action, after said attachment. The demandant caused his execution issued upon said judgment to be seasonably levied upon the land so attached, and said two undivided third parts of the same were set off to him in full satisfaction of his execution, which was duly returned and recorded.*

"The present action was brought within a year of recovering said judgment, to try the right of the demandant to hold the demanded premises as against said conveyances, on the ground that the same were fraudulent as to the creditors of Stephen Carroll. The tenants jointly pleaded *nul disseisin*. At the trial, the demandant offered in evidence, in support of his action, said judgment and the execution and levy under the same. [The execution and return of the levy were annexed to and made part of the report.] He also offered evidence of title in Stephen Carroll. The tenants objected to the validity of the levy, because it set off an undivided share of the lot to be held in common with Stephen Carroll, and it was not set forth in the return that said lot of land could not be divided so as to set off a portion of the same by metes and bounds to the demandant in satisfaction of his execution, without damage to the whole, which was more than sufficient to satisfy the execution. The demandant offered to prove that the premises could not be so divided without damage to the whole. The presiding judge declined to admit such proof, ruled that the levy was void for the above reason, directed a verdict for the tenants, and now reports the case to the supreme judicial court, for its decision whether said ruling was correct.

* Gen. Sts. c. 103, § 10: "When the premises levied upon consist of a mill, mill privilege, or other real estate, which cannot be divided without damage to the whole, and which is more than sufficient to satisfy the execution, the levy shall be made upon an undivided portion of the whole, to be determined by the appraisers, and to contain as much as they deem sufficient to satisfy the execution; and the portion thus taken shall be held in common with the debtor."

"After the verdict, the demandant suggested an amendment of the levy, which should state that, in the judgment of the appraisers, the estate was incapable of division; whereupon the presiding judge suggested that, if his ruling should be sustained, the demandant might make the motion in the supreme judicial court for a new trial, for the purpose of securing such amendment, if it is an amendment which by law is authorized."

W. C. Endicott & T. M. Stimpson, for the demandant, cited *Baker v. Davis*, 19 N. H. 325, 336; *Whittier v. Varney*, 10 N. H. 291; *Avery v. Bowman*, 39 N. H. 393; *Haven v. Snow*, 14 Pick. 28, 33; *Johnson v. Day*, 17 Pick. 106, 108; *Chase v. Merri-mack Bank*, 19 Pick. 564, 570; *Baxter v. Rice*, 21 Pick. 197; *Bates v. Willard*, 10 Met. 62, 80; *Pratt v. Wheeler*, 6 Gray, 520; *Wolcott v. Ely*, 2 Allen, 338; *Lawrence v. Pond*, 17 Mass. 433; *Brinley v. Mann*, 2 Cush. 337; *Brightman v. Eddy*, 97 Mass. 478.

S. B. Ives, Jr., for the tenants, besides some of the cases cited for the demandant, cited Gen. Sts. c. 103, §§ 5, 10, 25; *Williams v. Amory*, 14 Mass. 20, 29; *Emerson v. Upton*, 9 Pick. 167, 169; *Hovey v. Wait*, 17 Pick. 196; *Bradley v. Bassett*, 2 Cush. 417; *Chenery v. Stevens*, 97 Mass. 77, 84.

BY THE COURT. The court had power, at least before verdict, to allow an amendment of the levy, as is clearly shown by the cases cited in argument. Whether it was reasonable to set aside the verdict for the purpose of hearing a motion to amend the levy is a question of discretion, which should be decided by the court in which the trial was had; and which cannot properly be decided in this court, to which the whole case has not been brought. If the verdict should be set aside, and the amendment allowed in the superior court, the question whether the levy in its present form is valid would become immaterial. The setting aside of the verdict and allowance of the amendment, which involve a question of fact, should be disposed of before deciding the question of law presented by the ruling made at the trial; in order that the final judgment on the report in this court may be made upon the facts as they are finally to rest.

Motion to set aside the verdict and amend the levy to be heard in the superior court.

EDWARD C. WALKER vs. ANDREW SHARPE & another.

The service of a notice under the Gen. Sts. c. 90, § 31, to determine an estate at will in a shop occupied by the tenant with a partner, is sufficient, if on the day of its date the notice is delivered at the shop to and read by the partner, whom the tenant has left in charge of his business while he and his wife (constituting his whole family) are out of the Commonwealth.

ACTION on the Gen. Sts. c. 137, for possession of a shop in Lawrence. Writ dated September 17, 1866.

At the new trial in the superior court, before *Putnam, J.*, after the decision reported 14 Allen, 43, it was not disputed that the defendant Sharpe hired the shop in 1863, by an oral agreement with the agent of the owners, for a rent payable monthly on the first day of each month, and thenceforth occupied it alone until January 1866, when he entered into partnership with John C. Stewart, the other defendant, and from that time with Stewart. But there was no evidence to charge the owners of the shop with knowledge of its occupation by the firm; and it appeared that after as before January 1866 the bills for the rent were made out to Sharpe alone.

It appeared that Sharpe resided in Lawrence with his wife, "who constituted his whole family;" and there was evidence tending to show that on July 26, 1866, he went with her to New Hampshire, "leaving his partner Stewart in charge of his business," and that they did not return to Lawrence until August 3. There was also testimony that on August 1, 1866, the owners of the shop caused to be delivered at it to one of the clerks of the firm, there in attendance, a notice addressed to Sharpe for the purpose of determining his tenancy, which notice bore date of that day, warned Sharpe to quit on September 1, was delivered by the clerk to Stewart, and by him read soon after it was left at the shop, and was communicated to Sharpe upon his return on August 3. It was not disputed that on September 1, 1866, the owners made a written lease of the shop for years to the plaintiff; and that this lease was shown to Sharpe on or before September 10, and demand made on him by the plaintiff for possession of the premises; and that after the de-

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mand and before the bringing of this action the defendants had a reasonable time within which to have vacated the premises; and it appeared that on September 17, the date of the writ, the defendants forcibly ejected the plaintiff from the shop, which he had entered through a back window and refused to leave on their request.

The judge ruled "that the only question of fact in the case was whether the notice was really delivered to Sharpe on August 1," and "that, if the jury found that it was left at the shop on August 1, Sharpe being absent from the city, but was not delivered to him until a subsequent day, it would be insufficient, and their verdict must be for the defendants." The jury found for the defendants; and the plaintiff alleged exceptions.

D. Saunders & N. W. Harmon, for the plaintiff.

S. B. Ives, Jr., for the defendants.

GRAY, J. The oral lease from the owners of the land to Sharpe created a tenancy at will only. Gen. Sts. c. 89, § 2. Sharpe's taking a partner and admitting him into joint occupation with himself did not, in our opinion, amount to an assignment of his interest, or affect his own right in the premises. It has already been decided that, if the notice to quit was duly served on the 1st of August, the tenancy at will was determined and the plaintiff might maintain this action. *Walker v. Sharpe*, 14 Allen, 43.

The question is now presented whether there was a sufficient service of the notice to quit. The Gen. Sts. c. 90, § 31, provide that "estates at will may be determined by either party, by three months'" (or of a time equal to the interval between the days of payment of rent, when less than three months) "notice in writing for that purpose given to the other party;" but do not prescribe how such notice shall be given; and the statutes as to the service of writs have no application. The only reported case upon the subject in this Commonwealth is *Blish v. Harlow*, 15 Gray, 316, in which service on the defendant's wife at his dwelling-house on the premises, while he was away from the house, but not out of town, was held sufficient. But in England it is well settled that — although the mere leaving of a

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notice to quit at the defendant's dwelling-house off the demised premises, without explaining it to any one, is not good — either leaving a notice with the tenant's wife or servant, explaining its contents, at his dwelling-house off the premises, or delivering a notice on the premises to his wife or agent, or any other person occupying the same jointly with or under him, is a sufficient service. *Doe v. Lucas*, 5 Esp. 153. *Jones v. Marsh*, 4 T. R. 464. *Doe v. Dunbar*, Mood. & Malk. 10. *Roe v. Street*, 2 Ad. & El. 329. *Doe v. Ongley*, 10 C. B. 25, 34. *Smith v. Clark*, 9 Dowl. 202. And upon principle, it would seem that a notice delivered to an authorized agent upon the premises would be quite as likely to reach the tenant, or to be attended to if he did not receive it in person, as a notice given to one of his family or household at his dwelling-house in his absence. In this case, it appeared that the notice addressed to the defendant Sharpe was delivered upon the day of its date, on the demised premises, to and read by his partner, whom he had left in charge of his business, and while Sharpe and his wife (who constituted his whole family) were out of the Commonwealth. Under these circumstances, the mode of service adopted, if not the only one practicable for the landlord, was clearly the most beneficial to the tenant, and must be held sufficient. As the jury were instructed otherwise on this point, the *Exceptions must be sustained.*

BENJAMIN F. PERRY vs. AMOS BINNEY.

If the owner of a mill and dam with a water privilege conveys the same by a deed referring to his grantor's deed for a specification of the privilege, the privilege which he conveys must be measured by his grantor's deed, and not by the use he is actually making of the water at the time of his conveyance.

To prove how high the water has been raised in a mill pond, it is competent to refer to marks not only in the channel, but on the bank or any other place to which the water has flowed.

COMPLAINT under the mill act, Gen. Sts. c. 149, for flowing the complainant's meadows by the respondent's dam from January 1, 1867, to July 18, 1867, the date of the complaint.

Trial, and verdict for the respondent, in the superior court, before *Reed*, J., who allowed a bill of exceptions, the substance of which appears in the opinion except so far as relates to the form of the verdict, in regard to which the facts were stated in the bill substantially as follows: The case was committed to the jury in the afternoon, and their foreman sent to the judge the next morning a writing which stated that "the jury respectfully ask, in view of the fact that there seems to be no other way of arriving at a verdict, if they may not, in finding a verdict for the respondent, append a clause in relation to fixing the right to flow at a particular point, upon which they may be able to decide in case such permission be granted;" to which request, the jury being brought into court, the judge replied, against the respondent's objection, that he knew "no rule of law which will prevent the jury from appending to their verdict for the respondent a finding as to the right to flow to a particular point," but added "that any such finding would not bar or prevent future actions between the same parties as to the same right, and would probably be of no effect in case such action should be brought;" whereupon the jury again retired, and after an absence of six hours returned into court a general verdict for the respondent, and "a supplemental paper" containing a special finding that the respondent had established his right to maintain his dam, without compensation, to at least a specified height, from April 20 to October 20 in each year.

S. B. Ives, Jr., & S. Lincoln, Jr., for the complainant.

A. A. Abbott, for the respondent.

CHAPMAN, C. J. The dam which is the subject of complaint is built across the Saugus River; and the river there forms the dividing line between Lynnfield and Wakefield. There was a mill on each side of the river, connected with the dam. In March 1843, Adam Hawkes conveyed the mill on the Lynufield side to Edward Upton and David Preston. Preston conveyed his interest to Upton in August 1844; on November 27, 1844, Upton conveyed to John Wiley; and the respondent claims by mesne conveyances under Wiley. While Upton owned the mill,

and when he conveyed it to Wiley, he owned the farm now owned by the complainant, including the meadow now flowed by the respondent.

Upton's deed to Wiley conveys "a lot of land of one third of an acre, more or less, with a mill and other buildings thereon," describing it by metes and bounds, "together with all the water privilege that was conveyed by Adam Hawkes to Edward Upton and David Preston by deed of warranty," (stating date and registry,) "the owners of the mill to keep, so long as they make use of the water privilege, that part of the flume in Lynnfield in good repair."

As to the construction of this deed, the court instructed the jury "that if, while Upton owned the mill, in 1843 and 1844, he kept up the dam so as to flow his own farm, higher than it had been previously flowed, and kept it so flowed, and it was so kept flowed at the time he sold, and the jury should be of opinion that such flowage was reasonably necessary to the use of the mill, and then conveyed the mill to Wiley, the right so to flow would pass by his deed as appurtenant to the mill, and the respondent, having Wiley's title, would be entitled to a verdict, and this although Upton only had title to one mill and half the dam, while the respondent used both mills and the whole dam; and that, if they found such to be the fact during Upton's ownership of the mill, they need not consider any question of prescriptive right."

This ruling was objected to, and the court are of opinion that it was erroneous. By the terms of the deed, as recited above, the conveyance was not of the water power as then used, but as defined by the deed of Hawkes. Upton might have been using more power than he was willing to sell; and he had a right to sell what he purchased of Hawkes, and not sell the remaining part that he was then using. By the terms of his deed he did this; and the measure of the rights acquired by Wiley was the description in Hawkes's deed. That deed conveys the land by metes and bounds, "with a clothier's and fulling mill and other buildings thereon," "with privilege to use as much water at all times (if so much there be) as is necessary for the

use of said clothier's and fulling mill, the owners or tenants of said clothier's and fulling mill to keep, so long as they make use of the water privilege, that part of the flume in Lynnfield in good repair." The inquiry should have been, what extent of flowage was authorized by this deed?

The court refused to allow any testimony to be introduced as to the height of the water upon certain meadows, which were above the respondent's dam and near the complainant's meadow, at any time, past or present, or any comparison of the height of water upon their meadows at one time with another time; but did allow the complainant to state the height of the water in the river at any point at any time, and to compare its height in the river at one time with its height at another time.

If by the height of the river upon the meadows is meant its depth, the evidence offered would be immaterial. It would not be pertinent to the case, nor would it be reliable as showing the point to which the surface of the mill pond flowed, because the surface of the meadow might not be always the same. If it included evidence as to the effect of the water on the herbage, it would be inadmissible, because it would raise collateral issues, as in *Lincoln v. Taunton Copper Co.* 9 Allen, 181. But if the offer was to show the height of the water in the pond at various times, by reference to a mark or some object which served the purpose of a mark, the evidence would be pertinent; for the surface of the water is substantially the same at all points, and it is immaterial whether the mark that indicates it stands in the channel, or on the bank, or at some distance back from the bank, where the water comes when it is at its higher stages. The court understand the ruling as excluding evidence in respect to a mark showing the surface of the water, unless the mark is in the channel. If so, it was erroneous.

The course pursued by the jury in regard to the verdict was irregular; but, as it will not be likely to be repeated, it is not necessary to remark upon it. *Exceptions sustained.*

EDWARD L. NORFOLK & others *vs.* AMERICAN STEAM GAS
COMPANY & others.

The recovery of judgment in *scire facias*, against a corporation charged in the original suit as trustee on a debt owing by it and for which its officers are personally liable by reason of their failure to make the certificates required by law, is a sufficient recovery of judgment against it, within the St. of 1862, c. 218, § 3, to render the officers liable on a bill in equity filed under § 4 by the original creditor and the plaintiffs in the *scire facias*, to enforce such personal liability, after demand made on execution as provided in § 3, neglect of the corporation for thirty days to comply therewith, and the return of the execution unsatisfied.

BILL IN EQUITY, filed November 5, 1866, to charge individual defendants as officers in a manufacturing corporation, with personal liability, under the St. of 1862, c. 218, for a debt of the corporation; heard, on the pleadings and plaintiffs' evidence only, by the chief justice, who, without requiring the defendants to introduce any evidence to sustain their defence, reserved for the determination of the full court the case which is stated in the opinion.

C. Sewall, for the plaintiffs.

S. B. Ives, Jr., for the defendants.

MORTON, J. This suit is brought to enforce an alleged liability against the officers of the American Steam Gas Company, a manufacturing corporation organized in January 1860. At the hearing there was evidence tending to show that the defendants neglected to file the annual certificate required by law until May 25, 1861; and that the corporation owed the plaintiff Norfolk a debt, a portion of which was contracted between May 11 and May 25, 1861. For the portion of the debt contracted prior to May 25 the officers are individually liable. The question in the case is, whether the plaintiffs have complied with the requirements of law to entitle them to the remedy they have adopted to enforce this liability.

The liability of the defendants accrued in May 1861, and the St. of 1862, c. 218, applies to the case so far as it makes provision for the proper remedy to be pursued, and therefore determines the mode in which this liability is to be enforced. *Peels*

7. *Phillips*, 8 Allen, 86. By the third section of this statute, it is provided that no officer shall be held liable for any debts or contracts of the corporation, "unless a judgment is recovered against it, and the corporation shall neglect, for the space of thirty days, after demand made on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation, subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied." The fourth section, so far as applicable to this case, provides that, after the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity, in behalf of himself and all other creditors of the corporation, against it and all the officers liable for its debts and contracts, for the recovery of the sums due from said corporation to himself and such other creditors, for which the officers may be personally liable by reason of any act or omission on its part, or that of its officers, setting forth the judgment and proceedings thereon and the grounds upon which it is expected to charge the officers personally. Under these provisions, the plaintiffs must show, as a condition precedent to their right to maintain this suit, that a judgment has been recovered against the corporation, and that the corporation neglected, for thirty days after demand on the execution, to pay the sum or to exhibit property sufficient to satisfy it. Have the plaintiffs complied with these requirements?

The facts bearing upon this question are as follows: In February and May 1862, two creditors of Norfolk, who are joined as coplaintiffs in this bill, commenced suits against him and summoned the corporation as his trustee. These suits proceeded to judgment, and the trustee was charged in each. The trustee refusing to pay the execution on demand, writs of *scire facias* were sued out by the creditors, upon which judgments against the trustee were rendered and executions issued July 5, 1864. While these suits were pending, namely, on August 16, 1862, Norfolk commenced a suit against the corporation. The suit of Norfolk was referred by rule of court, and the referees made an award that Norfolk should recover of the corporation

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the sum of \$350.39, with interest from the date of his writ. The corporation by its counsel made the following indorsement on the award: "Defendants have no objection to this award except that they have been summoned as trustees of the plaintiff, and will make no other objection." Upon this state of the facts, the superior court at the September term 1864, by consent of parties, entered judgment in the suit of Norfolk against the corporation, that the plaintiff recover against the defendants costs of suit taxed at \$76.70, upon which judgment execution was issued. Demand was duly made upon the corporation on the execution in favor of Norfolk, and on the two executions in favor of the creditors in the *scire facias* suits, and the corporation neglected to pay them or either of them, or to exhibit property to satisfy them, for more than thirty days after demand, and the executions were returned unsatisfied.

These facts present a question which is novel and not free from difficulty. It is urged by the defendants, that the plaintiff Norfolk is seeking to enforce a mere statute liability; that he must show a strict and literal compliance with the requirements of the statute; and that, having shown no judgment in his name against the corporation for the debt he now seeks to enforce, he cannot maintain this suit.

The provisions of the statute under consideration are not to be construed with that technical strictness which prevails in the exposition of penal statutes, but should receive such reasonable construction as will best carry out the intentions of the legislature and the spirit of the enactments. It is true that Norfolk has not recovered in his own name a judgment against the corporation, and it is also true that a judgment has been recovered against it upon the debt due to Norfolk. The judgments in the *scire facias* suits are judgments against the corporation for the amount of the debt therein adjudicated to be due by it to Norfolk. They are judgments in the name of the creditors, upon the same debt, substituted by law in the place of a judgment in the name of Norfolk. A majority of the court are of opinion that the recovery of such judgments is a sufficient compliance with the provisions of the statute to enable the plaintiffs to maintain this suit.

All the objects of the third section are fully attained under the construction we have adopted. In the *scire facias* suits the question of the liability of the corporation to Norfolk was tried and judicially determined, under conditions certainly as favorable to the defendants as if it had been tried in a suit brought directly in the name of Norfolk. The defendants have had the benefit of a reasonable time given to the corporation to pay this liability. Any further proceedings by Norfolk against the corporation, if practicable under the rules of law, would be futile. His debt has passed into a judgment, which the corporation is unable to satisfy. Unless he can avail himself of this judgment as a foundation of a right to enforce the liability against these defendants, he is deprived of a valuable right without any default of his own. The language of the statute does not necessitate a construction which leads to such unjust results.

The question of the power of the superior court to make any amendment of its record, which would aid the plaintiffs, need not be considered, as in the view we have taken no amendment is necessary to enable them to maintain this suit.

Upon the whole matter, therefore, the plaintiffs are entitled to a decree against the defendants for such part of the debt due to Norfolk as was contracted prior to May 25, 1861. We cannot determine the amount, because under the ruling at the hearing this question was not considered. For the purpose of ascertaining the amount, if any, for which the defendants are liable under the principles above stated, and of settling such further questions as may arise, the case must be

Remitted for a further hearing.

DANIEL F. FITTS, administrator, vs. FRANCIS MORSE.

A written agreement of children, among themselves, in the lifetime of their father, never known to or approved by him, that sums owing by some of them to him shall be treated as advancements in the settlement of his estate when he shall die, is not an acknowledgment of the debts as advancements within the Gen. Sta. c. 91, § 8.

APPEAL from a decree of the judge of probate allowing the first and final account of the administrator of the estate of Edmund Morse, late of Haverhill, deceased intestate. The reasons assigned for the appeal were, that the administrator rendered claims of the estate against James S. Frye, to the amount of \$4030.43, as uncollectible, which should have been charged as an advancement against the distributive share of Harriet, wife of said James S., and daughter of the testator; and also rendered claims of the estate against Edwin Morse, a son of the deceased, as uncollectible, which should have been charged as an advancement against the distributive share of the legal representatives of said Edwin.

At the hearing, before *Wells, J.*, these facts appeared: Before 1861, Edmund Morse was placed under guardianship as an insane person, and so remained under guardianship until he died intestate in 1867; but he was often sane during the interval. On March 11, 1861, his children, namely, Francis, (the appellant,) Edwin and Harriet, together with Harriet's husband, signed an agreement, of which the following is the material part:

"Be it known that we, Edwin Morse, Harriet Frye and Francis Morse, children and heirs of Edmund Morse, and James S. Frye, husband of said Harriet Frye, all of Haverhill in the county of Essex, have received of said Edmund Morse sums of money, and other property, differing in their several amounts as received by each of us. Now therefore, it is hereby mutually agreed between us, said parties, that, in the settlement of said Edmund Morse's estate, at his decease, we shall severally mutually receive such amounts as that, when the same is added to the several amounts we each may have received from said Edmund Morse in his lifetime, the whole of each of our several

amounts, when so added, shall be equal. Meaning and intending herein to agree to an equitable settlement of said estate, in reference to the fact that one of us said heirs may have received of said Edmund Morse, in his lifetime, more than another."

In his inventory of the estate of Edmund Morse, the administrator included as assets claims against James S. Frye to the said amount of \$4030.43, all of which were for money paid to or for Frye by the intestate before he became insane, except one claim for about \$200 lent to Frye by the guardian: and also included as assets claims against Edwin Morse to the amounts respectively of \$1586.61 and \$1121.58. There was no claim against Harriet Frye on the part of the intestate or of the guardian. In his account, the administrator credited himself and asked to be allowed for the \$4030.43 and the \$1586.61, as uncollectible.

It further appeared that James S. Frye "is insolvent, and claims against him are of no value;" that the claim of \$1586.61 against Edwin Morse "was incurred previously to his discharge in insolvency, to which his father assented;" that the distributive share of Harriet Frye in the estate was larger than the claim included in the inventory against her husband; and that Edwin Morse had died leaving three children as his heirs at law

"There was no evidence that these were advancements, except the agreement of March 11, 1861, except as hereinafter stated. The appellant claimed that he could prove, if material, that the intestate, during some of his lucid intervals, declared to the guardian that it was his design and desire that any money paid to any of his children, or to said Frye, should be treated and regarded as advancements, and requested him to keep a strict account and to charge whatever said Frye received to said Harriet. He also offered to prove by the appellee, that, since the death of the intestate, Harriet had stated to him that she had understood that whatever her husband received should be charged to her, but subsequently stated that she had found out that that was not the proper construction of said agreement, and refused to allow such claims. The appellee disputed the competency of the declarations of the intestate and of Harriet, and did not admit that such declarations were made."

The judge reported the case for the determination of the full court, "if such declarations are competent, and material to the decision, then the case to stand for hearing; otherwise the decree to be affirmed, or reversed, or such decree to be made as the other facts may require."

D. Peabody, for the appellant.

S. B. Ives, Jr., for the administrator.

COLT, J. The appellant claims that the administrator had no right to charge off the demands against Frye and Edwin Morse as uncollectible, because they should be treated as assets in his hands, to be charged against the distributive shares of Mrs. Frye, the daughter of the intestate, and of the children of his son Edwin, now deceased; that the amounts in dispute were in fact advancements made by the intestate in his lifetime to his children, and must be treated as such in the settlement of his estate.

There are three modes, under our statute, in which a gift or grant may be shown to have been intended as an advancement; namely, when it is expressed in the gift to be so made, or is charged in writing by the intestate as such, or is acknowledged in writing as such by the child or other descendant to whom it is made. The appellant seeks to establish the advancements claimed in this case, under the last named mode only; and the agreement of March 11, 1861, is offered as an acknowledgment in writing which satisfies the requirements of the Gen. Sts. c. 91, § 8.* The parties to this instrument are the three children of the intestate, and the daughter's husband. It is wholly an agreement between themselves. The intestate was not a party to it, nor does it purport to be a receipt or voucher to him. It is an agreement for an equitable division of the estate, in view of the fact that one of them had received more than the others from their father in his lifetime. It does not appear that the intestate ever had knowledge of it, or in any way approved the

* "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant."

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arrangement. It is not an agreement or arrangement among the heirs, made with the concurrence or approbation of the administrator, as a basis upon which his accounts in the probate court should be rendered, and the estate distributed. It was made during the lifetime of the father, and only looks to future action in the settlement of the estate. There is no statement that the money and property received were received as advancements. At most, it is but a contract that they shall be so treated. Whatever rights this may give the parties among themselves, it is not enough to establish an advancement under the statute.

An advancement must be the intelligent act of the intestate. Whether money or personal property, delivered by him to his children, is to be treated as a loan or sale, or a gift, or an advancement, depends upon his intention, manifested in a legal way. No agreement to which he is not a party can effect such a result. The intent of the giver, not that of the receiver, is to govern. *Barton v. Rice*, 22 Pick. 508. *Hartwell v. Rice*, 1 Gray, 587. *Bigelow v. Poole*, 10 Gray, 104.

In the result to which we come, the declarations of the intestate and Mrs. Frye, which were offered, were immaterial, and need not be considered. They were not offered to show that the testator recognized and approved the agreement as an acknowledgment.

Decree affirmed.

ALBERT H. PARKER vs. SAMUEL A. PARKER & others.

A died intestate, leaving his widow administratrix of his estate, and as his heirs four children and the minor children of a deceased child B. The widow, as widow and as administratrix, the four children, and the guardian of B.'s children, agreed in writing to refer to an arbitrator "to determine how said estate shall be settled" and "to divide the real estate belonging to said parties, including the setting off of dower," with authority "to divide so much of said estate as shall remain after setting off dower" into equal portions and allow the parties to bid for a choice, and to charge debts due from the estate "upon the several heirs respectively;" and agreed further to execute the award by such conveyances as the arbitrator should order, and that the decrees necessary to carry it into effect might be made in the probate court. The written award first set off the widow's dower, and settled on her an annuity in full of her claims against the estate. "As to the

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remainder of said estate," it set off certain lands to B.'s children, "as and for one fifth part of the said real estate which would be remaining after payment of debts and charges," and "as and for their share of the real estate of the said A.," free of incumbrances, and with no charge on account of debts or charges against the estate; "and as to the remainder of said real estate, not set off as dower nor included in the part set off to B.'s children," it divided that into four shares, (not including any part of the dower lands, nor naming the reversion thereof,) provided for bids by A.'s four children for the choice of them, and the application of the money to be received from the bids, and then charged on these four shares equally the annuity and the balance of the liabilities of the estate. By an indenture, executed in pursuance of this award, by and between the widow, the four children, and the guardian of B.'s children "as he is guardian" of them, said parties, after reciting that the widow and heirs of A. had agreed to make partition among themselves "first assigning dower lands to said widow," released the same to her to hold for her life, "the reversion to be in the heirs at law of said A., their heirs, executors, administrators and assigns, who are parties hereto;" then described the five shares assigned to B.'s children and A.'s four children respectively, and released them severally to said assignees; and "covenanted and agreed that the partition hereinbefore set forth shall be deemed to be a full and complete division and partition of the lands herein described, by and among the parties hereto, except the reversionary interest of the heirs at law of the said A., who are parties hereto, in the dower lands of said widow, as is hereinbefore provided." *Held*, that the reversion of the dower lands on the death of the widow was not included in this partition; and that parol evidence was inadmissible to show that the arbitrator intended to include it in the award and did in fact include it in the estimate on which he set off the share to B.'s children.

PETITION filed in November 1868 by one of William Parker's children for partition of real estate set off in 1859 by way of dower to Hannah, said William's widow; submitted to the judgment of the superior court, and, on appeal, of this court, upon facts agreed, by which it appeared that William Parker died intestate in 1856, leaving his said widow, and, as his heirs, three sons, namely, Samuel A., Benjamin, and the petitioner; one daughter, Mary C.; and the minor children of a deceased son James, of whom George Pearson was guardian, and who with said Samuel A. were the respondents; that the widow was appointed administratrix of the estate, assumed the trust, and on September 1, 1853, as administratrix and as widow, entered into an agreement under seal, with the four surviving children and the guardian of the children of the deceased child, for the determination by arbitration of matters regarding the estate; that on November 30, 1858, the arbitrator made and published an award under this submission; that on January 13, 1859, the parties to the submission executed a partition deed, in which the real estate now in dispute was set off, as dower, to the

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widow for her life, and provision was made for the payment to her of an annuity; that the widow died in 1868, before the filing of this petition; that the petitioner had a deed from Benjamin of said Benjamin's share in the reversion of the dower lands, and accordingly claimed one half thereof, namely, a fourth part by virtue of said deed, and a fourth part in his own right; and that said Samuel A. had a like deed from said Mary C. of her share in said reversion. It was agreed, subject to the respondents' objection to the competency of such evidence, "that, in making up the award, it was understood and acted upon by the arbitrator that one fifth part of the entire estate, including the dower lands, should be set off to the children of James Parker, and that they were to have no interest in the reversion of the dower lands, and that the arbitrator took this into consideration in awarding that the other parties only should be charged with the payment of the annuity to the widow." The other material facts are stated in the opinion. The judgment of the superior court was, that the petitioner was entitled to only two fifths of the reversion.

S. B. Ives, Jr., (S. Lincoln, Jr., with him,) for the petitioner.

T. B. Newhall, for the respondents.

WELLS, J. The premises, of which partition is sought, consist of the land set out to Hannah Parker, as her dower, from the estate of William Parker. The children of James Parker claim to be entitled to one fifth of the same, in right of their father. They are so entitled, unless complete partition, as to them, has already been made. The petitioner insists that, in the division of the estate by which the dower was set out and partition made among the heirs of William Parker, in the course of the settlement of his estate, the full share of James Parker, in all the real estate that descended, was assigned to his children.

Upon careful examination of all the papers in the case, we are satisfied that this position on the part of the petitioner cannot be maintained. The submission to arbitration is declared to be in consequence of "certain differences" in regard to the settlement of the estate; and "for the purpose of finally settling the whole of said matters." The parties agree "to refer the same,

and each and every particular relating thereto," to arbitration. The arbitrator is to have full power "to determine how said estate shall be settled, and to divide the real estate belonging to said parties, including the setting off of dower." It authorizes the referee "to divide so much of said estate as shall remain after setting off dower" into equal parts, and to allow the parties to bid for choice; and to charge debts due from the estate "upon the several heirs respectively;" and "generally to decide all questions arising in and upon the matters hereinbefore described and set forth." The parties agree to execute the award by such conveyances as the referee shall order, and consent that such decrees may be made in the probate court as may be necessary to carry it into effect.

The award, in the first place, sets out the dower, and orders payment of \$100 a year to the widow in addition thereto, in full of her claims against the estate, including an interest in the share of a deceased daughter. It then proceeds: "And as to the remainder of said estate, inasmuch as the heirs and parties interested have desired that I should make equal division of the same upon the basis of charging the parties receiving the land with payment of the debts of the estate, I make and award the following distribution and division as and for an equal partition of said property." The arbitrator then proceeds, "having estimated the whole amount of debts" and costs of reference and expenses of administration, and assigns to the minor children of James Parker certain lands described, "as and for one fifth part of the said real estate which would be remaining after payment of debts and charges," and awards that they be assigned to them "as and for their share of the real estate of the said William Parker," free of incumbrances, and with no charge on account of any debts or charges against said estate. "And as to the remainder of said real estate, not set off as dower nor included in the part set out to the children of James Parker, understanding from the parties at the hearing that they desired a fair and equal division of the same and an apportionment of debts of the estate to be paid by them respectively, I award in relation thereto as follows, viz.: I have divided the remainder of the estate into four lots or shares, as follows."

As we understand the facts, no part of the dower lands is included in these four shares; nor is the reversionary interest named therein.

After providing for bids for choice, and the application of the money to be received from bids, the award proceeds to charge the balance of debts and expenses, and the annuity of \$100 for the widow, upon these respective shares in equal proportions.

The award makes no provision for a division of the dower lands; and no assignment of the reversion, in terms, to the four adult heirs or to any of them. It contains no statement that they consented to hold that portion of their shares of the real estate "together and undivided."

The terms of the award seem to us to exclude the construction that it did in fact and effect dispose of the reversion, as is claimed by the petitioner. The circumstance of one fifth being first set off to the heirs of James Parker does not justify the inference that the reversion was intended to be included in the remaining four fifths. It was a division of "the remainder" after having set off the dower lands, just as the subsequent division between the four adult heirs was a division of "the remainder of the estate" into four shares. The fact that the reversion was not treated as a part of "the remainder" in this subsequent division, and that there is no award that it shall constitute a part of the four shares, undivided, is strongly significant that it was not regarded as a part of "the remainder," either in the subsequent division of the four shares, or in the preceding one by which the one fifth was set out to the heirs of James Parker. From the silence of the award in regard to the reversion, we think the presumption is that it was intended to be left unaffected thereby; and that the partition was of estates in which there was a present possessory right. Rev. Sta. c. 103, § 3.

The manner in which the debts, expenses, and annuity to the widow are charged upon the four shares, and the fifth released, affords no ground for inference that the reversion was intended to be assigned to the four. It is just as consistent with the supposition that the allowance for those debts and charges was

made in estimating the value of the estates in possession, "which would be remaining after payment" thereof, as the basis upon which the one fifth share of the minors was determined.

The parol evidence of what was understood, intended and acted on by the arbitrator, is not competent to show what his award does not show, to wit, that he intended to include the reversion in his award of division, and did include it in the estimate by which the share of James Parker was set out to his children. *Clark v. Burt*, 4 Cush. 396. It adds to and varies the effect, if it does not contradict the written award.

The deed, given in pursuance of the award, is still more decisive against the petitioner. It recites that the parties, widow and heirs of William Parker, have agreed to make partition among themselves, "first assigning dower lands to said widow;" that George Pearson acts as guardian for the minor children of James Parker, by virtue of the St. of 1852, c. 248, "and being also specially authorized by the judge of probate for said county of Essex to release the interest of his said wards in so much of said real estate as is not hereinafter assigned to them, by virtue of the provisions of the 307th chapter of the statutes of the year 1855." After describing the lands set out to the widow for her dower, the several parties, as heirs, release the same to her, to hold for the term of her natural life, "the reversion to be in the heirs at law of the said William Parker, their heirs, executors, administrators and assigns, who are parties hereto." The five shares set out to the respective heirs are then described and severally released to each. Then follows this clause: "And it is hereby expressly covenanted and agreed that the partition hereinbefore set forth shall be deemed to be a full and complete division and partition of the lands herein described, by and among the parties hereto, except the reversionary interest of the heirs at law of the said William Parker, who are parties hereto, in the dower lands of said widow, as is hereinbefore provided."

It is argued for the petitioner that the "heirs at law," "who are parties hereto," excludes the guardian as well as the widow and that therefore the indenture of partition is to be construed as reserving the reversion exclusively to the four adult heirs who

executed it. There are several answers to this argument. In the first place, it is not a reservation at all, in legal effect. It is not something which issues out of the thing granted. If it were a reservation strictly, it could only be made to vest in the grantors respectively, and would pass no title from one to another. As an exception from the grant, it would leave the title just where it was before. There being no words of grant or release applicable to the reversion, no partition expressly made, and no assignment of it by way of partition, we think that the declaration that it is excepted or reserved must be taken to mean that it remains unaffected by the partition. Such also appears to us to be the natural interpretation of the words "heirs at law who are parties hereto." The children of James Parker are parties to the indenture, through their guardian, who enters into the same "as he is guardian" of said children, who are all named in the instrument; and the lands set out for their share are set out and released to them by name, and not to the guardian. We see no reason for the restricted sense which this argument seeks to put upon the term "who are parties hereto," and cannot adopt it as the proper interpretation of the instrument.

It is unnecessary to consider whether the guardian could properly make partition of the reversionary interest under the authority conferred by the St. of 1852, c. 248, or release that interest by virtue of the authority which he recites under St. 1855, c. 307; as we are of opinion that he has not made such partition or release.

The heirs of James Parker being entitled to one fifth of the real estate lately subject to the dower of Hannah Parker, it follows that the petitioner is entitled only to two fifths thereof, instead of one half, as he has claimed. The judgment of the superior court to that effect is accordingly *Affirmed.*

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BENJAMIN POOLE, administrator, vs. ALPHONSO MUNDAY & others.

An administrator may be allowed in his account for inventoried property which he has spent or consumed in carrying on in good faith, by the request of all parties interested in the estate, the business of the intestate after his death.

APPEAL by the administrator of the estate of Thomas P. Munday, late of Topsfield, deceased intestate, from a decree of the probate court disallowing his account; heard by *Coll, J.*, who made a report thereof substantially as follows:

It appeared that there were no creditors, and no persons interested in the account except the widow and the two children hereafter mentioned. "The principal controversy arose over an item of \$1766.54, for losses in carrying on the butchering business. In relation to this item, the appellant offered to prove that the intestate died in 1862, leaving a widow and two children, his representatives and heirs at law; that one of the children, Alphonso Munday, was twenty years and about ten months old, and the other child was about eighteen years old; that the intestate was a wholesale and retail butcher, owning a large slaughter-house, with all the necessary implements and fixtures, horses, carts, wagons, harnesses and other articles, together with a large stock of hogs, sheep, cattle, and meats of various kinds; that he had been in the business for more than twenty years, and had established a trade of great value, and which the parties desired should be preserved for Alphonso to take when he should become twenty-one years old; that Alphonso had been employed with his father and knew the details of the business; and that Alphonso himself, and the widow and the other child, and all the other friends and relatives of Alphonso, desired that the trade, business, good will and custom of the concern should be preserved for Alphonso."

"The appellant offered also to prove that, on the death of the intestate, the widow and the children repeatedly and urgently solicited the appellant to take administration of the estate, and to carry on and preserve said business until Alphonso should

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become of age and could take and carry on the business in his own name and right; and the appellant declined to take administration and carry on said business unless Alphonso would conduct the business, and unless the widow and children would assume the risks of the same; that thereupon the appellant consulted the judge of probate, and understood him to say that the business could be carried on for the estate with the consent of all the parties interested in said estate; that the appellant thereupon took administration of the estate, and an inventory of the estate was made and returned into the probate court; that all the stock, implements and materials used in the butchering business remained in the hands of Alphonso, and he carried on said business, pursuant to the arrangement made between the appellant, the widow and the said child; that Alphonso butchered and sold the cattle on hand at the decease of his father, and bought others and sold the same, and made returns of his said doings to the appellant from time to time; that the business was conducted in this way at the special instance and request of all the parties, in order that the good will and custom should be preserved for Alphonso when he should become of age and could buy and sell in his own name; that Alphonso became of age sometime in January or February 1863; that on March 2, 1863, the appellant, in pursuance of the agreement and arrangement before made by all the parties, sold and conveyed to Alphonso all the stock, tools, utensils and other things belonging to the estate and used in said business; and that Alphonso thereafter carried on the business as it was desired that he should by his mother, sister, and other relatives and friends.

“The appellant further offered to prove by Annette Munday, the other child of the intestate, that the arrangement above stated was urgently desired and expressly agreed to by herself and her mother and brother; that since she had become twenty-one years of age she had ratified said agreement and arrangement; that she had assented to the account of the appellant by signing it and waiving all objections to it; and that she desired that the appellant might be allowed in his said account for all

the losses incurred by reason of his carrying on the business as aforesaid.

"The appellant offered to prove further, that the widow specially desired and requested the business to be carried on as it was carried on, at the risk of the estate, for the use and benefit of her son when he came of age; and that she had repeatedly admitted that the business was so carried on at her request, and that the estate was liable for all the losses suffered while it was so carried on.

"And the appellant finally offered to prove that Alphonso specially requested the appellant to carry on the business as aforesaid till he should become twenty-one years old and could buy and sell; that he agreed to purchase all said property when he became of age and could make contracts binding upon himself; that when he became of age he purchased and took all said property as had been agreed upon, and at the same time ratified and confirmed all that had been done by the appellant in carrying on the business; and that since that time he had admitted in many different forms, and to many different persons, that the appellant carried on said business at the request of himself, his mother and sister, for said estate and at the risk of said estate, and that said estate was liable for the losses made while the appellant was carrying on said business.

"The judge declined to receive this evidence; ruled as matter of law that the administrator could not prove such an item in his account; and reserved the case upon the above offers for the consideration of the full court, the case, after the determination of the full court as to the principles under which the account should be made up, to be referred to an auditor to state the account upon the principles to be settled by the court."

J. W. Perry, for the appellant.

S. B. Ives, Jr., & S. Lincoln, Jr., for the appellees.

COLT, J. An administrator who, in a particular transaction, acts in good faith, under the direction of all the personal representatives who are interested in the estate, is to be protected, in rendering his accounts in the probate court, from a claim, on the part of such representatives, that he has not administered

strictly according to law in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the assets in a particular way, not usual or strictly legal; as by continuing the property in business; and the personal representatives, by whose request or assent it has been done, will not be permitted to charge him with maladministration.

Whether the administrator has acted in good faith, and by the consent or with the approbation of those interested, is open to inquiry, when he is called on to account. Thus, although he produces the receipts of all the heirs, acknowledging that he has paid them their distributive shares in full, yet he may be cited to render and settle his account, in order that the parties interested may show that the receipts were improperly obtained, and that the distributees ought not to be barred by them. *Bard v. Wood*, 3 Met. 74.

In the case at bar, there were no creditors, and no persons interested in the administrator's account but the widow and two children, at whose request and for whose benefit it is alleged that the property was continued in business. The evidence offered by the appellant should therefore have been received and considered by the probate court; and the case must be sent to an auditor to state the account upon the principles here recognized. *Brazer v. Clark*, 5 Pick. 96, 103. *Cowdin v. Perry*, 11 Pick. 503, 512.

Ordered accordingly.

WILLIAM A. BASSETT vs. DANIEL GRANGER, administrator.

SAME vs. SAME, executor.

Under the wills of A. and B. income of their estates was payable to C. during her life. D, as executor of both wills, settled in the probate court, before C.'s death, accounts indorsed with her written approval. C. died, leaving a will of which D. and E. were joint executors. From the allowance by the probate court of an account which they rendered as such, F., a residuary legatee under the will, appealed, on the ground that there was income of the estates of A. and B. which fell due to C. and was not accounted for. After a hearing and dismissal of that appeal by this court, F. petitioned the probate court to reopen said accounts settled by D. as executor of the wills of A. and B., for revision and

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correction as to said income, and to require D. to account further for any amount of said income which fell due to C. between the dates of those accounts and her death ; but the probate court decreed that the petition be dismissed. *Held*, that, even if F. had such an interest in the estates of A. and B. as to entitle him to appeal from this decree, yet, as between F. and D., in the absence of any fraud or mistake, C.'s approval of the accounts was conclusive as to income due to her from the estates of A. and B. before the dates of the accounts, and the judgment on the former appeal was in like manner conclusive as to any such income due after said dates.

APPEALS by Bassett as one of the twenty-eight residuary legatees under Nancy Horton's will (see 100 Mass. 348) from decrees of the probate court dismissing petitions filed by the appellant in May 1868, praying that accounts of Granger, as administrator *de bonis non*, with the will annexed, of the estate of James Horton, and as executor of the will of William Horton, rendered August 2, 1864, and settled and allowed in said court, might be reopened for revision and correction, and Granger be required to account further for the final settlement of the estates of said James and William, the petitioner alleging that income thereof, which accrued after Granger assumed his said trusts and became due to Nancy Horton under the terms of their said wills, was not duly accounted for by him.

At a hearing before *Wells, J.*, the judge overruled an objection made by Granger that the petitioner had no such interest in the estates of James Horton and William Horton as to be entitled to take an appeal; and it appeared that James Horton, who was Nancy Horton's husband, died March 4, 1861, leaving a will of which William Horton, their son, was executor; that William Horton, as such executor, rendered one account April 14, 1862, and died October 29, 1863, still holding the trust; that on November 10, 1863, Granger was appointed administrator *de bonis non*, with the will annexed, of James Horton's estate, and executor of William Horton's will, and rendered accounts in each capacity, on August 2, 1864, approved in writing indorsed thereon by Nancy Horton, which were the accounts sought to be reopened; that by the respective wills of said James and William a portion of the income of their several estates was given to Nancy Horton; that Nancy Horton died January 18, 1865, leaving a will of which Granger and John Balch were executors; and

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that Granger and Balch, as such executors, rendered an account in July 1866, from the allowance of which the petitioner appealed, and his appeal was heard and determined by the affirmance of the decree for the allowance of the account, all as reported 98 Mass. 462, which report was made part of this case.

The judge ruled "that, as to so much of the income of the two estates [viz. of James Horton and William Horton] as accrued after the accounts rendered August 2, 1864, the hearing and determination of the matter, as shown in the report of the case referred to, was final and conclusive between these parties; and, as to so much of the income as became due to Nancy Horton before those accounts were rendered, her assent to the accounts and their allowance in the probate court, in the absence of evidence to show fraud or that she was in any manner misled into so giving her assent and approval was so far conclusive that this petitioner was not entitled to maintain his petitions;" ordered the dismissal of the appeals, from which order the petitioner appealed; and reported the case to the full court.

At a subsequent hearing, before the same justice, the case was reopened to permit the petitioner to introduce evidence with a view to prove "that Nancy Horton's signature, approving the accounts, was affixed thereto without knowledge of their character and effect, and through misrepresentation or misapprehension;" on the whole of which evidence the judge "held that there was nothing to invalidate or limit the effect of Nancy Horton's release referred to in the case reported 98 Mass. 462, or of her writing of approval indorsed upon said accounts." The petitioner again appealed; and the evidence, rulings and findings at this second hearing were submitted to the full court in a supplemental report.

C. Lamson, for the appellant.

C. Kimball, for the appellee.

GRAY, J. Assuming that the appellant, as one of the residuary legatees of Nancy Horton, had such an interest in the estates of her husband and brother as to entitle him to apply to the probate court to compel an account by the appellee, as administrator with the will annexed of the estate of the one, and executor

the will of the other, for income bequeathed by them to her ; and to appeal from the decree of the judge of probate dismissing such an application ; the appellant fails to show any ground for requiring the appellee, in either capacity, to render any further account of such income. So much of that income as accrued before August 2, 1864, is clearly shown, by the facts proved at the hearing of this case, to have been settled for in accounts rendered by him in both capacities at that date, made up according to her directions, and upon a principle knowingly approved by her in a release under her hand and seal, and allowed by the probate court with her written assent, and without fraud or mistake. The alleged failure to account for any items of income accruing since that date has already been tried and adjudged against this appellant upon an appeal taken by him from the allowance by the probate court of the account of the appellee and John Balch as executors of the will of Nancy Horton. *Granger v. Bassett*, 98 Mass. 462. The adjudications that the appellee as such executor had not failed to account for any part of the income accruing during that time to Mrs. Horton from the estates of her husband and brother necessarily involved a finding that he had not unjustifiably failed to pay her any part of that income according to his trust and duty in settling those estates ; for if he had failed in that duty as representative of either of those estates, it would have been his duty, acting with his coexecutor of the will of Mrs. Horton, to see that the deficiency was paid up, and he would have been liable as such executor accordingly. No evidence has been introduced that any alleged item of such deficiency was through mistake or fraud omitted to be suggested or passed upon in the former case.

Decrees affirmed.

WILLIAM G. DOW vs. JAMES W. CHENEY.

Personal property, exempt from liability to attachment, was attached on mesne process in an action against the owner, who then agreed in writing with the plaintiff that it might be sold by auction on a certain day, but by reason of a second attachment the sale was postponed for several months, and until, the owner having meanwhile taken the benefit of the bankrupt act, it was prevented altogether by the claiming and taking of the property, by the assignee in bankruptcy, from the officer, in whose custody it had remained without any notice from the owner that he claimed it as exempt from attachment. *Held*, that the owner must be deemed to have waived his privilege of exemption, and could not maintain an action against the officer for a conversion of the property.

TORT against a deputy of the sheriff of Essex, for the conversion of a soda fountain, some ice-cream freezers and tin cans and some sugar.

At the trial in the superior court, before *Lord, J.*, the plaintiff's evidence tended to show that the plaintiff was a confectioner, and the articles named in his declaration were tools and implements, or materials and stock, necessary for carrying on his trade or business, and were exempt from liability to attachment, under the Gen. Sts. c. 123, § 32, and c. 133, § 32, *cl.* 5, 6; that part of his implements and stock, but not these articles, were mortgaged to William W. Dow; that, on mesne process in an action by William W. Dow against the plaintiff, all the property in the plaintiff's shop, including these articles, was attached by the defendant and put into the custody of a keeper; and that thereupon, on August 9, 1867, the plaintiff and William W. Dow agreed in writing "that all the stock, tools, and all other articles taken upon a mortgage" from the plaintiff to William W. Dow, "and also all of the stock not included in said mortgage, now attached upon mesne process upon a claim in favor of William W. Dow, may be sold at public auction on August 16, 1867."

The plaintiff's evidence tended further to show that, "four days after the first attachment, the defendant put on another attachment in favor of the firm of Southmayd & Co., and both of said attachments were upon valid claims;" that "the sale agreed upon was postponed after the second attachment, but

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under what circumstances did not appear, except that the plaintiff testified that the second attachment prevented the sale; that in December 1867, on a petition filed in October 1867, the plaintiff was adjudged a bankrupt, and John G. Case was appointed assignee of his estate in bankruptcy; that "the stock of goods in the shop was afterwards advertised and sold at auction, the mortgaged goods in the forenoon, and the unmortgaged goods, including the articles in question, in the afternoon of the same day;" and that "the plaintiff was informed by the mortgagee that the sale in the forenoon was by him, and the sale in the afternoon, the plaintiff thought, was by direction of the assignee."

"The judge, without calling upon the defendant to offer any evidence, ruled that 'if, after the attachment by the defendant of the stock, &c., on the writ in favor of William W. Dow, the plaintiff entered into the agreement dated August 9, 1867, without any objection that the attachment was of property exempt from attachment, and the shop of the plaintiff was kept closed, under the control of the defendant, until the plaintiff was adjudged a bankrupt and an assignee was duly appointed, and after such appointment the assignee took possession of all the attached property and dealt with it as such assignee, the defendant, if after the original attachment he did no act in relation to the property, and did not personally take possession of it except as above, is not liable in this action, even although the attachment included property exempt from attachment, unless at some time before the assignee took possession of the property the plaintiff notified the defendant that he claimed that the attachment covered property exempt from attachment.' Thereupon a verdict was rendered for the defendant, the plaintiff not claiming that under the ruling he was entitled to a verdict;" and the plaintiff alleged exceptions.

C. Sewall, for the plaintiff.

J. C. Perkins, for the defendant.

MORTON, J. At the trial, the plaintiff introduced evidence tending to show that the articles claimed in his writ were tools, implements and fixtures, and materials or stock, necessary for

carrying on his trade of a confectioner, and designed and procured by him to be used therein; and the instructions given assumed that they were in whole or in part exempt from attachment, under the Gen. Sts. c. 123, § 32. The attachment by the defendant, and the control and dominion which he exercised over the property, to the exclusion of the rights of the plaintiff, were acts sufficient to constitute in law a conversion, without any demand and refusal. *Bowen v. Sanborn*, 1 Allen, 389. *Woods v. Keyes*, 14 Allen, 236. It follows, therefore, that the defendant is liable for the value of such of the attached property as was exempt from attachment, unless the plaintiff by his acts or neglect to act has waived his right of exemption.

The grounds relied on by the defendant to show such waiver are, that, soon after the attachment, the plaintiff and the attaching creditor, who was also mortgagee of a part of the attached property, entered into the written agreement of August 9, a copy of which is annexed to the bill of exceptions; that the plaintiff did not then claim that any of the property was exempt from attachment, and never thereafter, at any time before the assignee took possession of the property, notified the defendant that he claimed that the attachment covered property exempt from attachment. We are of opinion that these facts constitute in law a waiver. We cannot doubt that the parties intended, by the agreement, to authorize the sale of all the property attached, whether included in the mortgage or not. This agreement, entered into without any objection that the property was exempt from attachment, was an act of the plaintiff inconsistent with an intention on his part to claim it as exempt. We do not mean to express the opinion that this agreement standing by itself was an absolute waiver, so that after the contemplated sale was defeated by the second attachment and the agreement became *functus officio*, the plaintiff could not insist upon his privilege of exemption; but it was a qualified or limited waiver, and indicated a purpose on his part not to claim the exemption, and would reasonably and naturally induce in the mind of the officer a belief that the property was attachable. If the plaintiff intended to claim the exemption, good faith and fair dealing

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required that he should notify the officer of his claim, so that he might relieve the property claimed from the attachment, or protect himself by retaining it in his hands after the assignee was appointed, and until the title could be settled. The facts present a case where the plaintiff, by his voluntary acts and neglect to act, has misled the defendant to his prejudice, and must be held to be a waiver.

This case is distinguishable from the case of *Woods v. Keyes*, 14 Allen, 236, where the plaintiff did nothing which could mislead the officer or influence his action, but merely left him to act upon his own responsibility. It is more nearly analogous to the cases of *Nash v. Farrington*, 4 Allen, 157, and *Clapp v. Thomas*, 5 Allen, 158, in which the plaintiff, by his voluntary act of intermingling the exempted property with other property which was attachable, and neglecting to claim or point out the portion which was exempt, was held to have waived his privilege of exemption.

Exceptions overruled.

GEORGE W. WILLIAMS vs. CHARLES MERRITT.

By an adjudication of bankruptcy under the bankrupt act, (U. S. St. 1867, c. 176,) even when the proceedings were begun on the debtor's voluntary petition, his property becomes exempt from subsequent attachment on mesne process.

Tort against a deputy of the sheriff of Essex, for the conversion of a horse and its harness, a carryall, a sleigh, and other chattels. Trial in the superior court, before Lord, J., who reported the case for the determination of this court, substantially as follows :

The plaintiff claimed title to the property under a bill of sale thereof to himself from Smith T. Downing, dated in January 1868. On February 27, 1868, Downing filed his petition for the benefit of the bankrupt act, (U. S. St. 1867, c. 176,) and was duly adjudged a bankrupt; but no meeting of his creditors was held, nor an assignee of his estate appointed, until March 10 1868.

On March 9, 1868, the defendant, as deputy sheriff, attached the property on a writ sued out that day against Downing; and the defendant contended that the bill of sale was executed by Downing without consideration, and for the purpose of defrauding his creditors, and that the plaintiff participated in this purpose.

"On these facts, the judge ruled that the defendant could not justify under his writ; excluded all evidence tending to impeach the plaintiff's title (it being agreed that a bill of sale was actually made and delivered, but not agreed that any delivery of the property was made); and directed a verdict for the plaintiff," under an agreement of the parties that the case should be open for the assessment of damages, if his ruling should be affirmed, otherwise the verdict to be set aside and a new trial granted.

S. B. Ives, Jr., for the defendant. 1. The defendant can justify under his writ, if not prevented by the bankrupt act.

2. At the time of the attachment, Downing's legal title to his property had not been so far affected by the bankrupt act as to relieve it of liability to attachment. There had been no assignment. Hence a right of property remained in him; and gave a right of possession, both as matter of fact and matter of law, because the marshal is not authorized to take possession of the debtor's property in cases of voluntary bankruptcy. This right of property is undoubtedly a qualified right. The debtor holds his estate as trustee for his creditors; and, whatever may be his rights as against them, he as their trustee, and any one claiming through him, has a right to hold, and may justify the holding, of property claimed to be his, as against third parties, not creditors, whose interest is adverse to the estate.

It is the assignment, and not the filing of the petition in bankruptcy, that dissolves attachments on mesne process, and relieves the debtor's property from liability to such attachments. And in any event, the aim and effect of the bankrupt act is to remove the debtor's property from the hands of special creditors, and add it to the general funds of the estate for the general benefit of all creditors; and not, in the interest of strangers, and to the disadvantage of the estate, to relieve the debtor's prop-

erty, or alleged property, from attachments of which the assignee might afterwards avail himself.

W. C. Endicott, for the plaintiff.

GRAY, J. If this case had arisen while our insolvent law was in force, there could have been no doubt that the ruling at the trial was in accordance with the previous decisions of this court. The plaintiff, claiming title under a bill of sale from the debtor, might have maintained this action, unless the defendant could show a better title. *Codman v. Freeman*, 3 Cush. 306. *Hubbard v. Lyman*, 8 Allen, 520. If indeed an attachment had been made before the institution of proceedings in insolvency, it would not have been dissolved before the assignment, and until that time the attaching officer would have retained the custody of the property attached, and, in case of a discontinuance of the insolvency proceedings before an assignment, and of a subsequent recovery of judgment, might have taken the property on execution. *Cutter v. Gay*, 8 Allen, 134. *Hill v. Keyes*, 10 Allen, 258. But, upon the execution of an assignment, he would have been bound to deliver the property to the assignee on demand, and such delivery would have exempted him from liability to the attaching creditor in case of the proceedings in insolvency being subsequently annulled by the court, because commenced without due notice to the debtor. *Penniman v. Freeman*, 3 Gray, 245. Even an officer who had attached property before the commencement of the insolvency proceedings, and who, after the first publication of notice of the issuing of a warrant therein, took it on execution and sold it, and paid over the proceeds, would have been liable therefor to the assignee subsequently appointed, because the title of the latter would have related back to the time of such first publication. *Edwards v. Sumner*, 4 Cush. 393. Upon the issuing of the warrant in insolvency to the messenger, and his taking possession under it, the debtor would have been divested of his estate; and all his property, not already attached, would have been in the custody of the law, and could not have been attached after the first publication of notice, so long as the proceedings in insolvency were pending. *Judd v. Ives*, 4 Met. 401. *Gallup v. Robinson*, 11 Gray

20. The necessary consequence would have been, that the party making an attachment pending proceedings in insolvency could not dispute the plaintiff's title on the ground of fraud. *Pomroy v. Lyman*, 10 Allen, 468.

So in *Perry Manufacturing Co. v. Brown*, 2 Woodb. & Min. 449, it was held that an attachment upon a writ from the circuit court of the United States after the first publication of notice of the issuing of a warrant under the insolvent law of Massachusetts, though before an assignment had been executed, or the property taken possession of either by the messenger or the assignee, was ineffectual.

The existing bankrupt act of the United States differs indeed from our insolvent law in not authorizing the messenger to take possession of all the bankrupt's property when the warrant is issued upon the bankrupt's own petition. But his property is not the less by the decree adjudging him a bankrupt brought within the exclusive custody and control of the court of bankruptcy. The bankrupt is held by the district court of the United States in this district to stand from that time in a fiduciary relation to his creditors. *March v. Heaton*, 2 Bankr. Reg. 66. And in the southern district of New York the practice is established, that, upon the bankrupt's executing the surrender which he is required by the act to make, the register takes immediate possession of his property, and may appoint custodians and make sales thereof, subject to the supervision of the court; and if the bankrupt delays to make a surrender to the register, the court will order him to do so. *In re Hasbrouck*, 1 Bankr. Reg. Suppl. xvii. *In re Vogel*, 2 Bankr. Reg. 138, and 3 Ib. 49. *In re Loder*, 2 Bankr. Reg. 162. *In re Bogert*, and *In re Shafer*, Ib. 178. The nature or comparative efficiency of the means provided by the statute to secure the property for the benefit of all the bankrupt's creditors cannot affect the operation of the adjudication of bankruptcy to bring all his assets at once into the custody of the law and prevent their subsequent attachment by one creditor for his own benefit.

The defendant cannot therefore justify under his writ; and according to the terms of the report the

Case is to stand for assessment of damages.

LEVERETT BRADLEY vs. JACOB C. REA & another.

To support an action on a common count for the price of goods sold to the defendant, who set up in defence a special warranty by the plaintiff of their quality, and a breach thereof, and that the sale was made on the Lord's day, the plaintiff introduced evidence, on the trial, which tended to prove that the goods were delivered by himself and accepted by the defendant on Monday, with the purpose that they should be sold and paid for, though without mention of a price. The defendant's evidence tended to prove that the plaintiff made an express contract with him on the Lord's day next previous, for the sale of the goods to him at a stipulated price and under a special warranty of their quality, and that the delivery and acceptance on Monday were in performance of this contract. *Held*, that the defendant had no ground of exception to the submission of the case to the jury under instructions "that, laying out of the case all that took place on Sunday as evidence of a valid contract, they might consider the delivery and acceptance on Monday as evidence tending to prove a sale on Monday, but whether it was sufficient to prove such sale was a question for them to determine," and that if they were satisfied that there was a sale on Monday, the law would imply a promise to pay the actual market value of the goods, whatever that was, without regard to any warranty made on the day previous.

On a trial of the issue of the value, at the time of the sale, of pigs sold by the plaintiff to the defendant, some of which soon afterwards died of a contagious disease, the plaintiff, for the purpose of showing that they were exposed to the contagion before the sale, proved "that several other pigs, sold out of the same drove" two days earlier, "were then sick, and some of them died." *Held*, that the plaintiff might thereupon prove how many pigs there were in the drove, and that certain of them were unaffected by the disease.

CONTRACT on an account annexed for the price of fifteen pigs sold by weight to the defendants; who answered, that the plaintiff specially warranted the pigs to be healthy, but that they were diseased and worthless, and also that the sale was made on the Lord's day. At the new trial in the superior court, before *Wilkinson, J.*, after the decision reported 14 Allen, 20, the jury found for the plaintiff, and the judge allowed exceptions substantially as follows:

"The plaintiff offered evidence tending to prove that he sold fifteen pigs to the defendants. The defendants contended, and offered evidence tending to prove, that the sale was made on Sunday, and the plaintiff represented and warranted the pigs to be sound and free from disease; and also that some of the pigs, at the time of the sale, were sick of a contagious disease to which they had been exposed, and all of them soon became sick of the same disease, and thirteen of them died. The plain

tiff controverted the truth of all this evidence, and offered counter testimony.

"As to the sale on Sunday, it appeared that the parties met on that day, and had some negotiation in regard to the sale of the pigs. The defendants testified that the sale was completed that day, by a definite agreement as to the price and a selection of the pigs from the drove by marking them; and that it was then agreed that the plaintiff should cause them to be driven to the defendants' place of business on the next morning. The plaintiff, on the other hand, testified that he refused to sell the pigs on Sunday, but did name his price on that day; and that he allowed the defendants to mark the pigs which they chose, in consequence of a suggestion of the defendants that he might otherwise sell them before they came on Monday.

"One of the defendants came on Monday, and at his request one of the marked pigs was changed for one not marked, out of the drove. No price was named on Monday; and the parties were not agreed as to whether anything was then said about the terms of payment. The pigs were driven to the defendants' place of business, by a servant of the plaintiff, after this, on Monday morning. There was other evidence upon the subject of the sale.

"The judge instructed the jury that the plaintiff could not recover unless he proved a sale on some secular day; that they must lay out of the case all that took place on Sunday as evidence of any contract; that no valid sale could be made on that day, nor could any contract, made on Sunday, be ratified on Monday so as to be valid or effectual; that neither a price fixed on Sunday, nor a warranty made on that day, would form part of any contract which could support an action; but that they were to consider whether the facts in proof satisfied them that a sale was made on Monday, and for that purpose they were to consider all the circumstances, including the delivery of the pigs by the plaintiff and the acceptance of them by the defendants, and would determine whether such delivery and acceptance were understood by the parties as a delivery and acceptance of goods sold, and which were to be paid for. If they found that

it was understood by the parties that the pigs were bought, then the plaintiff was entitled to recover the actual market value of the pigs at the time of such sale, without any reference to the price named or fixed on Sunday. If nothing was said as to price, the law would imply a promise to pay a fair price, such a sum as parties knowing the exact, actual condition of the pigs, and acquainted with the market, would pay for them in the market.

“The defendants requested the judge to instruct the jury that, if a sale of the pigs was completed and perfected between the parties on Sunday, by which the pigs were sold by the plaintiff to the defendants upon representation and warranty that the pigs were free from disease, and if, only in pursuance of the terms of such sale, so made on Sunday, the plaintiffs sent the pigs to the defendants on Monday, and the defendants received them, only in pursuance of the terms of the sale, such delivery and acceptance would not be evidence of a sale on Monday. The judge declined so to rule in terms, but instructed the jury that, laying out of the case all that took place on Sunday as evidence of a valid contract, they might consider the delivery and acceptance on Monday as evidence tending to prove a sale on Monday, but whether it was sufficient to prove such sale was a question for them to determine.

“The defendants also requested the judge to instruct the jury that, if the plaintiff, in pursuance of the terms of the sale on Sunday, sent the pigs to the defendants on Monday, and there was no other evidence of a sale on Monday except such as might be inferred from their being so sent, then the law could not imply a promise on the part of the defendants, from the mere delivery, to pay for the pigs, if at the time they were actually worth nothing to them. But the judge instructed the jury that, if the whole evidence in the case satisfied them that there was a sale on Monday, upon the principles already stated, then the law would imply a promise to pay the actual market value, whatever that was. If the pigs had no value by reason of sickness or of their having been exposed to contagion, then the plaintiff could not recover. If part were sick and thus of a diminished

value, or of no value, then the plaintiff could only recover for those not sick, or for such diminished value.

"For the purpose of proving that the pigs sold had been exposed to a contagious disease, the defendants offered evidence tending to show that several other pigs, sold out of the same drove on the Saturday previous, were then sick and some of them died. To rebut this, the plaintiff showed that the drove was bought in Brighton, and then consisted of about one hundred and fifty pigs; and was then allowed, under the objection of the defendants, to show that he sold seven pigs out of the drove to different parties, and that they showed no signs of disease."

D. Saunders, for the defendants.

S. Lincoln, Jr., (*S. B. Ives, Jr.*, with him,) for the plaintiff.

CHAPMAN, C. J. Under the instructions given them, the jury must have found that on Monday the pigs were delivered by the plaintiff, and accepted by the defendants, with the purpose that they should be sold and paid for. This would constitute a sale; and, if nothing was said about the price, the law would imply a fair price. This is all that appears to have been done on Monday. Thus the plaintiff's case would be established without proof of any illegal transaction.

For the purpose of relieving themselves from the implied obligation, the defendants offered to prove that, on the preceding Lord's day, an express contract was made for the sale of the pigs at an agreed price, and with a warranty that they were free from disease. But as this was an offer to maintain their defence by proof of their own illegal act, the court properly refused to listen to it; for it is not the duty of courts to enforce illegal transactions. The contract derived all its validity from the transactions of Monday; and if the defendants, on that day, omitted to make stipulations that they would otherwise have made, because they relied on the illegal acts of the preceding day, it was their own folly to do so. The jury were correctly instructed that no valid sale could be made on Sunday; nor could any contract made on Sunday be ratified on Monday so as to be valid or effectual; and that neither a price fixed on

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Sunday, nor a warrant made on that day, would form any part of a contract which would support an action. This was settled at the former hearing of this case. 14 Allen, 20.

The evidence offered by the defendants that several other pigs, sold out of the same drove on the preceding Saturday, were then sick, and some of them died, if competent, would be competent only so far as it tended to show there was a disease in the drove, to which the pigs sold to the defendants had been exposed. It was equally pertinent to the question to show what number of pigs the drove contained, and that some of them were unaffected by the same disease.

Exceptions overruled.

MARTHA A. BEERS vs. GEORGE C. JACKMAN.

On the trial of a complaint under the bastardy act, Gen. Sts. c. 72, which the defendant had answered denying every allegation of the complainant and charging a conspiracy to defraud, the complainant, in introducing her case, was permitted, against the defendant's objection, to put in evidence, "as tending to show the character of the intimacy between herself and the defendant," a letter written by him to her between seven and eight months before the time when she alleged and had testified that he begot the child. *Held*, that he had no ground of exception.

COMPLAINT made November 23, 1868, under the Gen. Sts. c. 72, that the complainant was pregnant with a child begotten by the defendant at Lawrence on or about April 15, 1868, which, if born alive, might be a bastard.

In the police court of Lawrence, to which the complaint was returned, the defendant, after due hearing, was required to give bond to appear and answer to it at the next term of the superior court.

In the superior court, the complainant, on February 19, 1869, further complained that, on December 30, 1868, she was delivered of a male child, which was still living and was born a bastard; that in the time of her travail she accused the defendant of being its father, and had ever since been constant in the accusation; and now charged that he was so, and that he begot the child at the place and on or about the day alleged in the previous

complaint; and prayed that he might be adjudged its father and be charged with its maintenance with her assistance. The defendant answered, denying each and every allegation of the complainant; and alleging that her complaints were made in pursuance of a conspiracy to defraud him.

At the trial, before *Scudder, J.*, "the complainant was the first witness called, and testified that she was begotten with child by the defendant on or about April 10, 1868, and that acts of criminal intercourse between her and him commenced in August 1867. A letter was produced, directed to her, and dated at Philadelphia, August 26, 1867, which she testified that she received by mail soon after its date. This letter was signed by the defendant and admitted to have been written by him. She offered the letter as evidence tending to show the character of the intimacy between herself and the defendant. The judge allowed the letter to be read to the jury against the objection of the defendant that it was immaterial." The jury returned a verdict of guilty, and the defendant alleged exceptions. The letter was not made a part of the bill of exceptions, nor was its substance stated therein further than appears above.

W. S. Knox, for the defendant.

J. K. Tarbox, for the plaintiff.

COLT, J. It would have been, perhaps, more according to the usual course, for the complainant to have introduced the letter of August 26 in reply to the defendant's case, relying in the first instance upon positive testimony that the child was begotten in April following. The answer contained a denial of the complainant's allegation, and a charge of conspiracy to defraud; and the order in which competent evidence, under the issue raised, should be introduced, was here in the discretion of the judge.

In proof of unlawful sexual intercourse, the adulterous disposition of the parties at the time may be shown. To this end, the antecedent and subsequent conduct and declarations of the parties, if it has a tendency to prove the fact, is admissible. It is a matter of common observation, that a criminal intimacy is usually of gradual development and when established is likely to continue between the parties. The act itself is the strongest

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evidence of the existence of the disposition; and it has been recently held that, for the purpose of proving it, an act of adultery at another time may be shown. *Thayer v. Thayer*, 101 Mass. 111. It had long been held that prior acts of familiarity were admissible to render it not improbable that the act might have occurred. *Commonwealth v. Merriam*, 14 Pick. 518.

The only limit to this description of evidence is, that it must be sufficiently near in point of time, and sufficiently significant in character, to afford an inference of the moral condition to be proved. And this limit must be fixed to a great extent by the discretion of the judge who tries the case. The facts stated in this bill of exceptions do not make it appear that the judge passed the limit, in admitting the letter in question. *Boyle v. Burnett*, 9 Gray, 251. *Exceptions overruled.*

DAVID KIMBALL vs. EDWARD F. CUSHMAN.

The fact that a person, who, being in charge of a horse with the assent of its owner and engaged on his business, caused an injury by negligent riding, was in the general employment of a third person, does not exempt the owner of the horse from liability for the injury, unless the relation of the third person to the business was such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor.

TORT for injuries alleged to have been caused to the plaintiff by the defendant through his servant Charles H. Flanders in negligently riding a horse against the plaintiff on a highway in Haverhill. The answer, among other grounds of defence, denied that Charles H. Flanders was the defendant's servant or agent at the time of the accident.

At the trial in the superior court, before *Scudder, J.*, the plaintiff introduced evidence tending to show that, about five o'clock in the afternoon of April 8, 1868, Charles H. Flanders was riding at an immoderate speed a horse (which it was admitted was one of a span belonging to the defendant) on the highway in question, when he came into collision with the plaintiff, who was crossing the highway on foot; that the alleged injuries were the

result of the collision ; and that the collision was caused by the rapid riding of Charles H. Flanders.

" It appeared that the defendant came to Haverhill in November 1867, with his wife and child, and boarded with his father in law, Joseph Flanders, who was the father of Charles H. Flanders ; that he brought his carriage and this span of horses ; and that a stable was built, about that time, on the premises of Joseph Flanders.

" The plaintiff was allowed to prove, under the objection of the defendant, that, from November 1867 until after the accident, Charles cleaned the defendant's carriage and harnesses and kept them in order, and took care of these horses at the stable, and fed, watered and groomed them ; that he frequently drove them, sometimes alone, and sometimes with the defendant or the defendant's wife or other members of the family ; that the hay and grain for the horses were ordered sometimes by the defendant himself, and sometimes by Charles, and the bills were paid by the defendant ; that on the morning of April 8, 1868, Charles ordered a bundle of hay for the horses, which was afterwards paid for by the defendant ; and that Charles brought the horses to the blacksmith to be shod, and the defendant paid the bills.

" John Griffin also testified that in June 1868 he overheard a conversation between the defendant and Henry Phelps, in which the defendant asked Phelps if he knew of any one whom he could get to take care of his horses, and Phelps said he did not, when the defendant said he wanted to get somebody because he was away a good deal and Charley was off a good deal of the time when he wanted him. It also appeared that the defendant was a trader in Boston, and was not in Haverhill much of the time except at night and on Sundays.

" This was all the evidence offered by the plaintiff to prove that Charles was the agent or servant of the defendant, and the defendant asked the judge to rule that it was insufficient, but as the defendant did not propose to rest upon the plaintiff's case, the judge declined so to rule.

" Upon the question whether Charles was his agent or servant, the defendant testified that, when he came to Haverhill, he

agreed with Joseph Flanders, that Flanders should build a stable for him and he would pay rent for it, and that Flanders should take care of his horses, he furnishing hay and grain and Flanders doing all the work ; that he did not suppose that Flanders would take care of the horses personally, and expected that Charles would do it, though nothing was said specifically about that ; that no price was agreed upon at the time, nor was anything paid by him until they settled in November 1868, when he paid Flanders five dollars a week for the care of the horses, and fifty dollars for the rent of the stable for a year. He further said that he never hired or in any way employed Charles to do anything for him. At the time of the accident he was away in Canada and had been absent several weeks.

" Joseph Flanders testified that the defendant employed him to take care of his horses ; that no specific bargain was made ; that the defendant was to find hay and grain, and he was to take care of the horses ; that Charles was employed by him, and was not at the time of the accident in the employ of the defendant ; and that he paid Charles for his service by supplying him with his living. On being asked by the defendant if he had any agreement with the defendant in relation to taking care of his horses, and if any, what it was, after some hesitation he replied that he received the pay for taking care of them ; that he settled with the defendant in November 1868, and received five dollars a week for taking care of said horses ; that no price had been agreed upon prior to that settlement ; that he was the depot master at Haverhill for the Boston and Maine Railroad ; that Charles was twenty-seven years old, had been in no particular business for some years, was with the defendant at Brookline prior to his coming to Haverhill, and since that time had lived with the witness, sometimes assisting him in his official duties, for which he (the witness) received pay, and sometimes rendering other service to the railroad for which he was placed upon the pay roll and received the pay himself ; that if the defendant had paid Charles he should not have claimed it or found fault with it.

" Charles H. Flanders testified that he was never employed by the defendant in regard to these horses, but did all that he did to or for them as the servant of his father, with whom he lived; that he frequently drove all the members of the family with the defendant's assent; that he had no particular talk with his father about taking care of these horses, and knew of no agreement between the defendant and his father; that he only knew that he had taken care of the horses and had received no pay for it, but his father had. He also testified that, on the morning of the day of the accident he had ordered a bundle of hay for the horses, which was afterwards paid for by the defendant; and that, in the afternoon of said day, finding the hay had not come, his father told him he had better go and hurry it up, as there was none left, and suggested his taking a horse for that purpose; that he mounted the horse, and had started to go after the hay when he met the team with the bundle of hay on it; that he then thought he would go to the post-office and see if there were any letters in his father's box; that he went there and looked into the office, and, seeing the box empty, started to return, and while riding back came into collision with the plaintiff. On cross-examination he said that the defendant's wife as well as the rest of the family sometimes had letters in that box, and that he should have taken letters for her if there had been any, as was his custom.

" This was all the testimony offered by the defendant on this part of the case. The only evidence in reply was that of the plaintiff himself, who testified that Charles told him, after the accident, that he took care of the defendant's horses, but that there was no particular agreement about it; and of another witness, who testified that Charles told him that at the time of the accident he had been down to see why the bundle of hay ordered by him that morning had not arrived, and, finding that it had been sent, he went back in a hurry for fear that the teamster would leave it in the wrong place.

" The defendant requested the judge to instruct the jury that, upon the whole evidence, they would not be authorized to find that Charles was the agent or servant of the defendant, so that he would be liable in this action for any negligence which caused

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this injury. But the judge refused so to rule, and submitted the case to the jury with instructions to which no other exception was taken. The verdict was for the plaintiff, and the defendant alleged exceptions."

S. B. Ives, Jr., & S. Lincoln, Jr., for the defendant.

H. Carter, for the plaintiff.

WELLS, J. There was some evidence, competent to be submitted to the jury, and from which they might infer that, in the care and exercising of the horse, and in the main purpose for which he was out with the horse on the occasion in question, Charles H. Flanders was the servant of the defendant. It is not necessary that he should be shown to have been in the general employment of the defendant, nor that he should be under any special engagement of service to him, or entitled to receive compensation from him directly. It is enough that, at the time of the accident, he was in charge of the defendant's property by his assent and authority, engaged in his business, and, in respect to that property and business, under his control. *Wood v. Cobb*, 13 Allen, 58. The fact that there is an intermediate party, in whose general employment the person, whose acts are in question, is engaged, does not prevent the principal from being held liable for the negligent conduct of the subagent or underservant, unless the relation of such intermediate party to the subject matter of the business in which the underservant is engaged, be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor.

In this case, there was no contract with Joseph Flanders such as would exclude the defendant from control of and responsibility for the acts of Charles H. Flanders in the service upon which the latter was engaged; and we think it was rightly left to the jury to determine, upon all the evidence in the case, whether there was such control and responsibility; that is, whether, on the occasion in question, Charles was acting as the servant of the defendant, in his business and with his assent and authority. The jury having, under proper instructions, found that he was so, their verdict must stand.

Exceptions overruled.

SAMUEL BLAKE vs. JAMES DAMON.

On the trial of an action for assault and battery by blows struck on an occasion when the plaintiff met the defendant to adjust a money account, evidence is competent of how much he owed the defendant and how much the defendant afterwards paid him on the account.

On the trial of an action for assault and battery of the plaintiff by blows struck in the defendant's shop, evidence is competent that, shortly before the striking of the blows, and when the plaintiff was entering the shop, the defendant was talking with some customers about Calvinists and Methodists, and, as the plaintiff approached, remarked, "Here's a fellow who believes in hell."

On the trial of an action for assault and battery, at which the defendant testifies as a witness in his own behalf, it is competent for the plaintiff to examine him as to insulting remarks made by him, after the alleged assault, concerning the injuries inflicted on the plaintiff.

On the trial of an action for assault and battery, the plaintiff was a witness in his own behalf, and on cross-examination testified that before the alleged assault he never complained to anybody, and in particular, not to S., a blacksmith, or to O., of such an injury as he then received. S. and O. then testified, for the defendant, that the plaintiff did so complain, in their presence, at a certain prior time, when he brought a colt to S. to be shod; and S. further testified that it was a colt called the Danvers colt, and that he broke the colt in order to shoe it, the plaintiff asking him to do so because on account of the injury he was unable to do so himself. *Held*, that, as tending to show that S. and O. were mistaken in time, it was competent for the plaintiff then further to testify that he broke, himself, the Danvers colt, which he took to S. to be shod at said prior time, but that at a certain other time, after the alleged assault, he did take another colt to S. and ask him to break it; although he further testified, also, that O. was not present at this subsequent time.

In an action for assault and battery, since the practice act, (Gen. Sts. c. 129,) as before, if the plaintiff alleges acts which, if proved and not justified, will sustain his action, and the defendant seeks to justify them, the burden is on him to prove his justification.

TORT for assault and battery. The declaration was as follows: "And the plaintiff says, the defendant made an assault upon him, and threw him with great violence upon and against a certain counter, whereby he received serious injury." The plaintiff also filed the following specifications: "And now comes the said plaintiff, and, being called upon for a more particular specification, says, that the defendant violently and forcibly assaulted him in a certain shop in Ipswich, and seized him, and dragged and threw him upon the counter there, thereby inflicting many and severe bruises upon his arms, shoulders, loins and other parts of his body, and causing serious injuries to his private parts, and the muscles, tendons, cords and other parts

thereto adjacent, and causing serious and permanent disease of one of the testicles, and of the spermatic cord, whereby the plaintiff has suffered great pain and weakness and loss of capacity to labor, and been subjected to great expense and inconvenience."

The answer was as follows: "And now comes the defendant, and says that the plaintiff was in a certain shop, the same being the defendant's place of business in said Ipswich, and under his control, and the defendant requested the plaintiff to leave the premises, and, the plaintiff not departing therefrom, the defendant attempted with gentle force to remove him, and used no more force than was necessary for that purpose. And the defendant denies that he violently and forcibly assaulted the plaintiff, or that he in any way or manner assaulted him, or seized him, or dragged or threw him upon a counter, or inflicted any or severe bruises upon his arms, shoulders, loins or any part of his body, or caused any injury to his private parts, or the muscles, tendons, cords or other parts adjacent thereto, or caused serious or permanent injury or disease of one of his testicles, (or more,) or of the spermatic cord, or that the plaintiff has suffered any pain or weakness or loss of capacity to labor, or has been subjected to any expense or inconvenience by reason of anything done by this defendant."

At the trial in the superior court, before *Reed, J.*, the jury found for the plaintiff, with damages in the sum of \$2300, and the defendant alleged exceptions of which the following are all the parts that are material.

"There was evidence tending to show that on February 18, 1867, the plaintiff went to a shop in Ipswich, where the defendant had control and management, and, after some conversation between the parties about a bill claimed to be due from one party to the other, the defendant took hold of the plaintiff. The plaintiff contended and testified in his own behalf that it was done without giving him notice to leave the shop, or time to do so; and that the defendant violently pushed him against a counter," injuring his left hip, and his abdomen between the hip and his navel, and also the spermatic cord of his left testicle. "Th

defendant contended, and himself and other witnesses in his behalf testified that he gave the plaintiff notice, ordered him out of the shop, opened the outer door and told him to leave the shop, and, after the plaintiff had time enough to leave the shop, but did not, then took hold of him gently for the purpose of pulling him towards the door to eject him from the shop; that the plaintiff resisted, remained in the shop, and after a few minutes passed out of his own accord."

"The plaintiff, in his direct examination, testified, in substance, 'I never had any difficulty before. It produced an affection of the spermatic cord;' referring to the time of the alleged assault, and the disease produced by it. On cross-examination, he testified: 'All the injuries I now have I received from the assault by the defendant. I mean, I never had difficulty of this kind before the time of the alleged assault;' referring to the affection of his spermatic cord. 'I have never said so to anybody. I never complained of being injured, before the time of said assault, to anybody. I know Benjamin Smith, of Ipswich, the blacksmith. He did shoe a colt for me in 1864. I went to get him to shoe a colt in 1864. He never asked me if the colt was broken, until after I got hurt by said assault. I never told Smith in 1864 that I would bring a bridle to break the colt with. I did say so in 1867. I did not tell Smith so when Patrick O'Connell was at work for him as an apprentice. I did not say in 1864, while O'Connell was at work for Smith as an apprentice, that I hurt myself in trying to break a colt, or that I had hurt myself and brought on an old difficulty, or that in substance, or anything like that. I know I never said anything like that, either to Smith or O'Connell.' No reëxamination was made by the plaintiff on this point, as to what the plaintiff had said or done with Smith or O'Connell.

"Smith was called as a witness by the defendant, and testified in chief that O'Connell was an apprentice to him in 1864 and up to May 1865; that in October 1864 the plaintiff came into the shop of the witness early in the morning, at his request; that the witness asked the plaintiff if he had broken the colt down so the witness could handle his legs, and the plaintiff in reply.

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said, No,' that he was the toughest customer he ever got hold of; that he tried to break the colt yesterday, but he hurt the plaintiff and brought an old trouble on the plaintiff; and that the plaintiff then placed his left hand on his side, between his left hip and navel, showing where the place was that he got hurt; that the plaintiff then sat down in the shop and continued to complain of his side, and the witness thereupon broke the colt and shod him; that O'Connell was not there when the plaintiff first came with the colt, but came soon after and held the head of the colt, while the witness shod him; that there was but one occasion when the plaintiff complained of having been hurt, when O'Connell was in the shop as an apprentice. On cross-examination, Smith testified that it was the Danvers colt he shod in 1864, of which he had testified; and that the plaintiff did not bring him a colt to shoe, in 1867, which he said had not been broken. On reëxamination, he testified there was but one occasion, when the plaintiff complained of being hurt, when O'Connell was present.

"O'Connell was then called as a witness by the defendant, and testified in chief, that he was at work for Smith in October 1864, and remembered his shoeing a colt for the plaintiff; that he found Smith, the plaintiff and the colt in Smith's shop one morning early; that he heard the plaintiff then complain of his side; and that the plaintiff said he was breaking the colt yesterday afternoon, and hurt his side. On cross-examination, the witness said that the plaintiff said he had hurt his side in trying to break down the colt yesterday, but did not say what kind of a hurt it was.

"On the part of the defendant, Mrs. Julia F. Proctor was called as a witness, who testified in chief, that she was with another woman trading with the defendant in the shop, on the day of the alleged assault; that she heard the defendant tell the plaintiff, while behind the counter, to leave the shop; that the plaintiff then walked away from the door and further down the shop; that the defendant went to the outer door, opened it and told the plaintiff to leave; and that thereupon she left the shop. On cross-examination, against the defendant's objection, the

judge allowed the plaintiff to ask her: 'Was not the defendant, while you were talking with him, as the plaintiff came up to where you were, using profane and abusive language in regard to Calvinists and Methodists?' The plaintiff had previously testified in chief, under objection, that, as he approached the defendant in the shop, the defendant was talking with the women about hell and damnation, or the doctrines of eternal punishment, and then, turning towards him, said, 'Here's a fellow who believes in hell.' The defendant had also testified in chief on the same subject, and had denied this. He was cross-examined on the subject, and was asked whether, when the plaintiff came towards him, he was not using profane and abusive language about Calvinists and Methodists, and did not apply it directly to the plaintiff; and he said he did not. The judge thereupon allowed the question to be put to Mrs. Proctor; and she answered that he was criticising, not abusing them.

"The defendant was called as a witness in his own behalf, and testified in chief as stated. On cross-examination, he was asked, 'Have you ever used insulting language to the plaintiff since this action was brought, in the street or a public place?' To this question the defendant objected, on the ground that it was not competent for any purpose; but if for the purpose of showing bias and prejudice in the defendant as a witness, then that the question should be at first generally as to the state of feeling between the plaintiff and the defendant, whether hostile or not, (and the defendant was willing to agree that it was hostile,) but that the plaintiff had no right to inquire as to particular acts showing such hostility; that all such acts were purely collateral, and were incompetent and inadmissible. The judge overruled the objection, and the plaintiff was permitted to and did ask the above question, to which the defendant replied, 'I did ask him, at the time of the last trial, how his balls were, at the dinner table.' The plaintiff then asked the defendant, 'Did you then ask the plaintiff how his balls were, at the time of the last trial, to insult him?' To this the defendant objected as before, and the judge overruled the objection, and the defendant in answer said, 'I said that, because it came into my mind quick; and I said it quick.'

"The defendant was also asked, on cross-examination, against his objection, 'How much was the bill owed you?' and replied,

Two dollars and sixty-seven cents. That is the bill in your hand.' And, against the defendant's objection, said bill receipted was produced by the plaintiff and read in evidence to the jury. The defendant, against the plaintiff's objection, was also asked,

'Have you since that time,' referring to the time of the account, 'paid the plaintiff any money?' In answer, the defendant replied, 'I think I have paid him five or six dollars.'

"After the testimony for the defendant was in, the plaintiff recalled himself as a witness, and, against the defendant's objection, which was overruled, testified in substance, 'I had a colt in my possession, called the Danvers colt, in 1864. I broke that colt. I had no more trouble with him than any other colt. He kicked me once, but did not hurt me. I remember when I took that colt to Smith to shoe. I did not tell him I had been hurt the day before.' On cross-examination, he said, 'I don't say I did not take a colt to Smith to shoe in 1864, but I do swear he did not break it. I do swear that I did not say to Smith or O'Connell, in substance, that I had got hurt the day before.' He was then reëxamined, and, against the defendant's objection, which was overruled, was asked to state what the transaction was that occurred between him and Smith in November 1867, and answered, in substance, 'In November 1867 I took a colt to Smith, and said I was not able to handle the colt and should give it up to him. O'Connell was not then in the shop.' To this answer the defendant objected as incompetent, but the judge overruled the objection and allowed the evidence. On cross-examination, he said: 'I took the colt from Rowley November 7, 1867; am sure of it; took it to Smith next day. I don't recollect what time O'Connell left Smith, but he was not at work at this time as an apprentice, and had not been for two years. I can't say as I had seen O'Connell at Smith's for two years.' The defendant then attracted the attention of the judge to the fact that the last testimony of the plaintiff did not purport to cover the same time that Smith and O'Connell had testified to, and was thereby incompetent to con

tradict them or either of them ; but the judge overruled the objection, and made no allusion thereto in his charge to the jury."

The defendant submitted nine prayers for instructions, the last four of which were as follows :

"6. That the burden of proof under the pleadings is upon the plaintiff throughout, to prove to the jury, by a fair preponderance of evidence, that the defendant illegally assaulted the plaintiff; and that, if the plaintiff does not support the burden of proof, or leaves it doubtful in the jury's minds, taking into view the testimony offered by the defendant as well as the plaintiff, whether or not the defendant did illegally assault the plaintiff, then he cannot recover, and the verdict must be for the defendant.

"7. That under the pleadings the defendant does not concede that he assaulted the plaintiff, nor does the defendant take upon himself at all to justify an assault ; and that, if the defendant, in said shop, placed his hands on the plaintiff to remove him from said shop, after having notified and ordered the plaintiff to leave the shop, the defendant then and there having the control of the shop, and the plaintiff not going out of the shop, but remaining therein, then such placing of hands upon the plaintiff, or force used, in his removal from the shop, if no more force was used than was necessary and proper under the circumstances, is not an assault.

"8. That the mere fact that the defendant did take hold of the person of the plaintiff, and attempt to remove him from the shop, does not thereby shift the burden of proof from the plaintiff to the defendant ; that, in order for the plaintiff to recover, he must show, by a proper preponderance of evidence, taking into view that offered on the part of the defendant as well as on the part of the plaintiff, that what he calls an assault was in fact illegal and unjustifiable, and if, in all the evidence, the plaintiff should leave it doubtful whether what he alleges as an assault was or not illegal or unjustifiable, he cannot recover ; that it is the duty of the plaintiff, on all the evidence, affirmatively to make it appear that the defendant illegally and unjustifiably assaulted the plaintiff.

"9. That the burden of proof is upon the plaintiff to show that the defendant had no right under the law to do that which the plaintiff claims was an assault; and that, if it should appear that the defendant, under the circumstances, did have a legal right to do that which the plaintiff calls an assault, or if the plaintiff on all the proof leaves it doubtful in the jury's mind whether or not the defendant had a right to do that which the plaintiff calls an assault, then the motive of the defendant or his manner or language, however coarse, abusive, profane or vulgar, is wholly immaterial in this action at law."

"The plaintiff, among other things, contended and argued to the jury, that the object and purpose of the defendant, in laying hands on the plaintiff, was to punish and injure him, and not to eject him from the shop after notice given him to leave.

"The judge, among other things, instructed the jury that a violent laying of hands upon another against his will constituted an assault and battery, unless it was justifiable; and that, if the jury should find such a laying on of hands in this case, they should find a verdict for the plaintiff for some damages, unless the defendant showed a justification; and that the burden was upon the defendant to show such justification; and that, if the jury found such an assault, and were in doubt on the whole whether the act was justifiable, they should find for the plaintiff.

"The judge instructed the jury as requested by the defendant as to the use of insulting language, and as to all other matters except as in the ninth prayer and those prayers concerning the burden of proof; and as to the ninth prayer instructed them that, if the purpose and intent of the defendant in the acts done by him were to punish the plaintiff, and not to eject him from the shop, then the acts would constitute an assault, although they might find that the plaintiff had been ordered to quit the shop, and had had a reasonable time for so doing. The seventh prayer, except as to that part of it which concerns the effect of the pleadings, was given."

G. A. Somerby, for the defendant. 1. What the defendant said to the women, before any conversation between the plain-

tiff and the defendant, was incompetent. Its purpose and effect were to prejudice the jury against the defendant.

2. Whether the plaintiff owed the defendant, or the defendant owed the plaintiff, was wholly immaterial and incompetent, and the evidence admitted on the subject was adapted to mislead the jury from the true issue and to prejudice the defendant.

3. The rule is, that bias may be shown on the part of a witness, but he should first be asked if he has bias, and to what extent. If he concedes bias, then it is wholly collateral to inquire into the circumstances showing it. If he denies having it, or the extent of it, perhaps he may be asked as to acts or declarations showing it, and, if material, be contradicted as to them. If the rule were otherwise, the parties would be compelled to try each circumstance showing bias of each particular witness, with the same rigor as the main issue of the action. The object in the present case was, not to show bias, but to prejudice the jury by the circumstances claimed to show it.

4. The admission of what took place between the plaintiff and Smith in November 1867 was incompetent. The plaintiff, in his examination in chief, had testified that he never had any difficulty before the alleged assault; and that it produced an affection of the spermatic cord. On cross-examination he said that he had never been injured, and never complained of being injured, before the alleged assault. He was asked if he did not say, in presence of Smith and O'Connell, that he hurt himself in attempting to break a colt in October 1864. This he denied. To contradict him Smith and O'Connell were called, and swore that in October 1864, in their presence, he said that he tried to break the colt yesterday and hurt himself and brought on an old trouble. The plaintiff was not re-examined on this point. But, against objection, after this, he was allowed to be called as a witness in his own behalf and repeat his former denial, stated on cross-examination; and also to testify to another conversation, which he had with Smith at a different time and when O'Connell was not present.

5. The pleadings were under the practice act, Gen. Sts. c. 129. It was an action of tort. The plaintiff was compelled to state

the facts he relied on to maintain his action; and on the other hand the defendant was compelled, in addition to answering the plaintiff's allegations, to set forth any substantive fact intended to be relied on in avoidance of the action. The defendant denied every allegation of plaintiff as fully as he had stated it; and set forth as a fact what he himself did. If what he set forth does not constitute an assault, then he had not admitted any assault, under the pleadings, and it is wholly immaterial to consider what the position of the parties would have been before the adoption of the practice act. Suppose that, before the practice act, in order to justify, as it was called, the defendant had to admit that he had assaulted the plaintiff; Gould Pl. c. 6, § 111; it does not follow that under these pleadings such would be the case. For the dispute between the parties was whether there was an assault at all; not that the defendant conceded an assault and sought to excuse or justify it. The only object of the practice act, in compelling a defendant to set forth the facts he relies on in defence, is, to give the plaintiff notice of the true issue, and have the parties come prepared to try the same questions of fact. In the present case, the plaintiff was compelled to begin with the burden of proving an assault; this burden was not removed by the defendant's answer, which denied any assault and stated no facts which show an assault. An assault and battery is an unlawful and unjustifiable use of force and violence, however slight, upon the person of another. A justifiable use is not an assault and battery. *Commonwealth v. Clark*, 2 Met. 23. *Commonwealth v. McKie*, 1 Gray, 63, 64. The rulings given in the present case assume that an assault was made, and from them the jury may have thought that the defendant had to excuse or justify an assault which he had persistently denied. The judge should have defined carefully what was in law an assault, and have said that what constitutes an assault under one state of facts may not constitute an assault under other and different circumstances, and that, as the plaintiff relied upon an assault, within the legal definition of that word, he must prove it notwithstanding the evidence which had been put in by the defendant.

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S. B. Ives, Jr., for the plaintiff, to the points of the defendant's argument relating to the admission of evidence on the main issue, cited *Fisher v. Plimpton*, 97 Mass. 441; to the point relating to showing bias of the defendant as a witness, *Day v. Stickney*, 14 Allen, 255, and *McGuire v. McDonald*, 99 Mass. 49; and to the point relating to the burden of proof, *Gray v. Gardner*, 17 Mass. 188; *Davis v. Jenney*, 1 Met. 221; 1 Chit. Pl. (6th ed.) 500, 501; 2 Greenl. Ev. §§ 95, 98; *Phelps v. Hartwell*, 1 Mass. 71; *Loring v. Steineman*, 1 Met. 204, 211; *Crowninshield v. Crowninshield*, 2 Gray, 524, 531; *Commonwealth v. McKie*, 1 Gray, 62.

CHAPMAN, C. J. Several exceptions were taken at the trial which were not insisted on at the argument. They must be regarded as waived.

The assault and battery alleged took place in the defendant's shop, where the plaintiff seems to have gone to adjust a money account with the defendant. When the plaintiff entered the shop, the defendant was making some offensive remarks, which the jury might find applicable to the plaintiff, and soon afterwards made the assault. It was proper to prove the remarks as part of the *res gestæ*; also the amount of the bill which was part of the account; and the amount of money afterwards paid on the account by the defendant. These facts were pertinent, though not very material.

As the defendant testified in the case, it was proper to prove any insulting remarks made, or questions put, by him to the plaintiff at a subsequent time, in regard to the injury inflicted by the defendant; for they tended to show his state of mind towards the plaintiff. *Day v. Stickney*, 14 Allen, 255.

The plaintiff's testimony as to what he said to Benjamin Smith in November 1867, several months after the assault and battery, was competent, because it tended to explain an apparent contradiction. The plaintiff had testified on cross-examination, that he never, before the assault and battery, received an injury similar to that which he received then. He was inquired of as to what he said to Smith on the subject, in 1864, when he went to get a colt shod, and denied having made certain remarks

at that time. Smith and O'Connell had been called to contradict him ; and had testified to certain conversations, stating the times when they took place. The plaintiff's testimony in reply tended to show that they were mistaken as to the time, and had no bearing on the case in any other respect. For this purpose it was admissible.

But the exception principally relied upon relates to the burden of proof. The court ruled, in substance, that the burden was on the plaintiff to prove the assault and battery, but was on the defendant to prove any facts relied on by him in justification. The defendant's position is, substantially, that the plaintiff must prove that the act was unjustifiable. We understand the rule to have been established the other way from the earliest times. In the pleadings the plaintiff alleged the violent acts, and upon proof of them was entitled to maintain his action ; and the defendant in his plea must allege such facts as he relied upon in justification, and in order to defeat the action he must prove the truth of his allegations. The rule is not changed by our present system of pleadings. *Exceptions overruled*

COMMONWEALTH vs. EDWARD O'BALDWIN & another.

On the trial of an indictment charging the defendant with fighting with Joseph Wormald, the defendant contended that there was no evidence as to the name of the person with whom he fought otherwise than by testimony describing it as "Wormald," except that one witness had testified that the defendant spoke of the person as "Jo;" the judge's minutes of the testimony contained no memorandum of any further evidence of it, and his memory corresponded with his minutes; but the attorney for the Commonwealth contended that some of the Commonwealth's witnesses had described the person as Joseph Wormald. The judge refused the defendant's request for a ruling that evidence that a man named "Wormald" or "Jo" fought with the defendant was insufficient to warrant a conviction, but instructed them that they must be satisfied on the whole evidence that the Wormald with whom the fight occurred was Joseph Wormald; and also declined to direct the jury "to find specially upon the proof as to the Christian name of Wormald." *Held*, that the defendant had no ground of exception.

INDICTMENT for prizefighting, charging that Edward O'Baldwin and Joseph Wormald, "by and in pursuance of a previous

appointment and arrangement made by and between them to meet and engage in a fight with each other, did meet and engage in a fight with each other, against the peace," &c.

At the trial of O'Baldwin, in the superior court, before *Brigham*, C. J., the jury returned a verdict of guilty; and the judge allowed a bill of exceptions of which the following is the material part: "In the argument, the defendant's counsel contended that there had been no evidence regarding Joseph Wormald; that all the witnesses but one, in speaking of the person with whom O'Baldwin fought, spoke of him as 'Wormald' or 'Mr. Wormald'; that the one witness testified that O'Baldwin, on being interrogated how he received a particular injury, answered that 'Jo' gave it to him; and that the foregoing was all the testimony in the case upon the subject of Wormald's name. And the judge, upon request, referred to his minutes of the trial, and stated that they contained no other evidence, and that he had no recollection of any other evidence and should submit that fact to the memory of the jury. The district attorney contended that there was other evidence, and that one or more of the witnesses for the Commonwealth had spoken of Wormald as Joseph Wormald; and thereupon the question as to such evidence was submitted to the jury upon the claim of the defendant's counsel, and of the district attorney. No evidence was offered at the trial on the part of the defendant. The defendant's counsel then asked the judge to instruct the jury that it was incumbent upon the Commonwealth to prove that the arrangement and appointment and the fight alleged in the indictment were made and entered into between Edward O'Baldwin and Joseph Wormald, and if the Commonwealth failed to prove that Joseph Wormald participated in the same the jury could not properly convict the defendant; and that evidence that a man called 'Wormald' or 'Jo' participated, without any other evidence of his Christian name, was insufficient, and the jury must acquit. The judge declined so to instruct the jury; and instructed them that they must be satisfied upon the whole evidence in the case that the Wormald proved to have participated in the fight was Joseph Wormald. The

judge was requested to direct the jury to find specially upon the proof as to the Christian name of Wormald; but he refused so to direct the jury. To which several rulings and refusals to rule the defendant excepted."

W. D. Northend, for the defendant. The charge of a fight with Joseph Wormald was material, and must be proved as laid. Any variance either in the Christian name or the surname would be fatal. *Commonwealth v. Wade*, 17 Pick. 395. *Commonwealth v. Pope*, 12 Cush. 272. On the claim of the defendant's counsel, the state of the minutes of the judge, and the judge's recollection, the defendant was entitled to have the jury instructed that they were not warranted in inferring that the "Wormald" referred to by some witnesses, and the "Jo" referred to by one witness, were one and the same person, or were Joseph Wormald. "Jo" might mean Josiah, Jonah, Joel, Job or Jonas, just as well as Joseph. And "Wormald" only might be any Wormald. There surely was room for a reasonable doubt.

C. Allen, Attorney General, for the Commonwealth.

BY THE COURT. The defendant has no ground of exception to the judge's instructions or refusals to instruct. Evidence that the person proved to have participated with the defendant was called "Wormald" or "Jo" was sufficient in law to warrant the jury in finding that his name was Joseph Wormald. The question of the amount and weight of the evidence on that point was rightly submitted to the jury. No question appears to have been made at the trial as to the degree to which the jury must be satisfied of the facts which the Commonwealth was bound to prove.

Exceptions overruled.

COMMONWEALTH vs. JOHN S. CHISHOLM.

An indictment on the St. of 1868, c. 141, for keeping intoxicating liquors for sale at a certain time and place, the defendant "not being then and there authorized by law to sell the same in any manner, and not having then and there any license, appointment or authority so to keep for sale or sell said liquors," sufficiently negatives that the keeping was within the provisos of § 1.

An indictment on the St. of 1868, c. 141, for keeping intoxicating liquors for sale, may charge such keeping with a *continuando*.

An indictment on the St. of 1868, c. 141, for selling intoxicating liquors at a certain time and place, the defendant "not having then and there any license, authority or appointment according to law, to make such sale," sufficiently negatives that the sale was within the provisos of § 1.

INDICTMENT on the St. of 1868, c. 141, with three counts; returned into the superior court at October term 1868. The first count charged that the defendant at Gloucester on June 15, 1868, "and on divers other days and times between that day and the day of the finding of this indictment," "unlawfully did keep for sale intoxicating liquors with intent then and there unlawfully to sell the same," he "not being then and there authorized by law to sell the same in any manner, and not having then and there any license, appointment or authority so to keep for sale or sell said liquors." The second and third counts charged him, each with an unlawful sale of intoxicating liquor to a person unknown, on June 25, 1868, and June 29, 1868, respectively, he "not having then and there any license, authority or appointment, according to law, to make such sale." The defendant, pleading not guilty, filed a motion to quash the indictment, "because neither count of said indictment sufficiently negatives any authority to do the acts charged nor shows that the same were unlawful; because neither count negatives that the acts charged came within the provisos and exceptions in the St. of 1868, c. 141, § 1; and because there is no sufficient allegation of time in the first count." This motion being overruled by *Morton, J.*, he pleaded guilty, and moved in arrest of judgment for the same reasons; which motion also was overruled, and he alleged exceptions.

Commonwealth v. Carey.

W. D. Northend & S. B. Ives, Jr., for the defendant. 1. The indictment does not negative that the intoxicating liquors averred to have been sold or kept for sale by the defendant were not sold or kept for sale within the provisos of the St. of 1868, c. 141 § 1.* 2. The keeping for sale cannot be charged with a *continuando*.

C. Allen, Attorney General, for the Commonwealth.

BY THE COURT. The offence is sufficiently alleged in the indictment. *Exceptions overruled.*

COMMONWEALTH vs. WILLIAM H. CAREY.

On the trial of an indictment charging distinct offences in separate counts, it is the duty of the jury to pass upon each count separately, applying to it the evidence bearing on the question of the defendant's guilt of the offence therein charged.

If, on the trial of an indictment charging distinct offences in separate counts, the jury return a general verdict of guilty, and, in answer to an inquiry of the court, reply that they did not pass upon the counts separately, and the verdict is thereupon ordered to be affirmed and recorded, the defendant has good ground of exception, even if the case was submitted to the jury with suitable instructions as to the several counts.

INDICTMENT on the St. of 1868, c. 141, with three counts, the first charging the defendant with unlawfully exposing intoxicating liquors for sale, and the second and third respectively with making different unlawful sales of intoxicating liquors.

* "No person shall sell, or expose or keep for sale, intoxicating liquors, unless he is authorized to sell the same in the manner provided in this act: provided, that the maker of cider and native wines may sell the same not to be drunk on his premises; and provided also, that the importer of liquor of foreign production, imported under authority of the laws of the United States, may own, possess, keep or sell the same in the original casks or packages in which it was imported, and in quantities not less than the quantities in which the laws of the United States require such liquor to be imported; and provided further, that nothing herein contained shall apply to sales made by sheriffs, deputy sheriffs, coroners, constables, collectors of taxes, executors, administrators, guardians, assignees in insolvency or bankruptcy, or any other person required by law to sell personal property."

Trial in the superior court, before *Brigham*, C. J., who allowed a bill of exceptions of which the following is the material part:

"The jury returned a general verdict of guilty. Before the verdict was affirmed, the defendant's counsel suggested a doubt whether the jury intended to convict on all the counts. The judge then said to the jury, 'You mean guilty on each count?' The foreman said that the jury did not pass upon them separately. The defendant's counsel then requested the judge to ask the jury to consider the several counts, if they had not already done so; or to inquire of them what they really intended by their verdict. The judge replied that the jury had already been sufficiently instructed as to their duties in relation to the several counts, and had rendered a general verdict; and that he should say no more, and ask no more questions, unless the jury had some suggestions. No member of the jury said anything further; and the judge ordered the verdict to be affirmed and recorded, to which the defendant excepted. The judge gave instructions to the jury upon the several counts, which were not excepted to. The defendant filed a motion to set aside the verdict upon the above grounds, which motion was overruled. To all these rulings and refusals the defendant excepts."

W. D. Northend, (S. B. Ives, Jr., with him,) for the defendant.

C. Allen, Attorney General, for the Commonwealth.

MORRIS, J. It is well settled that several offences may be charged in separate counts of the same indictment, if they are of the same general character and subject to the same kind of punishment; and whether they shall be tried separately or together is a matter within the discretion of the presiding judge. But if they are tried together, the cardinal principles of the criminal law apply in the same manner as if each offence was charged in a separate indictment and tried separately. Each offence charged must be proved beyond reasonable doubt, by evidence legally applicable thereto. It necessarily follows that the jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offence therein charged. And if they fail to do so, their verdict cannot be sustained.

Proctor v. Wells.

In the case at bar, the jury returned a general verdict of guilty, but, before it was affirmed and recorded, their foreman stated, in answer to a question by the court, that they did not pass upon the counts separately. It was thus made to appear in a proper manner, that the jury, probably through misapprehension of the instructions given, had failed to perform the duty required of them, and that their verdict was unauthorized by law. It was undoubtedly a matter within the discretion of the presiding judge whether inquiry should be made of the jury as to the grounds or counts upon which they found their verdict; and if no inquiry had been made, the general verdict of guilty would apply to each count, upon the presumption that the jury had correctly understood and applied the instructions given them. But, the inquiry having been made, and having elicited the fact that the verdict had not been found in a manner authorized by law, it was erroneous in the court to order the verdict thus found to be affirmed and recorded.

Exceptions sustained.

MARY A. H. PROCTOR *vs.* BENJAMIN WELLS.

The right of taking clams from the flats under tide waters in any town in this Commonwealth is a public right, unless restricted by acts of the legislature or the town, or by prescription; and is not impaired by a grant of the flats from the legislature to the town, or from the town to individuals; nor by the St. of 1841, c. 64, for the protection of the shell fishery in Ipswich.

TORT for entering the plaintiff's close in Ipswich, digging clams thereon and carrying them away; submitted to the judgment of the court on facts agreed, of which the following is the material part:

The close on which the trespass was alleged to have been committed consisted of flats, adjoining the upland along Ipswich River and the seashore, granted by the colony to the commoners of Ipswich; 1 Mass. Col. Rec. 172; 2 Ib. 283; 4 Ib

part 2, 427; and in 1844 conveyed by the town of Ipswich for a valuable consideration to Daniel Dole, who died before the time of the alleged trespass and devised them to the plaintiff, who also claimed title to them under a deed of Francis J. Oliver, dated in 1834. They have never been inclosed in any manner, and are open to navigation when the tide is full.

Inhabitants of Ipswich have taken clams from these flats ever since the memory of man. The defendant was an inhabitant of Ipswich; and the alleged trespass consisted in his entering upon the flats between high and low water mark, and within one hundred rods of the upland, in a boat, and while the flats were covered with water, and, after waiting till the tide had ebbed, digging and carrying away five bushels of clams embedded in the soil and of natural growth.

The St. of 1841, c. 64, entitled "An act for the protection of the shell fishery in Ipswich," was also made a part of the agreed facts. If the facts would sustain the action, judgment was to be given for the plaintiff for nominal damages; otherwise for the defendant.

S. B. Ives, Jr., for the plaintiff.

C. A. Sayward, for the defendant.

GRAY, J. The law which governs this case is well settled by repeated and carefully considered decisions of this court. The right of fishing in the sea or rivers in any town in this Commonwealth, either for swimming fish or for shell fish, is a public right, which belongs to all the inhabitants of the town, unless restricted by acts of the legislature or of the town, inconsistent therewith, or by prescription; and a grant by the legislature to a town of the title in the bed of a river, or in flats covered by tide water, within its limits, does not convey by implication the right of fishing to the town as its own property; for the right of fishing, not being an incident to the right of property in the soil, but a public right to take the fish, which, whether moving in the water or imbedded in the mud covered by it, depend upon the water for their nourishment and existence, is unaffected by the question whether the title in the land under the water is in the Commonwealth, in the town, or in private persons. *Coolidge*

v. *Williams*, 4 Mass. 140. *Randolph v. Braintree*, Ib. 315. *Dill v. Wareham*, 7 Met. 438. *Weston v. Sampson*, 8 Cush. 347. *Lakeman v. Burnham*, 7 Gray, 437. *Commonwealth v. Bailey*, 13 Allen, 541. The St. of 1841, c. 64, imposing a penalty to the use of the town of Ipswich for the taking of clams by any person, without permission of the selectmen, from the flats owned by the town, contains no indication that the legislature intended or understood that the right of fishing for them was the property of the town or incident to the ownership of the flats. It follows that the deeds under which the plaintiff claims title to the flats in question, whether made before or since that statute, gave her no exclusive right to the shell fish therein as against other inhabitants of the town; and that, as she has offered no evidence of having acquired any such right by prescription, there must be

Judgment for the defendant

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
AT THE
NOVEMBER SESSION 1869, IN BOSTON.

PRESENT :

HON. REUBEN A. CHAPMAN,	CHIEF JUSTICE.
HON. HORACE GRAY, JR.,	} JUSTICES.
HON. JOHN WELLS,	
HON. JAMES D. COLT,	
HON. SETH AMES,	
HON. MARCUS MORTON,	

SUFFOLK COUNTY.

WILLIAM R. CLARK & another vs. LORENZO WILSON.

The holders of a bill of sale of a vessel, absolute on its face, though intended as a mortgage, may maintain an action for her conversion against a person claiming under a barratrous sale by the master; although on learning of the barratry they abandoned her to the insurers, and received payment from them as on a total loss.

TORT for conversion of the schooner *Lena*. At the trial in the superior court, before *Brigham*, C. J., it appeared that the schooner was built by Josiah French, and mortgaged by him to the plaintiffs; that afterwards French gave them a bill of sale of the vessel, absolute on its face, but intended as collateral security for advances by them; that this bill of sale was duly registered at the custom house; and that the vessel was then

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sent to sea by French, under the charge of a master who bartrously sold her to John Kennedy, who, in his turn, two days afterwards, sold her to the defendant.

The defendant offered evidence tending to show that the plaintiffs had insured the schooner; that, upon receiving information of her sale, they abandoned her, with the assent of French, to the underwriters; and that they afterwards recovered from the underwriters, as for a total loss (see 100 Mass. 509); but the judge excluded this evidence. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

H. W. Paine & R. M. Morse, Jr., for the defendant.

S. Bartlett & E. H. Abbot, for the plaintiffs.

GRAY, J. The jury have found the defendant guilty of a conversion of the vessel sued for, under instructions to which no exception was taken.

The previous bill of sale of the vessel from the owner to the plaintiffs, absolute in terms, and recorded according to the statutes of the United States, though intended by the parties as collateral security for advances on the ship, transferred the legal title to the plaintiffs, (if not already transferred by the earlier mortgage,) with the right of maintaining an action against a wrongdoer for the conversion of the property. *Woodruff v. Halsey*, 8 Pick. 333. *Coles v. Clark*, 3 Cush. 399. *Esson v. Tarbell*, 9 Cush. 407. *Pratt v. Harlow*, 16 Gray, 379.

The only question in the case, which requires much consideration, is, whether the abandonment by the plaintiffs to the underwriters, and recovery and payment of a total loss by the barratrous sale of the master, under which the defendant claimed title, transferred all the plaintiffs' rights to the insurers, so as to prevent this action from being afterwards brought in the plaintiffs' name against this defendant.

The case does not require us particularly to consider the rights of the mortgagee against the plaintiff, or of the insurance company against the mortgagee. It may be said generally, that, in the absence of express stipulations, a policy of insurance obtained by a mortgagee is collateral to and independent of the contract between him and his mortgagee. If a mortgagee of

real estate, without authority from or agreement with the mortgagor, obtains insurance against fire, the mortgagor cannot be charged with any part of the premiums paid, nor share in the amount recovered in case of loss. *White v. Brown*, 2 Cush. 412. *Fowley v. Palmer*, 5 Gray, 549. *Russell v. Southard*, 12 Ho. v 139, 157. *Dobson v. Land*, 8 Hare, 216; *S. C.* 4 De G. & Sm. 575. *Bellamy v. Brickenden*, 2 Johns. & Hem. 137. In the case of these plaintiffs against their underwriters, the same rule was declared to apply in marine insurance; and it was held that the mortgagor was not the owner of the vessel in such a sense as to prevent the plaintiffs from recovering, under a policy effected by them, for the barratry of a master appointed by the mortgagor. *Clark v. Neptune Insurance Co.* 100 Mass. 509. It is also established in this Commonwealth, that a mortgagee of real estate, who, independently of the mortgagor, insures his own interest, either by specific description or generally, is not bound, at law or equity, to assign his mortgage, or any part thereof, to the insurer, upon the payment of a loss. *King v. State Insurance Co.* 7 Cush. 1. *Foster v. Equitable Insurance Co.* 2 Gray, 216. *Suffolk Insurance Co. v. Boyden*, 9 Allen, 123. Whether, in the case of marine insurance, an abandonment by a mortgagor for a total loss would give the insurers any greater rights in the mortgaged property, or in the debt secured thereby, is not now before us. See *Trull v. Roxbury Insurance Co.* 3 Cush. 267, 268; *King v. State Insurance Co.* 7 Cush. 12; *Rice v. Cobb*, 9 Cush. 302; *Rice v. Brown*, *Id.* 308.

No question is here presented of the title of the insurers to the property itself; nor of their interest in a contract between the assured and another party, existing before and unaffected by the loss; but only of their right against a party previously liable for the very act which caused the loss for which the insurers have paid. Even in the case of fire insurance, payment of a loss by the insurers doubtless vests in them, at law as well as in equity, a corresponding right in any damages which may be recovered against other parties responsible for the loss, as, for example, by actions under statutes against the hundred for acts of rioters, or against the proprietors of a steamboat or railroad for

fire communicated from their engines. *Mason v. Sainsbury*, 3 Doug. 61. *London Assurance Co. v. Sainsbury*, 1b. 245. *Clark v. Blything*, 3 D. & R. 489; S. C. 2 B. & C. 254. *Quebec Assurance Co. v. St. Louis*, 7 Moore P. C. 286. *Hart v. Western Railroad Co.* 13 Met. 99. In marine insurance, a valid abandonment for a total loss has the like effect in this respect as payment of the loss, and vests in the underwriters, from the time of the loss, the interest of the assured in any right to be compensated for the loss by any other party. Familiar instances of the application of this principle are to be found in cases of the seizure of a vessel by a foreign government, whether the compensation is obtained under letters of marque and reprisal, or under the award of commissioners appointed by treaty; of the negligent injury of a vessel by collision; and of general average. *Randal v. Cockran*, 1 Ves. Sen. 98. *Blaauwpot v. Da Costa*, 1 Eden, 130. *Comegys v. Vasse*, 1 Pet. 193. *Mercantile Insurance Co. v. Corcoran*, 1 Gray, 75. *Yates v. Whyte*, 5 Scott, 640; S. C. 4 Bing. N. C. 282. *White v. Dobinson*, 14 Sim. 273. *North of England Insurance Association v. Armstrong*, Law Rep. 5 Q. B. 244. *Dickenson v. Jardine*, Law Rep. 3 C. P. 639. *Lord v. Neptune Insurance Co.* 10 Gray, 126.

It does not, however, follow that abandonment and payment for a total loss will defeat the right of the assured to sue in his own name, or will authorize the underwriters to sue in their name, in trover for a tort already committed. An action of trover is not brought to recover the property itself, but damages for its conversion. The right to bring it is a personal right of action, accruing to the owner at the time of the conversion. The measure of damages is the value of the property at that time, with interest thereon. A subsequent return of the property to the owner will not defeat the right of action, but only mitigate the damages so far as he has received the benefit of the property. *Vandrink v. Archer*, 1 Leon. 221, 223. *Murray v. Burling*, 10 Johns. 172. *Chamberlin v. Shaw* 18 Pick. 278. *Johnson v. Sumner*, 1 Met. 172. *Lucas v. Trumoull*, 15 Gray, 306. A transfer of personal property from a rightful owner out of possession will doubtless pass the title, and enable the as-

signee, upon demand and refusal, to sue a wrongful holder in trover, as for a new conversion. *Carpenter v. Hale*, 8 Gray, 157. *Tome v. Dubois*, 6 Wallace, 548. But it does not destroy the right of action for the previous tort, nor, if the property has meanwhile been diminished in value by the act of the wrongdoer or otherwise, lessen the measure of his liability; nor can it, consistently with the rules of the common law, transfer a personal right of action for a tort, to one who, at the time of its commission, was not the party injured, so as to enable him to sue for that tort in his own name. *Gardner v. Adams*, 12 Wend. 297. *Day v. Whitney*, 1 Pick. 503. *Crain v. Paine*, 4 Cush. 483. To hold such a right of action to have been transferred, by relation to the time of the commission of the tort, would be to keep in abeyance the question against whom the wrong had been committed, to make that question depend upon the validity and effect of subsequent transactions in which the wrongdoer had no part, and to give him opportunity to escape before it could be determined in whose name an action should be brought.

The technical rules of law are adhered to, and the rights of all parties interested are preserved, by allowing the underwriters to maintain an action against the wrongdoer, in the name of the assured, if already commenced; or to bring such an action, in the same name, if not already brought. In either case, the action cannot be released by the assured, and a judgment in it will protect the defendant from further liability. This view is supported by the general current of the authorities.

It was held by Lord Mansfield and Justices Willes, Ashhurst and Buller, that insurers of a house destroyed by rioters might, upon paying the amount of the loss, bring an action against the hundred in the name of the assured; and by the opinion of Lord Mansfield and Mr. Justice Buller, against that of their two associates, but unanimously confirmed in the exchequer chamber, that the insurers could not maintain such an action in their own name. *Mason v. Sainsbury*, 3 Doug. 61. *London Assurance Co. v. Sainsbury*, Ib. 245. The right of the owner of the property to maintain an action against the hundred, after he had been paid the full amount of his loss by the insurers, was again

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affirmed in *Clark v. Blything*, 3 D. & R. 489; S. C. 2 B. & C. 254. In *Hart v. Western Railroad Co.* 13 Met. 99, it was held by this court, that, upon payment by the insurers of a loss by fire communicated from the locomotive engines of a railroad corporation, the assured became a trustee for the insurers, and they might bring an action in his name against the railroad corporation, which he could not release. See also *Trask v. Hartford & New Haven Railroad Co.* 2 Allen, 331; *Miyor &c. of New York v. Stone*, 20 Wend. 139; *Rockingham Insurance Co. v. Bosher*, 39 Maine, 253; *Perrott v. Shearer*, 17 Mich. 48.

In the cases just cited from 3 Doug. and 13 Met., the right of a marine underwriter, in case of an abandonment, to maintain an action in the name of the assured against the parties liable for the loss, was recognized by Lord Mansfield and each of his associates, and by Chief Justice Shaw. Mr. Justice Buller peremptorily denied that an insurer could sue in his own name for the running down of the ship. 3 Doug. 251. And Lord Mansfield said: "There is no instance of an action in the name of an insurer, while numberless actions have been brought by owners of ships for damage done by other ships, where many of them must have been insured." Ib. 256. Mr. Justice Bayley, in 3 D. & R. 492, treated the law as settled that, in case of damage done to a ship, the owner might recover from the underwriters for his own benefit first, and afterwards sue the authors of the damage in his own name for the benefit of the underwriters. In *Yates v. Whyte*, 4 Bing. N. C. 282; S. C. 5 Scott, 640, the owner of a ship maintained an action in his own name against the owner of another ship, for the full amount of the damages occasioned by a collision, without deducting the amount paid to him by the underwriters; and Chief Justice Tindal said: "If the plaintiff cannot recover, the wrongdoer pays nothing, and takes all the benefit of a policy of insurance, without paying the premium;" or, according to the other report, "It would be monstrous to hold that the wrongdoer shall stand even in a better situation than the owner, by being permitted to take all the benefit of the policy, without having paid any premium." In *Dickenson v. Jardine*, Law Rep. 3 C. P. 644, Mr. Justice Willes

said that the underwriters, after paying in the first instance the amount claimed for general average, would then be entitled to use the name of the assured, and proceed against the other parties liable.

The only case cited for the defendant, which seems inconsistent with these authorities, is *Cammell v. Sewell*, 3 H. & N. 617. But that case, when carefully examined, is of little weight. It was an action of trover by the insurers of a cargo of deals. The ship was wrecked on the coast of Norway. The cargo was there sold by the master, by public auction, upon the recommendation of surveyors, but without necessity, and after the insurers had received notice of abandonment from the owner of the cargo, and, through an agent on the spot, had protested against the sale. After that sale, the insurers, who had at first refused to accept the abandonment, paid as for a total loss, and brought a suit to set aside the sale in a Norwegian court, which confirmed the sale. After the payment of the loss, the purchaser at that sale sent the cargo to the defendants at London, upon whom the plaintiffs on its arrival served a notice to deliver it up to them; notwithstanding which, it was sold by auction by the defendants for a much higher price than it had brought in Norway; and the damages sought to be recovered by the underwriters were the amount of the net proceeds of the last sale. Baron Martin, in delivering the judgment of the court of exchequer, said that, "upon the acceptance of the abandonment, its operation was retrospective, and the title of the plaintiffs to the deals had relation back to the time of the alleged loss;" (citing 2 Arnould on Insurance, 1178, and *Robinson v. United Assurance Co.* 1 Johns. 592;) "although it seems the point has never been directly decided in England;" and that "the plaintiffs therefore are the proper parties to maintain this action." 3 H. & N. 614. The materiality or significance of the first part of this statement is not easily appreciated. The conversion for which the plaintiffs sued was not the sale in Norway, but the sale in London, with notice of their claim, after they had accepted the abandonment and paid as for a total loss, and thus, according to a decision of the house of lords nearly ten years before,

clearly acquired the title in the cargo, and the right to sue any one who, without better title, withheld it from them. *Stewart v. Greenock Insurance Co.* 2 H. L. Cas. 159; S. C. 1 Macq. 328. See also *Lord v. Neptune Insurance Co.* 10 Gray, 121 & seq. Although the plaintiffs' counsel said that it would be urged that the action could not be maintained in the name of the underwriters, no such objection appears by the report to have been made or argued for the defendants, and the opinion of the court upon this point speaks of the argument for the plaintiffs only. If the point arose in the case, and was argued by counsel, it was clearly not necessary to the decision; for that was in favor of the defendants, upon the ground that the judgment of the Norwegian court was conclusive, in the nature of a judgment *in rem*. The judgment of the court of exchequer was affirmed in the exchequer chamber, without passing upon either of these points, upon still another ground, that, by the law of Norway, the master's sale, though unauthorized, passed a good title to a *bona fide* purchaser. *Cammell v. Sewell*, 5 H. & N. 728. And the case of *Robinson v. United Insurance Co.* 1 Johns. 592; S. C. 2 Caines, 280; cited by the learned baron, was trover brought by the underwriters, not against a third person, but against the assured himself, for goods which had passed by the abandonment, and which he had refused to give up.

The other cases cited for the defendant do not touch the question of the right of insurers to maintain an action of tort in their own name at common law to recover damages, the right to which had accrued to the assured before the abandonment. *The Sarah Ann*, 2 Sumner, 206, was upon a libel *in rem* in admiralty, brought by the insurers after abandonment and payment of the loss and an express assignment by the assured of all their rights to the insurers. *Rogers v. Hosack*, 18 Wend. 319, was a bill in equity for the distribution of a fund in the hands of an executor, arising out of the collection of a claim against a foreign government for the destruction of the property insured. The cases of *Quebec Assurance Co. v. St. Louis*, 7 Moore P. C. 286, *Mellon v. Bucks*, 17 Martin, 371, and *Hooper v. Whitney*, 19 Louisiana, 267, were decided under the rules of the

Donnell v. The Starlight.

French or civil law, prevailing in Canada and Louisiana. The remaining cases cited * related to rights as between underwriters and assured, in suits between them, to ship, goods or freight.

The result is, that, allowing to the abandonment made by the plaintiffs, and the recovery and payment of a total loss, the full effect, for which the defendant contends, of an abandonment by an absolute owner and payment of a total loss to him, they did not defeat the right to bring an action at law in the name of the plaintiffs for the tort previously committed against them. The question whether the damages recovered will belong to them or to the insurers is a question in which the defendant has no interest, and which is not now in issue.

Exceptions overruled.

WILLIAM E. DONNELL & others vs. THE STARLIGHT.

The courts of the Commonwealth have jurisdiction to enforce a lien, under the Gen. Sts. c. 151, for repairs done to a vessel lying in a port of the Commonwealth, if the general owner, who has the exclusive possession and control of her, resides in such port, although she has been registered in the port of another state in the name, as owner, of a person there residing, to whom the builder's certificate has been made, but whose real interest in her is that of mortgagee.

The order of notice on a petition under the Gen. Sts. c. 151, to enforce a lien on a vessel, may be made returnable at the same term of the court at which the petition has been filed.

The order of notice on a petition to the superior court, under the Gen. Sts. c. 151, to enforce a lien on a vessel, may be issued after the attachment at any time before the hearing; and it is within the discretion of the court to allow it to be served on respondents out of the state by handing to them attested copies of the petition and order.

Labor and materials furnished in the alteration of a vessel to fit her for new uses are furnished in her "construction and repairs" within the meaning of the Gen. Sts. c. 151, § 12, giving materialmen a lien.

A mortgage on a vessel is postponed to the lien given to materialmen by the Gen. Sts. c. 151, § 12.

* *Houstman v. Thornton*, Holt N. P. 242. *Roux v. Salvador*, 3 Bing. N. C. 266. *Davidson v. Case*, 8 Price, 542. *Coolidge v. Gloucester Insurance Co.* 15 Mass. 346. *Chesapeake Insurance Co. v. Stark*, 6 Cranch, 268. *Columbian Insurance Co. v. Ashby*, 4 Pet. 139. *Mutual Safety Insurance Co. v. Cargo of the Brig George*, Olcott, 89. *Union Insurance Co. v. Burrell*, Anthon, 128. *Schieffelin v. New York Insurance Co.* 9 Johns. 26. *Evans v. Ingersol*, 15 Ohio State, 292.

PETITION to enforce a lien for labor and materials expended on the steamer *Starlight*. Trial at April term 1868 of the superior court, before *Dewey, J.*, who reported the case for the determination of this court, substantially as follows :

The *Starlight* was built in Maine in 1866, for Charles Spear, then and ever since a resident of Boston ; and on July 1 of that year was launched and given into his possession ; but, to secure liabilities incurred on behalf of Spear by Benjamin T. Manson and Edward K. Harding, both residents of Maine, the builder's certificate was made to them, and the steamer was registered in their names as owners at the port of Bath in Maine, with intent to be held by them as collateral security only. Spear ran the steamer on a river in Maine until September or October 1866, when he brought her, without any knowledge or consent on the part of Manson or Harding except such as may be implied from the relations of the parties to the steamer, to Boston ; and while there, in February, March and April 1867, without the knowledge of either Manson or Harding, ordered the labor and materials, for which a lien was claimed by the petitioners, to be expended on her, and had the exclusive possession and the control and direction of the steamer, as general owner, from the time she was launched till May 27, 1867, when Manson and Harding took possession of her as she was lying at the wharf in Boston, and kept possession of her there until she was attached on this petition in February 1868.

The petition was filed in the clerk's office of the superior court on February 17, 1868, and, on the same day, the clerk made out a writ directed to the sheriffs and their deputies, and commanding them to attach the steamer, with her tackle, apparel, and furniture, and to summon Spear, Manson and Harding to appear before the superior court on the third Monday of the ensuing March to answer unto the petition. On this writ the steamer was attached, and subsequently Spear and Manson were summoned, "by delivering to them an attested copy of this petition and order of court," to appear and answer. At the time of filing the petition the superior court was sitting for the January term, and it remained in session for that term till after

the return day of the writ. On July 2, 1868, Manson and Harding gave a bond to discharge the attachment.

When the case came on for trial in the superior court at October term 1868, the court ruled that the process to summon the respondents was defective, but granted leave to take out a new order of notice, ordering the petitioners to give notice to Spear, Manson and Harding to appear at January term of the superior court "by serving them with a true and attested copy of said petition with this order thereon" fourteen days at least before the first day of said term, "and said order is without prejudice to the former order and attachment." Spear, Manson and Harding were all out of the Commonwealth at the time, and the orders were served on them in other states by officers of those states authorized to serve process therein.

"The work done on the steamer" by the petitioners "consisted in enlarging or extending the promenade deck, taking off and replacing the hurricane deck, and sheathing inside, and other items, the whole or a considerable part of which was done in order to adapt the steamer to new uses and service."

The respondents Manson and Harding contended "that the court had no jurisdiction, because, this being a proceeding *in rem*, the attachment was illegal, the same being on a writ or process illegally issued, and made returnable at a time not authorized by law; and also because the subject matter of the petition was within the maritime jurisdiction of the courts of the United States, and the jurisdiction of said courts was exclusive on the facts; that this objection was not cured by the bond given to dissolve the attachment; that the matters sued for were not such as the statute provided a lien for, the same being alterations, and not repairs, construction, &c., as provided in the statute; that the original processes were illegally issued and served, and were made returnable at a time unauthorized by law; and, as no other attachment had been made than the one originally made, that the vessel was not in the custody of the law, being held neither by the attachment nor the bond, and there was nothing upon which to found any order or decree of court; that the service made of the order of notice, issued at

October term 1868, was illegal; and that, if all the proceedings had been regular and legal, the respondents' claim had priority over that of the petitioners.

"If any of these objections are regarded by the court as tenable, and fatal to the petitioners' right to maintain their suit, even with such amendments, if any, as might be asked for and allowed, judgment is to be rendered for the respondents, otherwise for the petitioners."

A. Churchill, for the petitioners.

H. G. Hutchins, for the respondents Manson and Harding.

MORTON, J. Several questions arise in this case. 1. The respondents Manson and Harding contend that the superior court has no jurisdiction of the case, because the subject matter of the petition is within the exclusive maritime jurisdiction of the courts of the United States. It is settled by the authorities, that the courts of a state have jurisdiction to enforce liens, created by its laws, for labor and materials furnished in constructing or repairing domestic vessels. *Gen. Sts. c. 151. Maguire v. Card*, 21 How. 248, 250. *The Belfast*, 7 Wallace, 624. *McMonagle v. Nolan*, 98 Mass. 320. *Foster v. The Richard Busted*, 100 Mass. 409. If the steamer *Starlight* then was in her home port, the lien of the plaintiffs can be enforced in the superior court. The steamer was registered at the port of Bath in the name of Manson and Harding as owners; but the facts show that their real interest in her was that of mortgagees. Spear was the mortgagor and general owner, and as such had the exclusive possession and control of her until after these liens had attached. The facts, that the builder's certificate was made to them, and that the ship was registered in their name, are not conclusive proof of ownership. In *Howard v. Odell*, 1 Allen, 85, and *Blanchard v. Fearing*, 4 Allen, 118, the defendants were allowed to defend against a claim for supplies furnished the ship, by showing that they were in fact mortgagees, and not owners, although they had an absolute bill of sale and the registry was in their names. Spear was the owner of the steamer; he resided in Boston; she was in Boston under his sole direction; and under these circumstances we are of opinion that the

residence of her owner determines the home port of the vessel, and that under the statutes the superior court has jurisdiction. *White's Bank v. Smith*, 7 Wallace, 646. *Weaver v. The S. G. Owens*, 1 Wallace, Jr. 359. *Hill v. The Golden Gate*, 1 Newberry, 308.

2. The respondents also contend that the superior court has no jurisdiction, because the attachment was illegal, being in a process illegally issued and made returnable at a time not authorized by law. The fifteenth section of chapter 151 of the General Statutes provides two modes in which proceedings to enforce a lien may be commenced: "The petition may be entered in court or filed in the clerk's office in vacation, or it may be inserted in a writ of original summons, with an order of attachment, and served, returned and entered as other civil actions." When the first mode is adopted, the same section provides that "at the time of entering or filing the petition a process of attachment against such ship or vessel, her tackle, apparel and furniture, shall issue," and the subsequent proceedings shall be "as prescribed in chapter 150 for enforcing liens on buildings and land, so far as the same are applicable." Section 14 of chapter 150 provides that "the court in which the petition is entered, shall order notice to be given to the owner of the building or structure, that he may appear and answer thereto at a certain day in the same term, or at the next term, by serving him with an attested copy of the petition, with the order of the court thereon, fourteen days at least before the time assigned for the hearing."

The petitioners in this case adopted the first mode above named of commencing their proceedings. They entered their petition in court during a term thereof, and took out a process of attachment, which was duly served by a seizure of the vessel. Thereupon the court acquired jurisdiction of the vessel and of the case. After the entry of the petition, the court may order notice to be given to the owner in the same order directing the attachment, as was done in this case; or may order such notice at any future time before the hearing upon the merits takes place, and such order may be returnable at a certain day in a

October term 1868, was illegal; and that, if all the proceedings had been regular and legal, the respondents' claim had priority over that of the petitioners.

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residence of her owner determines the home port of the vessel, and that under the statutes the superior court has jurisdiction. *White's Bank v. Smith*, 7 Wallace, 646. *Weaver v. The S. G. Owens*, 1 Wallace, Jr. 359. *Hill v. The Golden Gate*, 1 Newberry, 308.

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pending term, or at the next term. *Rockwood v. Walcott*, 3 Allen, 458. The fact, therefore, that the order issued in this case was made returnable at a day in the same term, and not at the next term, is not a ground of objection to it. The fallacy in the respondents' argument upon this point consists in assuming that the petition was inserted in a writ of original summons, which could only be made returnable at a regular term. But if the order of notice had been defective in all the particulars claimed by the respondents, it would be immaterial. It was not necessary, to give the court jurisdiction, that any order of notice to the owner should have been inserted in the process of attachment; if the petition was duly entered and the process of attachment duly issued and served, the jurisdiction attached, and would not be defeated by any insufficiency of the notice. The court has full power at any time before the hearing to order such notice to the owner as shall be deemed proper and effectual. Gen. Sts. c. 150, §§ 15, 16. In this case the superior court did, at October term 1868, order a new notice to the respondents, which was duly served upon them. This cured any defects in the original notice, and could not have the effect to oust the court of jurisdiction.

The objection that this new order was not legally served cannot prevail. The respondents being absent, the court had power to order such notice as under the circumstances of the case was considered most proper and effectual; the sufficiency of the notice was for the decision of the superior court, within its discretion, and is not open to exception. Gen. Sts. c. 150, § 15.

3. We have no doubt that the labor and materials, for which the petitioners claim their liens, were furnished in the "construction or repairs" of the steamer, within the meaning of the Gen. Sts. c. 151, § 12. *The Ferax*, 1 Sprague, 180.

4. One other question is raised by the report. The respondents claim that, being in law mortgagees, their mortgage has priority of the plaintiffs' lien. If these respondents can be considered as standing in the same position as parties having a conveyance in mortgage duly recorded, we are of opinion that their claim would not have preference of the lien. This point was decided

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in *The Granite State*, 1 Sprague, 277, in which it was held that a lien for supplies and repairs has preference of a prior mortgage, and such lien was enforced after the mortgagee had taken possession. We see no reason to doubt the correctness of this decision. The statute provides that the "lien shall be preferred to all others thereon except mariners' wages." Gen. Sts. c. 151, § 12. The labor and materials furnished increase the value of the mortgagee's security, and inure to his benefit. The manifest purpose of the statute is, to give to laborers and materialmen an interest in the vessel to the extent to which they have added to its value, which has precedence of all other liens and incumbrances except mariners' wages.

Judgment for the petitioners.

JOHN Q. A. CLIFTON & others vs. DWIGHT FOSTER & others

A mechanics' lien, under the Gen. Sts. c. 150, on a building, is not dissolved by the bankruptcy of the owner of the building, although the statement required by § 5 is not filed till after the commencement of the proceedings in bankruptcy; and the petition to enforce the lien may be entered in the superior court, and ordered to stand continued to await the result of those proceedings.

GRAY, J. The petitioners, under an agreement with McKay & Aldus, furnished lumber which was actually used in the erection of a building upon land, both owned by the latter; and had, by the Gen. Sts. c. 150, a lien thereon to secure the payment of the debt due to them for such materials. On the 21st of December 1868, within thirty days after they ceased to furnish the materials, they filed in the city clerk's office the certificate required by § 5 of that statute; and on the 16th of February 1869, within ninety days after they ceased to furnish the materials, they filed this petition to enforce their lien in the superior court for the county of Suffolk. On the 15th of December 1868, McKay & Aldus filed in the district court of the United States a petition for the benefit of the bankrupt act, and were adjudicated bankrupts and on the 21st of January 1869 the respondents were appointed by that court assignees of their estate.

On these facts, the respondents contend, 1st, that the petitioners' lien is dissolved; and 2d, that, if it has any validity as against them, it can only be enforced in the courts of the United States, and the state courts have no jurisdiction thereof.

The first objection was not strenuously urged in argument, and is clearly untenable; for the bankrupt act, while it provides for the collection and distribution of all the assets of the bankrupt and for vesting them in the assignee, recognizes and preserves all liens thereon. In § 1 it declares that the jurisdiction of the courts of the United States, sitting in bankruptcy, shall extend "to the ascertainment and liquidation of the liens and other specific claims" on the assets of the bankrupt. By § 11 the bankrupt is required to annex to his petition a statement of any existing lien or other security given for the payment of any debt, and an inventory of all his estate, with a statement of any incumbrance thereon. By § 14 the assignee has authority, under the direction of the court, to redeem or discharge any lien upon any property, real or personal, or to sell the property subject to the lien. And by § 20 a creditor who has a lien on real or personal property of the bankrupt, to secure the payment of a debt owing to him from the bankrupt, may be admitted to prove the balance of his debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee or by a sale in such manner as the court shall direct; or may release or convey his claim upon the property to the assignee and be admitted to prove his whole debt; and if the value of the property exceeds the sum for which it is held as security, the assignee may release to the creditor the bankrupt's right therein on receiving such excess, or may sell the property subject to the claim of the creditor thereon.

The second objection requires more careful consideration. Upon the institution of proceedings in bankruptcy and the appointment of an assignee, all the property of the bankrupt passes into the custody of the courts of the United States, and cannot, while such proceedings are pending, be taken out of their custody upon any subsequent suit in the state courts. Pending the bankruptcy proceedings, therefore, no order could be made on

this petition for the sale of the real estate to satisfy the lien of the petitioners. *Norton v. Boyd*, 3 How. 426. *Wiswall v. Sampson*, 14 How. 52. *Peale v. Phipps*, Ib. 368. *Taylor v. Carryl*, 20 How. 583. *Foster v. The Richard Busteed*, 100 Mass. 406, 411. It does not however follow that the petition must be dismissed.

The lien of a mechanic or materialman upon real estate is a statute lien, depending for its existence and continuance upon a strict compliance with the provisions of the statutes of the Commonwealth. *Hilliard v. Allen*, 4 Cush. 532. These statutes create a lien as soon as the labor is performed or the materials furnished and used; Gen. Sts. c. 150, §§ 1-4; therein differing from the statutes of New Jersey as construed by Judge Blatchford in *Dey's case*, 3 Bankr. Reg. 81. But they declare that it shall be dissolved unless the creditor shall file a certificate thereof in the city clerk's office within thirty days, and begin a suit to enforce it within ninety days, after he ceases to furnish the labor or materials; and specify the courts in which, and the form of proceeding by which, such suit may be commenced and prosecuted. Gen. Sts. c. 150, §§ 5, 7 & seq. The seasonable filing of such certificate and petition would seem to be necessary to keep the lien alive, whether it is ultimately to be made effectual in the state or in the federal courts; and cannot be deemed to encroach upon the authority of the latter. *In re Bininger*, 3 Bankr. Reg. 121. It is possible indeed that, after the institution of bankruptcy proceedings, a petition to the United States court in bankruptcy within the ninety days might be held by that court equivalent to the filing of a petition in the courts of the Commonwealth. But in the absence of any decision in the courts of the United States to that effect, we cannot safely assume that such would be the construction.

The cases in the United States courts for the southern district of New York, cited for the respondents, are quite different from this case. In *Vogel's case*, 2 Bankr. Reg. 138, and 3 Ib. 49, the sheriff who was ordered to deliver up goods of the bankrupt had taken them on a writ of replevin from a state court after the filing of the petition in bankruptcy and the surrender of the goods

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by the bankrupt to the register. In the case of *The Kerosene Oil Co.* 2 Bankr. Reg. 164, and 3 Ib. 31, in which those courts granted an injunction of a suit brought in the state courts to foreclose a mortgage of real estate after the commencement of bankruptcy proceedings, the validity of the mortgage was denied, and the foreclosure, if ordered, might vest the property in the mortgagee. It may also be remarked that the supreme court of the United States held in *Peck v. Jenness*, 7 How. 612, 624, that the courts of the United States had no authority, under the bankrupt act of 1841, to issue injunctions to the state courts; and has not yet passed upon the question whether any greater authority in this respect is conferred by the act of 1867. In the case of *The People's Mail Steamship Co.* 2 Bankr. Reg. 170, the district court of the United States, sitting in bankruptcy, stayed a suit in the same court sitting in admiralty, to enforce a lien upon a vessel, not dependent for its existence upon such a suit, and which could be as well ascertained and liquidated in bankruptcy as in admiralty.

Under the provisions of the bankrupt act, already cited, the courts of the United States, sitting in bankruptcy, may indeed authorize the assignee to redeem the property and discharge the lien; or they may order the entire property to be sold, and ascertain the amount of the debt secured by the lien, in which case that debt would be preferred in the distribution of the proceeds, and the purchaser of the estate would take it discharged of all incumbrances. *Houston v. City Bank*, 6 How. 486. *Fowler v. Hart*, 13 How. 373. *Wiswall v. Sampson*, 14 How. 52. *Pulliam v. Osborne*, 17 How. 471. *In re Barrow*, 1 Bankr. Reg. 25. *Foster v. Ames*, 2 Bankr. Reg. 147. But, on the other hand, those courts may in their discretion, without investigating the validity or the extent of the lien, allow the assignee to sell the property subject to the lien, and the bankrupt's estate to be finally settled, without any determination of the rights claimed under the lien, in which case the petitioner would retain those rights as against the purchaser of the property. *Wiswall v. Sampson*, 14 How. 67. *Briggs v. Stephens*, 7 Law Reporter, 281. *In re McClellan*, 1 Bankr. Reg. 91. *In re Bowie*, Ib. 185

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Foster v. Ames, 2 Bankr. Reg. 147, 148. If the courts of the United States, sitting in bankruptcy, should abstain from ascertaining the lien and providing for its satisfaction out of the property or the proceeds of a sale thereof, the only way of enforcing it would be under the present petition.

The rights of the petitioners will be preserved, and all interference with the custody or the jurisdiction of the national courts avoided, by ordering this petition to stand continued in the superior court to await the result of the action of the courts of the United States in the proceedings in bankruptcy.

Case to stand continued.

L. W. Osgood, for the petitioners.

D. Foster, for the respondents.

ASA JOSSELYN vs. THOMAS GLEASON & others.

A pilot offering his services to an inward bound vessel, which he has boarded, not from a pilot boat, but from a tug on which he is returning from piloting an outward bound vessel, is entitled, under the St. of 1862, c. 176, to pilotage fees, if he has received the consent of the master of the station boat, although such boat is not then in sight.

CONTRACT against the owners of the brig *Carira*, to recover pilotage fees. At the trial in the superior court, before *Wilkinson, J.*, it appeared that the plaintiff had piloted out of the port of Boston a vessel which was towed by a steam tug; that on the way back the master of the tug contracted with the master of the *Carira*, which was inward bound, to tow her up the harbor; that, soon after the tug had taken the *Carira* in tow, the plaintiff boarded her from the tug, made himself known as a pilot, offered his services, and claimed pilotage; that the master of the *Carira* refused to accept his services, and denied his right to pilotage; and that no station boat was then in sight.

The defendants contended that, under the provisions of the St. of 1862, c. 176, that "in case of a want of pilots at any time on board of the station boat to supply the demand of inward bound vessels, pilots taken on board from outward bound

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vessels may, with the consent of the master of the station boat, go on board of inward bound vessels ; but no pilot shall board an inward bound vessel, except from the boat to which he belongs, without such permission," the plaintiff must prove the consent of the master of the station boat ; and the judge so ruled. The defendants also requested the judge to instruct the jury "that, if the pilot boat failed of being on its assigned station on her weekly turn to be there, or during her assigned time to be there to supply pilots to inward bound vessels, the law relieves the master of an inward bound vessel from payment of compulsory pilotage to any other pilot, and left it optional for the master to employ some other pilot or not." The judge refused so to instruct the jury ; they returned a verdict for the plaintiff ; and the defendants alleged exceptions.

C. G. Thomas, for the defendants.

J. B. Richardson, for the plaintiff.

CHAPMAN, C. J. Under the instructions given them, the jury have found that the plaintiff had the consent of the master of the station boat to offer his services to the defendants' vessel. Under the regulations contained in the St. of 1862, c. 176, he had a right to make the offer ; and if the vessel refused to accept his services, she became liable to pay his fees. No question is made as to the offer having been properly made, if the plaintiff had a right to make it. The instruction prayed for was properly refused.

Exceptions overruled.

WASHINGTON INSURANCE COMPANY vs. JAMES T. WHITE.

A vessel insured for a year by a policy which provided that, if she was "on a passage at the end of the term," the risk should continue until arrival at "port of destination," sailed from the Chincha Islands on a voyage to Europe, and put into Callao on the mainland, one hundred and twenty miles from the islands, but which is the port of entry for the islands, and where vessels bound from the islands obtain the necessary clearance, water and crew for the further voyage. While there, the year expired. *Held*, that the vessel was not "on a passage" within the meaning of the policy ; and that the risk ended with the year.

CONTRACT to recover an additional premium on a policy of insurance issued by the plaintiffs to the defendant on the ship

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Louis Walsh, for one year from August 17, 1867, and containing this clause: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until twenty-four hours after arrival at port of destination, and no longer."

The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon the following agreed facts: "At the end of the year the Louis Walsh was at Callao, having sailed from the Chincha Islands the day previous. She had taken a cargo at the Chincha Islands, and was bound to the Canary Islands. The Chincha Islands are a group of three small islands situated in the Pacific Ocean, off the coast of Peru, distant about fourteen miles from the shore; are valuable for large deposits of guano; belong to Peru; but have no port or custom-house, and no clearance can be effected there. Vessels carrying guano from the Chinchas clear from Callao, and when bound to these islands are obliged to call at Callao, enter at the custom-house, and get a permit to load. Callao is on the mainland, and one hundred and twenty miles distant from the Chinchas. Vessels on their way to the Chinchas are usually detained at Callao two or three days, during which time the crew almost invariably desert, and it becomes necessary to ship a new crew at Callao to work the vessel to and from the Chincha Islands, and to load her while there. On the return to Callao, these men, usually natives, are discharged, and a crew of seamen shipped for the voyage. Vessels, after loading at the Chinchas, get their supply of water at Callao for the voyage, and are seldom detained there less than two days."

If, upon these facts, the court should be of opinion that the continuation clause in the policy attached, then judgment was to be rendered for the plaintiffs for \$315.56 and interest; otherwise, judgment for the defendant.

H. C. Hutchins & A. S. Wheeler, for the plaintiffs, besides cases cited in the opinion, referred to *Bond v. Nutt*, 2 Cowp. 601; *Wright v. Shiffner*, 2 Camp. 247; *Thellusson v. Fergusson*, 1 Doug. 361; *Robinson v. Manufacturers' Insurance Co.* 1 Met. 143; *Thompson v. Taylor*, 6 T. R. 478; *Muckenzie v. Shedden*, 2 Camp. 431; *Horncastle v. Swart*, 7 East, 400; *Riley v. Hartford Insurance Co.* 2 Conn. 368.

F. B. Dixon, for the defendant, besides cases cited in the opinion, referred to *American Insurance Co. v. Hutton*, 24 Wend. 330; *Cunard v. Hyde*, El., Bl. & El. 670, and 2 El. & El. 1; *Wilson v. Rankin*, Law Rep. 1 Q. B. 162; *Graham v. Barras*, 5 B. & Ad. 1011; *Pittegrew v. Pringle*, 3 B. & Ad. 514; *Thompson v. Gillespy*, 5 El. & Bl. 209; *Giles v. The Cynthia*, 1 Pet. Adm. 203; *Thompson v. Faussat*, Pet. C. C. 182; *Blanchard v. Bucknam*, 3 Greenl. 1.

GRAY, J. It is doubtless true, as argued by the learned counsel for the plaintiffs, that if this vessel had been insured by a voyage policy from Callao to the Chincha Islands and thence to another port, the going into Callao, after leaving the Chincha Islands, for a clearance and a supply of water and change of crew, would not have been a deviation, if it was in the usual course of trade upon such a voyage. *Parsons v. Manufacturers' Insurance Co.* 16 Gray, 463. *Harrower v. Hutchinson*, Law Rep. 4 Q. B. 523. But it by no means follows that while in the port of Callao for that purpose, she was on a passage, within the meaning of the continuation clause in a time policy not mentioning particular ports or voyages.

A nearer analogy is afforded by the case in which it was held by Lord Ellenborough and the whole court of king's bench that under a policy of insurance "at and from Portneuf to London, warranted to sail on or before" a certain day, a vessel which had left Portneuf and dropped down the St. Lawrence thirty miles (with a sufficient crew for river navigation, but not for the voyage to London) to Quebec, which was the nearest place at which she could obtain a clearance, had not sailed. *Ridsdale v. Newnham*, 4 Camp. 111; S. C. 3 M. & S. 456.

But the safest guides in the interpretation of this policy are to be found in the adjudications of this court upon time policies containing words which, if not exactly identical, may for the purposes of this case be deemed equivalent.

In *Wood v. New England Insurance Co.* 14 Mass. 31, the point adjudged was that a vessel, which at the expiration of the year was actually in a port into which she had been carried by overwhelming force while proceeding on her voyage on the high

seas, was "at sea" within the meaning of such a clause. The authority of the decision has been limited to that point, and the more general *dicta* of Chief Justice Parker in delivering the opinion disapproved, in the later cases. See *Gookin v. New England Insurance Co.* 12 Gray, 510-514.

In *Bowen v. Hope & Merchants' Insurance Cos.* 20 Pick. 275, and 12 Gray, 512 note, the vessel which was held to be "at sea," and "on a passage," had left her port of lading, fully prepared to proceed to her port of destination, and with a real intent to do so, and had dropped down the straits seven or eight miles, and had then been obliged by head winds to come to anchor, but without relinquishing the intention of proceeding on her voyage as soon as wind and weather would permit.

In *Cole v. Union Insurance Co.* 12 Gray, 501, 519, a vessel anchored in the open roadstead at the Chinch Islands, for the purpose of taking in cargo, was held not to be "at sea," within the meaning of the first part of the continuation clause. And in *Gookin v. New England Insurance Co.* Ib. 501, 506, a vessel was held to have arrived at a "port of destination," under the last part of the clause, upon her arrival at a similar open roadstead at Ypala for a like purpose.

In *Wales v. China Insurance Co.* 8 Allen, 380, it was held that a vessel which was chartered to one port, there to receive orders which should indicate to her within twenty-four hours whether to discharge there or go on to another port, and to be kept at the first port as long, and sent to such other port, as those from whom she was to take her orders might elect; and which did not, within twenty-four hours after giving notice of her arrival at the first port, receive orders to go to another port; had arrived at a port of destination, within the meaning of the last part of the continuation clause. There is no intimation in the opinion that the vessel could be considered as "at sea" or "on a passage," or as not having arrived at her port of destination, for any longer period than while the port which she entered might be considered as a port into which she had put for orders only.

Perry v. Provident Insurance Company.

The case at bar is less consistent with a continuation of the risk than either of these. At the expiration of the year, the vessel was not in an open roadstead, but in a safe harbor, into which she had put voluntarily, not for orders merely, but to obtain the necessary clearance, water and crew for her further voyage, with none of which had she been previously supplied. The necessary conclusion is that she was not "on a passage." The policy therefore ended with the year, and the insurers are not entitled to an additional premium.

Judgment for the defendant.

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MARY A. PERRY vs. PROVIDENT LIFE INSURANCE AND
INVESTMENT COMPANY.

Under a policy of insurance in the sum of \$2000 against loss of life from accidental injuries occasioning death within ninety days from the accident, and in the sum of \$10 a week for a period not exceeding twenty-six weeks against personal injury "for any single accident by which the assured shall sustain any personal injury which shall not be fatal," the weekly sum is due for injury by an accident which does not occasion death within ninety days, although it is finally fatal.

CONTRACT by the executrix of the will of Calvin Perry, on a policy of insurance whereby the defendants insured the plaintiff's testator "against loss of life or personal injury; against loss of life in the sum of \$2000, to be paid to Mary A. Perry and her legal representatives within ninety days after sufficient proof that the assured, at any time after the date hereof, and before the expiration of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy and the conditions hereto annexed, and such injuries shall occasion death within ninety days from the happening thereof, sufficient proof being furnished this company; against personal injury, in the sum of \$10 per week, for a period not exceeding altogether twenty-six weeks for any single accident within the meaning of this policy, and the conditions hereto annexed, by which the assured shall sustain any personal injury which shall not be fatal

but which shall absolutely and totally disable him from the prosecution of his usual employment, satisfactory proof being furnished this company." The action was brought to recover \$130, being \$10 a week for each of thirteen weeks during which the testator was absolutely and totally disabled from the prosecution of his usual employment.

The plaintiff's testator had his arm crushed by an accident on December 11, 1866, and continued to be absolutely and totally disabled from the prosecution of his usual employment till March 12, 1867, on which day he died from the results of the accident. The defendants admitted that the plaintiff was entitled to recover unless the fact that the accident was fatal constituted a defence; and the case was submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts, of which the material part was as above stated. The plaintiff had previously failed in an action against the defendants to recover \$2000 under the policy. See 99 Mass. 162.

L. A. Jones, for the plaintiff.

J. D. Ball, for the defendants.

CHAPMAN, C. J. The policy insures the plaintiff's testator against two classes of injuries, namely, those which occasion loss of life within ninety days, in the sum of \$2000; and those which shall not be fatal, in the sum of \$10 per week for a period not exceeding altogether twenty-six weeks. The two provisions are to be construed together; and the evident intent is, that, if an injury happens within the meaning of the policy, it is insured against as coming within one class or the other. If it were otherwise construed, an injury which should not prove fatal within ninety days would furnish no ground of action till it should be made to appear that it would never prove fatal. This would render the insurance nugatory in such cases.

Judgment for the plaintiff.

Badger v. American Popular Insurance Company.

ELIAS W. BADGER, administrator, vs. AMERICAN POPULAR LIFE INSURANCE COMPANY.

A policy of life insurance which provides that it shall not be in force until countersigned by "A. B., agent," is invalid till so countersigned, although A. B. is himself the assured and the policy has been received and retained by him.

CONTRACT by the administrator of the estate of Almarin F. Badger on a policy of insurance, alleged to have been made by the defendants on the life of the plaintiff's intestate. Trial in this court, before *Gray, J.*, who made a report of the case, of which the material part was in substance as follows:

The defendants sent to the plaintiff's intestate at Boston the policy declared on, which contained the following provision: "Nor shall this policy be in force until it is countersigned by A. F. Badger, agent at Boston." By "A. F. Badger, agent," was meant the intestate. On his death, this policy was found among his papers; but it had never been countersigned by him. The case was taken, by consent of parties, from the jury, and reserved for the determination of the full court; if, on the above facts, a jury would be warranted in finding a verdict for the plaintiff, then judgment to be rendered for him; otherwise, for the defendants.

H. W. Paine & H. F. French, for the plaintiff.

G. O. Shattuck & J. B. Thayer, for the defendants.

CHAPMAN, C. J. The defendants sent to Almarin F. Badger, the plaintiff's intestate, the policy in question, containing the following clause: "Nor shall this policy be in force until it is countersigned by A. F. Badger, agent at Boston." He received the policy and had it in his power to make it a valid contract by countersigning. But he did not do this, and consequently the policy never became in force. We need not inquire into the motives of the company for inserting this condition; nor into his motives for neglecting to comply with it. It is sufficient that the defendants had a right to insert it and to insist upon it. There is no evidence tending to show that it was waived.

Judgment for the defendants

THOMAS T. MERRILL, administrator, vs. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

A resident of another state, having insured his life with an insurance company chartered here, by a policy payable to himself, his representatives or assigns, and conditioned to be void if assigned without consent of the insurers, delivered it to a creditor here residing, as a pledge for the debt, and died, leaving the debt unpaid. An administrator of his estate was appointed in the state of his residence; and afterwards the creditor was appointed ancillary administrator here. The principal administrator then sued the insurers on the policy in the place of the domicile of the assured, and their agent duly accepted service of the summons in the suit, and of an injunction not to pay the policy to the creditor, under a statute requiring such acceptance of service. The creditor, as ancillary administrator, afterwards brought a suit on the policy against the insurers here, in which they admitted their liability and willingness to pay the policy to the person entitled. *Held*, that the pendency of the first suit was no bar to the maintenance of the second suit; the right of the plaintiff in the second suit, inasmuch as he represented the equitable interest and right of immediate possession and control of the pledgee as well as the legal capacity to sue, being superior to that of the principal administrator.

CONTRACT by the plaintiff as administrator of the estate of Howard M. Merrill, on a policy of insurance issued by the defendants upon the life of his intestate. Writ dated February 20, 1869. The answer admitted the liability and willingness of the defendants to pay the amount of the policy to the person properly entitled thereto, but alleged that the plaintiff's appointment as administrator was void, and that the defendants had been sued on the policy in Illinois; as appears more fully in the agreed facts upon which the case was submitted to the determination of the superior court, and, on appeal, of this court, and the material parts of which were as follows:

The defendants, a corporation under the laws of this Commonwealth, and having their principal place of business in Boston, issued a policy, dated August 20, 1866, for \$2500 on the life of Howard M. Merrill, who was a resident of Chicago in the state of Illinois, payable to him, his executors, administrators or assigns, sixty days after due notice and proof of his death, and containing a condition that "if this policy or any interest therein shall be assigned without the written consent of said company, then this policy shall be null and void," and no express provision as to the place of payment. This policy was taken out by the assured, under an agreement with the plaintiff, (who was his uncle and

resided in this Commonwealth,) that it should be sent to him to be held as security for a promissory note of the assured, to be given for a loan of \$700 to be made to the assured by the plaintiff. This agreement was a consideration and a condition precedent for the loan. The loan was made; and the note and policy were sent to the plaintiff. The note was never paid; and the note and policy have always remained in the plaintiff's hands. In a letter, inclosed in which the assured sent the policy to the plaintiff, he wrote, "It is payable to my heirs at my death, and so, in the event of my decease, all you have to do is to turn the policy over to my parents for collection, and present to them the note." After sending the policy to the plaintiff, the assured wrote to his parents, that he had his life insured; that the policy was in the hands of the plaintiff; and that they as his heirs could "draw the money and pay" the note for \$700, "which would leave you \$1800."

In October 1868 the assured died at Chicago, and on December 23, 1868, Charles B. Daggett of Chicago was appointed administrator of his estate, by the court of the state of Illinois having jurisdiction in the premises, and demanded payment of the policy in question from the defendants, which they refused. On January 18, 1869, the plaintiff was appointed administrator of the estate of the assured, by the probate court for this county, "and has been duly and completely qualified and entitled to administer upon said estate;" and the parents of the assured made demand on the defendants, and on the plaintiff as administrator, for the sum of \$1800 or such part as should remain after satisfying the note for \$700 above mentioned.

On February 2, 1869, Daggett filed a bill in equity in the superior court of Chicago against the defendants, to recover the amount of said policy; and said court issued a summons to the defendants to appear, and an injunction commanding them not to pay over the amount of said policy to the plaintiff in this action; and service of said summons and injunction were, on February 4, 1869, accepted by the general agent of the defendants for Illinois, duly authorized by them, and required by the statutes of that state, to accept service on their behalf. This

suit in equity was removed, upon the petition of the defendants, into the circuit court of the United States for the northern district of Illinois, and was still there pending.

"The sole ground of defence in this case, as claimed by the defendants, is, that the defendant corporation is not liable under the circumstances to pay the plaintiff, but claims that said defendant corporation is liable to pay the administrator in Illinois."

A. R. Brown & E. A. Alger, for the plaintiff.

D. Foster & G. W. Baldwin, for the defendants. The administrator appointed in Illinois can maintain an action on the policy against the defendants. *Lafayette Insurance Co. v. French*, 18 How. 404. *Shultz v. Pulver*, 3 Paige, 182; *S. C.* 11 Wend. 361. *Whyte v. Rose*, 3 Q. B. 493. Story Conf. Laws, § 515. This is not a mere question of *lis pendens*; for, whenever an administrator recovers judgment, the debt vests in him personally. *Talmage v. Chapel*, 16 Mass. 71. The prior action by either administrator is a bar to any subsequent process by the other. The exact point may not have been decided; but many cases are entirely indistinguishable from this in principle. *Whipple v. Robbins*, 97 Mass. 107. *Slocum v. Mayberry*, 2 Wheat. 1, 9. *Harris v. Dennie*, 3 Pet. 292. *Hagan v. Lucas*, 10 Pet. 400. *Peck v. Jenness*, 7 How. 612, 624. *Williams v. Benedict*, 8 How. 107. *Wiswall v. Sampson*, 14 How. 52. *Pulliam v. Osborne*, 17 How. 471. *Freeman v. Howe*, 24 How. 450. *Buck v. Colbath*, 3 Wallace, 334. *Orcutt v. Orms*, 3 Paige, 459. It is no part of the duty of an ancillary administrator to enforce a pledge or lien. This pledgee must resort to the courts of Illinois, because the fund on which he claims a lien has been brought within the grasp of their jurisdiction. There can be no valid lien on the policy, because, by its terms, it was to be void if assigned without the consent of the company, and the company had no notice of this assignment. *Stevens v. Warren*, 101 Mass. 564. The assignment was only an order on a part of the fund. *Palmer v. Merrill*, 6 Cush. 282. *Dana v. Third National Bank*, 13 Allen, 445.

WELLS, J. There can be no doubt that the appointment of the administrator in Massachusetts was legal and proper. A

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debt due to the intestate from any party having a domicile in this state, or any demand or right, requiring legal authority for its enforcement, is sufficient to give jurisdiction for such an appointment. Gen. Sts. c. 117, § 2. *Pinney v. McGregory*, 102 Mass. 186. *Picquet, appellant*, 5 Pick. 65. *Emery v. Hildreth*, 2 Gray, 228. Such administration is auxiliary only, when the domicile of the intestate was elsewhere at the time of his decease, if there is an administrator at the place of domicile. It extends to all assets found within the state; and, within the jurisdiction where granted, it is exclusive of all other authority. The administrator appointed at the place of domicile of the deceased is the principal administrator; and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction, without an ancillary appointment there. And, if another has already been appointed auxiliary administrator, the collection can be made, within that jurisdiction, only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicile of the debtor. *Hutchins v. State Bank*, 12 Met. 421. Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached.

The appointment by the insurance company of a general agent, with authority to accept, in behalf of the principal, service of legal process in Illinois, subjects the defendant to the suit brought by the principal administrator in the courts of that state. *Gillespie v. Commercial Insurance Co.* 12 Gray, 201. As that suit was first brought, and apparently embraces the whole cause of action, so that a judgment therein would merge all liabilities of the defendant upon the policy, we should be inclined to hold that it was exclusive of any other remedy, so that no action could be prosecuted in any other court upon the same contract at the same time, if the administrator in Illinois

had then had the legal title and possession of the policy, or the absolute right of possession. *Whipple v. Robbins*, 97 Mass. 107. *Newell v. Newton*, 10 Pick. 470. *Wallace v. McConnell*, 13 Pet. 136. *Embree v. Hanna*, 5 Johns. 101. *American Bank v. Rollins*, 99 Mass. 313.

It is said by Mr. Justice Dewey in *Coll v. Partridge*, 7 Met. 574, that "whether a plea in abatement that another action between the same parties, and for the same cause, is pending in another state, is good, has not been decided here." It is also said by Mr. Justice Foster in *American Bank v. Rollins*, that the doctrine of that case and of *Wallace v. McConnell*, *Embree v. Hanna*, and *Whipple v. Robbins*, "constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea."

The present case does not depend upon the ordinary rule in regard to *lis pendens*; nor is it within the exception to that rule, if the decisions, above referred to, do constitute an exception. The administrator in Illinois and the administrator in Massachusetts are not the same party. They are not even in privity with each other. *Low v. Bartlett*, 8 Allen, 259. *Ela v. Edwards*, 13 Allen, 48. The authority and right of each is independent and exclusive within the jurisdiction of his own appointment. If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it.

But, upon the facts stated, we are satisfied that the intestate had parted with the possession of the policy, upon a valuable and legal consideration, in his lifetime; so that, at his decease, he had no right of possession, and none passed to his administrator, except subject to such rights as had been conferred by the pledge and delivery of the policy by the intestate to his uncle Thomas T. Merrill. The agreed statement shows a distinct and

unequivocal pledge of the policy to secure the intestate's note for seven hundred dollars, given for money lent to him by Thomas T. Merrill upon the assurance and condition that it should be so secured. The policy was delivered in pursuance of that agreement, and remained in the possession of Thomas T. Merrill until he was appointed administrator. This was sufficient to constitute a good pledge of the instrument, giving to the pledgee an equitable interest in the proceeds of it. Angell on Insurance, §§ 327-340. *Palmer v. Merrill*, 6 Cush. 282. *Dunn v. Snell*, 15 Mass. 481. *Currier v. Howard*, 14 Gray, 511.

In that state of facts, if the principal administrator had himself received the ancillary appointment in Massachusetts, he could not have reclaimed the policy from the hands of Thomas T. Merrill without payment of the note in redemption of the pledge. It is unnecessary to consider now, whether, beyond this, the claim of the parents of the intestate would be protected against the general interests of the estate. It is sufficient that there was a right of possession in Thomas T. Merrill, superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the states, or otherwise; but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of Howard M. Merrill. That legal right to sue is held by the administrators of Howard M. Merrill, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The

assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrators to collect or release the demand in disregard of his interests. *Jones v. Witter*, 13 Mass. 304. *Eastman v. Wright*, 6 Pick. 316. *Grover v. Grover*, 24 Pick. 261. *Rockwood v. Brown*, 1 Gray, 261. *Bates v. Kempton*, 7 Gray, 382. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf and without recognition of the rights of the assignee. Within the same jurisdiction, the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between the federal and state courts, to the effect that a subject matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court. But that doctrine is explained and narrowly limited by Mr. Justice Miller in *Buck v. Colbath*, 3 Wallace, 334. It does not apply to this case, for reasons already indicated; because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that state, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee had an independent title, accompanied by possession of the policy; and by bill in equity in his own name, or by suit in the name of the administrator, in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecu-

tion of such a suit. Against either administrator, seeking to collect the amount of the policy by other proceedings or means, the insurance company have a sufficient defence. That defence stands not merely upon the jurisdiction and judgment of the court, but equally well upon the title of the pledgee, yielded to by the insurance company without suit.

We have thus far considered the question, purposely, without regard to the condition in the contract which renders it void in case "the policy or any interest therein shall be assigned without the written consent of said company." We do not see how this condition can affect the question of jurisdiction for the enforcement of the contract; or the relative rights of the several parties claiming to control the possession of the policy and its proceeds. The condition does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or to refuse its consent to such transfer; and, if made without its consent, to avoid its contract altogether. The effect of the condition is, to defeat the policy; not to defeat the transfer. It is because the transfer takes effect, that the policy becomes void, or voidable. By the contract of pledge, and delivery of the policy, the pledgee acquired an interest therein, which he is entitled to maintain against the assured and his legal representatives. He might have made that interest perfect against the insurance company also, by obtaining its consent to the pledge. The assured not having required the pledgee to obtain that consent as a condition of the transfer, his representatives cannot set it up as a breach of obligation which will defeat the pledge. It was no more the duty or for the interest of the pledgee, than of the pledgor, to obtain such consent. The assured therefore could only defeat the interests of the pledgee, by defeating the policy altogether. His obligations as pledgor forbid him to do this. Story on Bailments, § 354. *Eaton v. Mellus*, 7 Gray, 566. Besides, the condition in the policy is one to be availed of at the election of the insurance company, and not at the election of any other party to the contract. The company may waive the condition, if it sees fit to do so. This we think has been done in the most formal and effectual manner possible, by omitting to set it

up in the pleadings, and by submitting this case to the determination of the court upon an agreed statement, in which the facts of the transfer are fully disclosed, but not relied on at all to defeat the policy. On the contrary, it is expressly agreed that "the sole ground of defence in this case, as claimed by the defendant, is, that the defendant corporation is not liable under the circumstances to pay the plaintiff, but claims that said defendant corporation is liable to pay the administrator in Illinois." We understand from the argument, and the whole conduct of the defence, that there is no purpose or desire to defeat the policy or to avoid payment of the amount of the insurance, but only to protect the corporation from being made twice liable by means of the conflicting claims in the two jurisdictions. This course is certainly creditable to the defendant, and ought not to expose the corporation to the risk of a double loss. If the facts disclosed here are properly pleaded and proved in the courts of Illinois, or those of the United States to which the suit in Illinois has been removed, we cannot think that the defendant is in danger of being again held liable there.

Upon the agreed statement, being satisfied that the plaintiff, as administrator of the intestate's estate in Massachusetts, and representing also the equitable interest and possessory right of the pledgee of the policy, is entitled to its control and collection, in preference to the principal administrator in Illinois, we feel bound to render judgment accordingly for the amount due from the defendant by the terms of the policy.

Judgment for the plaintiff.

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ELIZABETH H. SHAW *vs.* BERKSHIRE LIFE INSURANCE COMPANY.

A certificate given by a life insurance company, since the passage of the St. of 1861, c. 186, acknowledging the receipt of an annual premium on a policy issued before said passage, does not make the policy subject to the provisions of that statute regarding nonforfeiture.

GRAY, J. The policy upon which this action is brought, having been made before the passage of the St. of 1861, c. 186, is not affected by that statute. The policy expressly provides that it shall cease and determine in case the assured shall not pay the agreed premiums on or before the first day of December annually. The certificate acknowledging the receipt of the premium due on the 1st of December 1863 was not a new policy of insurance, and did no more than continue the original policy in force for one year. By the failure to pay the next annual premium, the policy was avoided before the death of the assured. *Pitt v. Berkshire Insurance Co.* 100 Mass. 500.

Judgment for the defendants.

J. O. Teele, for the plaintiff.

E. Merwin, for the defendants.

COMMONWEALTH *vs.* EASTERN RAILROAD COMPANY.

GEORGE W. KEENE & others *vs.* SAME.

A statute requiring a railroad corporation, whose charter, under the Rev. Sts. c. 44, § 22, (Gen. Sts. c. 68, § 41,) is subject to amendment, alteration or repeal at the pleasure of the legislature, to erect a station-house at a place on its road and cause trains to stop there, is not in violation of the Constitution of the United States, as impairing the obligation of a contract; and may require the station-house to be reasonably commodious is the judgment of commissioners to be appointed by this court.

THE FIRST CASE was an action of tort on the St. of 1868, 89, which was passed March 27 of that year, and is printed

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in the margin,* against a railroad company incorporated by the St. of 1836, c. 232, to recover \$400 for the delay of the defendants for two months to establish a station at Knight's Crossing in Newbury. Writ dated September 16, 1868. The answer alleged that the St. of 1868, c. 89, was unconstitutional. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon the pleadings, and these facts agreed :

" It is agreed that, since the passage of the St. of 1868, c. 89, the defendants did not, prior to the date of this writ, take any steps by way of compliance with the provisions of said act; that they did not erect any station-house at the place named in said act, and have never caused any trains to stop at said place; and that they have never advertised or in any way recognized Knight's Crossing as a station or place for the stopping of trains, whether signalled or otherwise. It is further agreed that the plaintiffs have no evidence that any person ever offered himself as a passenger at said station, or that any freight was ever offered there for carriage; but it is agreed also that the defendants have never made any provisions for receiving passengers or freight there."

J. C. Davis, Assistant Attorney General, for the Commonwealth, cited *Roxbury v. Boston & Providence Railroad Co.* 6

* " SECTION 1. The Eastern Railroad Company is hereby required to establish and maintain, on the line of its railroad at Knight's Crossing, so called, in the town of Newbury, a flag station; and to erect at said place a station-house reasonably commodious for the use of passengers and the accommodation of freight, at which at least two trains each way shall stop each day, upon the proper signals being made; and said company is hereby authorized to take such land as shall be necessary for the erection of such station-house, and for approaches thereto, under the provisions of the sixty-third chapter of the General Statutes.

" SECTION 2. Said station-house shall be ready for the accommodation of passengers and freight by the first day of July next, and said Eastern Railroad Company shall forfeit and pay the sum of two hundred dollars for each month's delay in the establishment of said station after said first day of July, to be recovered to the use of the Commonwealth.

" SECTION 3. This act shall take effect upon its passage."

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Cush. 424; *Massachusetts General Hospital v. State Assurance Co.* 4 Gray, 227, 234; *Bangor, Oldtown & Milford Railroad v. Smith*, 47 Maine, 34, 49; *Suydam v. Moore*, 8 Barb. 358; 1 Am. Law Rev. 451.

B. R. Curtis & E. Merwin, for the defendants, cited *Oliver v. Washington Mills*, 11 Allen, 268; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Old Colony & Fall River Railroad Co. v. County of Plymouth*, 14 Gray, 155; *Roxbury v. Boston & Providence Railroad Co.* 6 Cush. 424; *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.* 4 Allen, 198; *Commonwealth v. Essex Co.* 13 Gray, 239, 253; *Central Bridge Co. v. Lowell*, 15 Gray, 106, 117; *Miller v. New York & Erie Railroad Co.* 21 Barb. 513; *Sage v. Dillard*, 15 B. Monr. 340; *State v. Noyes*, 47 Maine, 189.

CHAPMAN, C. J. By the St. of 1868, c. 89, the defendants are required to establish a flag station on their railroad at Knight's Crossing in Newbury, and erect there a station-house at which at least two trains each way and each day shall stop. The statute has not been complied with, and the defendants contend that it is unconstitutional. The defendants were chartered April 14, 1836, subject to the provision in the Revised Statutes that every act of incorporation passed since March 11, 1831, shall at all times be subject to amendment, alteration or repeal at the pleasure of the legislature,* and to the provisions of the 39th chapter of the Revised Statutes.

The defendants say that the act of 1868 violates the contract made with them by the Commonwealth; and requires them to expend their property for an assumed public use without compensation, contrary to the Constitutions of the United States and of this state.

That such a charter is a contract is not denied. It was so held in *Dartmouth College v. Woodward*, 4 Wheat. 518; and charters are habitually spoken of as contracts. In *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154, Lord Eldon said he regarded them all in the light of contracts made by

* Rev. Sts. c. 44, § 23; reenacted by Gen. Sts. c. 68, § 41.

the legislature on behalf of every person interested in anything to be done under them. In respect to charters for railroads, both the legislature and the corporation act as trustees of the public interest to some extent; for the corporation is intrusted with the exercise of the right of eminent domain, which is in its nature a public right, and is not to be sacrificed to uses that are exclusively private. The private interests of the stockholders are likely to have a controlling influence with the officers of the company, and it is important that the legislature should possess the power to prevent abuses to which this influence may lead. To some extent they would possess such a power without any clause in the charter reserving it. But to define their rights more clearly, the clause has been introduced reserving to them the power to alter, amend and repeal. This clause constitutes a part of the express contract between the legislature and the corporation. The question arising in the present case is, whether the act of 1868 above referred to is within the fair interpretation of this clause. In several cases this clause has been the subject of discussion. In *Roxbury v. Boston & Providence Railroad Co.* 6 Cush. 424, 432, it was said by the court that the clause authorized the legislature to make reasonable alterations and amendments, and it was held that the St. of 1842, c. 22, which authorized county commissioners, upon the application of the selectmen, &c., to alter or lower roads so as to prevent crossings at the same grade with a railroad, and to require the corporation to pay the expense with costs, was a valid act. It is true that it was a general act; but it required corporations to expend money for the benefit of the public and without any apparent equivalent to themselves, except to diminish the danger of collisions with travellers on the highway. In *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.* 4 Allen, 198, 205, the clause was applied to special statutes of 1856, c. 296, and 1857, c. 128, which required the Fitchburg, the Grand Junction and the Boston and Lowell Railroad Corporations to make expensive changes at their crossings, and to erect a bridge of specified dimensions and materials and construct a connecting track, and which directed how the

work should be superintended, and how the expense should be apportioned. The court held that under this clause the changes were rightly ordered, and that the legislature might prescribe by whom, in what manner and under whose supervision the work should be accomplished, and in what proportions according to their respective interests it should be paid for by the parties affected by it. As these are special acts directing expensive changes at a particular locality, the present case seems to be covered by that.

But independently of the authority of those cases, it seems to us that the clause was intended to provide for such a case as the present. If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive.

The objection that it takes the property of the company and appropriates it to the benefit of others is not valid. The depot which they are required to build is to be their own, like all the other depots, and their compensation for all their outlays is in their freights and fares. If the act required them to build a structure for the private benefit of others exclusively, and having no connection with the business of their road, the case might be within the principle stated in *Commonwealth v. Essex Co.* 13 Gray, 239, 253, as it would take away their property or rights which had become vested under a legitimate exercise of

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the power granted them. It was there held that an act requiring a water power company to erect a fish way in their dam was void. But the act upon which this action is brought is not subject to such an objection. It is a modification of the charter, within the fair interpretation of the power reserved to the legislature in the charter; and merely requires them to provide what the legislature regards as a reasonable accommodation to the public in a particular locality where they are using property which they have taken for that purpose.

Judgment for the Commonwealth.

THE SECOND CASE, which was argued at the same time, was a petition, filed January 16, 1869, by George W. Keene and more than twenty-five other legal voters of the city of Lynn, under the St. of 1868, c. 348, (which was passed June 11 of that year and is printed in the margin,*) alleging that the Eastern Railroad Company, though often requested to erect a new station-house in Lynn in compliance with § 1 of that statute, and to do the other acts thereby authorized or required, had wholly neglected and refused so to do, and praying therefore "that three

* "SECTION 1. The Eastern Railroad Company is hereby required to erect a new station-house, and to maintain the same on said railroad at the central station on Central Square in Lynn, reasonably commodious for the use of passengers, together with sufficient platforms, and containing a ticket-office and separate apartments for men and women; and said company is hereby authorized to take such land as may be necessary for the erection of said station-house, with proper approaches thereto, under the provisions of the statutes authorizing railroad corporations to take land for the construction of railroads.

"SECTION 2. In case of neglect or failure of said corporation to erect such station-house, as aforesaid, within six months from the passage of this act, the supreme judicial court may, on the application of any twenty-five legal voters in the city of Lynn, and notice to said corporation, appoint three commissioners at the expense of said corporation, who shall decide all questions relating thereto that may arise between the parties; and the said court or any judge thereof shall have full power and authority to make any decisions or pass any orders in the premises that may be suitable, to compel a specific performance of the requirements of this act.

"SECTION 3 This act shall take effect upon its passage."

commissioners may be appointed at the expense of said corporation, with instructions to hear the parties and to decide all questions relating to the erection of said station-house that may arise between the parties; and that such orders may be passed as may be suitable to compel a specific performance by said corporation of the requirements of said act; and for such other relief in the premises as may be just and proper."

Notice was given to the railroad corporation, and it appeared and made answer, admitting that it had not erected a new station-house in Lynn as directed to do by the statute, but denying that the statute was constitutional, and that the court had any jurisdiction or authority in the premises.

By agreement of the parties, the case was reserved by *Gray, J.*, for the determination of the full court, upon the petition and answer "with like effect as if the same were a bill and answer in equity."

P. W. Chandler & G. O. Shattuck, for the petitioners.

B. R. Curtis & E. Merwin, for the respondents, relied on the grounds taken in the preceding case; and also argued that the petition, so far as it asked for anything beyond the appointment of commissioners, was not authorized by the statute; that commissioners should not be appointed until it should first be determined, in a proceeding instituted by the attorney general in behalf of the public or the Commonwealth, whether the statute imposed any lawful duty upon the corporation the execution of which commissioners are needed to regulate or supervise; and that such commissioners as are contemplated in the statute would be judicial officers within the meaning of the Constitution of Massachusetts, part 2, c. 2, § 1, art. 9, and therefore could not be appointed by this court.

BY THE COURT. The statute is constitutional and valid, for the reasons stated in the opinion in *Commonwealth v. Eastern Railroad Company*.

Prayer of petition granted; commissioners to be appointed.

**MIDDLESEX RAILROAD COMPANY vs. THOMAS L. WAKEFIELD
& others.**

THE right of the Commonwealth to widen the draw in a bridge belonging to it over a navigable stream is not impaired by the fact that the widening will temporarily interrupt the use of the street railway of a corporation to which it has granted a right to run cars over the bridge.

BILL IN EQUITY against Thomas L. Wakefield, Edward S. Philbrick and William T. Davis, the commissioners authorized by the St. of 1869, c. 272, to widen the draws in Charles River Bridge and Warren Bridge, and against William A. Kenrick, to restrain them from widening said draws in such a manner as to prevent the plaintiffs from running their cars as usual over those bridges at all times. The case, as it appeared from the bill, answer and agreed facts, on which it was reserved by Ames, J., for the determination of the full court, was as follows:

The bridges are situated near each other, and both lead from Boston to Charlestown and are the property of the Commonwealth. The plaintiffs were incorporated by the St. of 1854, c. 434, for the purpose of constructing, maintaining and using a horse railway or railways leading from Boston to Charlestown over both bridges. By the second section of this statute it was provided that the tracks of the plaintiffs' railway upon the bridges should be located by three commissioners to be appointed by the governor, and that these commissioners should fix and determine 'the construction of suitable draws in said bridges, and the manner in which the same shall be managed and opened for the passage of vessels, and the attendance upon the same; and in case tolls shall be demanded for the passage of persons or vehicles over said bridges, the said commissioners shall have power to fix and determine the amount which shall be paid by said corporation for such use of such bridges respectively; and in case the same shall be assented to by the corporation, the same shall be binding upon the Commonwealth and said corporation, so long as said bridges respectively remain the property of the Commonwealth, unless the same shall be released, or some part thereof, by the legislature; and in case said corporation shall not assent

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to the rate of compensation as found by said commissioners, the supreme judicial court, upon petition of said commissioners or of said corporation, and upon notice to the other party, shall appoint three commissioners, who shall, upon due notice to the parties interested, proceed to determine and fix the rate of compensation or toll." The fourteenth section provided that the legislature might at any time "repeal this act, or limit, restrict or annul any powers herein granted."

The plaintiffs proceeded to construct their road; the commissioners appointed under the second section of the act located the track of the plaintiffs' railway on the centre of the bridges; and the plaintiffs accepted the doings of the commissioners, agreed with them upon the toll to be paid, and paid such toll so long as tolls were collected on the bridges. In March 1857 the plaintiffs began to run their cars over the bridges, on their road thus located and constructed, and have continued to do so ever since. The daily number of passages by their cars in the year beginning March 1857, during which toll was paid to the Commonwealth, was three hundred, and the daily number of passages at the time of filing this bill was eight hundred and twenty. The plaintiffs always kept the part of the bridges between their tracks in repair.

By the St. of 1869, c. 272, the defendants Wakefield, Philbrick and Davis, were authorized as commissioners to "cause to be made, in lieu of the existing draws in Charles River and Warren Bridges, a draw in each bridge with a clear opening of forty-four feet in width," and made a contract with the defendant Kenrick to make a new draw in Charles River Bridge. The plaintiffs knew of this contract, and were notified that the bridge would be taken up in some ten days. The interruption to travel over the bridge would continue for six weeks or two months. The damage to the plaintiffs was estimated by their president at \$400 a day so long as the interruption continued, unless, as they had authority to do, they laid a second track over Warren Bridge, on which the defendants did not intend to commence work until they had completed the draw on Charles River Bridge.

L. Child & L. M. Child, for the plaintiffs.

T. L. Wakefield, for the defendants.

AMES, J. The franchise conferred by charter, upon corporations of the class to which these plaintiffs belong, is of a carefully limited and qualified nature. They are authorized to use the streets in which their tracks may be laid, in a manner in some respects differing from the ordinary public use, and to some extent modifying the rights of other travellers over those streets. But the use of the streets is granted to them only in common with others. Their franchise does not give them the control of the highways. By the general legislation on the subject, as well as by the terms of the charters, that control is placed, or, more properly speaking, remains, in the municipal authorities of the places in which any part of the street railway is laid. Those municipal officers have the power to control and regulate in a great degree the manner in which the franchise of the railway corporation is to be exercised; and it is made their duty, by means of that control, to protect the rights and promote the convenience of the whole public. It will not be contended that anything contained in the plaintiffs' charter could in any event be construed as conflicting with the right and duty of any town or city through which their railway may pass to make all such needful repairs or improvements of highways, such widening of culverts or enlargement of bridges, as may from time to time become necessary, even though a serious interruption to the use of the railway might be thereby rendered unavoidable. On such occasions the owners of street railways, like all other parties desirous of using the highway, must submit to a temporary inconvenience for the sake of a permanent advantage.

But the plaintiffs claim that, as to so much of their railway as has been "located" on either of the bridges between Boston and Charlestown, this rule does not apply. They contend that, by the terms of their charter, the Commonwealth has parted absolutely and forever with all right and power to interrupt or interfere with the use of the tracks "located on those bridges," even for the purpose of repairing, improving or rebuilding them, or of widening the draws, whatever new public exigency may arise

It is difficult to believe that such could have been the intention of the legislature ; and we do not think the statute will bear any such construction. The second section provides that the tracks upon those bridges shall be "located" by three commissioners, to be appointed by the governor; that they shall fix and determine "the construction of suitable draws in said bridges, and the manner in which the same shall be managed and opened for the passage of vessels, and the attendance upon the same; and in case tolls shall be demanded for the passage of persons or vehicles over said bridges, the said commissioners shall have power to fix and determine the amount which shall be paid by said corporation for such use of such bridges respectively; and in case the same shall be assented to by the corporation, the same shall be binding upon the Commonwealth and said corporation, so long as said bridges respectively remain the property of the Commonwealth, unless the same shall be released, or some part thereof, by the legislature; and in case said corporation shall not assent to the rate of compensation as found by said commissioners, the supreme judicial court, upon petition of said commissioners or of said corporation, and upon notice to the other party, shall appoint three commissioners, who shall, upon due notice to the parties interested, proceed to determine and fix the rate of compensation or toll." It is the amount of compensation or toll, to be paid by the corporation for the use of the bridges respectively, which, if assented to, shall be binding upon the Commonwealth, so long as the bridges remain its property, and which, in case of disagreement, is to be determined finally upon appeal to the supreme judicial court. It is not claimed or intimated that the corporation was to pay anything whatever for the privilege of laying its tracks over them. The terms of the act indeed show very plainly that it was understood to be entirely uncertain whether the corporation would be required to pay to the Commonwealth any sum of money whatever. It is only in the event of the reimposition of tolls that the corporation would be required to pay for the use of the bridges, and then only for the passage of their vehicles across them, in the same manner and upon the same principles as in

the case of any and all other persons crossing them with vehicles. The provision that "the same shall be binding upon the Commonwealth" "unless the same shall be released, or some part thereof, by the legislature," would be a proper form of expression in relation to the tolls or amount of compensation to be paid, but hardly seems appropriate or applicable to the subject matter of "the construction of suitable draws in the bridges, and the manner in which the same shall be managed and opened for the passage of vessels, and the attendance upon the same." If the plaintiffs' interpretation of their charter were more plausible than we consider it, it is by no means certain that the statute under which these defendants are acting might not be sustained under the right reserved to the legislature in the fourteenth section of the plaintiffs' charter "to limit, restrict or annul" any of the powers granted by that charter.

But we do not find it necessary, in order to justify the defendants, to resort to the power of the legislature to limit, restrict or annul its own grant. The bridges are the property of the Commonwealth, and they cross a navigable stream which is itself of common right a public highway for the passage of vessels. The sovereign power of the state, that is to say the legislature alone, has the power and is charged with the trust of deciding whether the public good may be better served by causing bridges to be thrown over it than by suffering the natural passage upon its channel to remain free. The legislature is the only tribunal that is to reconcile these conflicting interests. *Commonwealth v. Essex Co.* 13 Gray, 239. It is under precisely the same obligation to make suitable provision to preserve the navigation of the river, having in view the magnitude and comparative importance of that interest, as it is to provide for the accommodation of public travel by means of bridges. The bridges must necessarily be a great obstruction to navigation, and it is for the legislature, acting as the best good of the public on the whole may require, to prescribe as a condition to projectors who may be authorized to build them, or it may lay down for itself, with regard to bridges belonging to the Commonwealth, such a mode of construction as will sufficiently preserve for vessels the nat-

ural passage by the stream, at the same time that the public may be accommodated by an artificial passage across it. We find nothing, in the whole course of legislation on the subject, which implies that the draws once established were intended to be unchangeably and forever fixed, so as never to be subject to any such reasonable modification, as to dimensions and shape and mode of use, as the increased demands of commerce or any new public exigency may require. We must look upon the statute, under which the defendants were proceeding to enlarge the draw, as a formal declaration of the legislature, acting in behalf of the public, that the existing provision for the passage of vessels was insufficient, and that the public convenience requires the proposed enlargement. No sound distinction, in our opinion, can be made between needful repairs and such improvements as are required by the public good. In our judgment, the right of way granted to the plaintiffs upon these bridges is the same as it is everywhere else, a right to use the highway in common with others. The privilege granted to them, of adapting a portion of each bridge to their peculiar mode of conveying passengers, was not intended to give them the control of the way; and upon the bridges, as well as elsewhere, and by these plaintiffs as well as by all others, the right of passage is to be enjoyed in subordination to the general right of the appropriate public authorities to make from time to time all such needful repairs, alterations and improvements as the public good may require.

On these grounds, we cannot view the St. of 1869, c. 272, as an encroachment upon the plaintiffs' charter, or a withdrawal of any portion of their grant, and therefore their

Bill must be dismissed.

**MOSES A. DOW & others vs. THOMAS L. WAKEFIELD & others
ATTORNEY GENERAL vs. CITY OF CHARLESTOWN.**

The St. of 1854, c. 451, provided for the imposition of tolls on two bridges belonging to the Commonwealth, between two cities, for the purpose of raising a fund to be applied to their future maintenance and repair. The St. of 1868, c. 322, provided in § 1 that the supreme judicial court should appoint three commissioners for the purposes in said statute named; and in §§ 2-5, that they should be sworn to the faithful and impartial discharge of their duties, and should, after due public notice and hearing of all parties in interest, proceed to award what counties, cities or towns received particular and special benefit from the maintenance of the bridges, and apportion and assess the expense of maintaining the same upon such of said counties, cities or towns, and in such manner and amount as they should deem equitable and just, and that the award, when returned into and accepted by the court, should be a final and conclusive adjudication and binding upon all parties, and the bridges should thereupon become highways. The court appointed commissioners "for the purposes named" in said statute. After the commissioners had appointed a time and place for hearing all parties and given notice accordingly, the legislature passed the St. of 1869, c. 272, which in terms repealed the St. of 1868, c. 322, §§ 2-5, and provided in §§ 1-6 that the said commissioners should cause to be made new draws in the bridges, should apply so much as might be necessary of the bridge fund to the construction of the draws, should apportion and assess, in such manner and amount as they should deem just and equitable, upon the two cities at the extremities of the bridges, the expense of maintaining and keeping in repair said bridges and draws, and should assign and divide between the cities any surplus of the fund, and, if the fund should prove insufficient, assess and apportion such deficiency upon said cities, and that upon the acceptance of this award by the court the bridges should become highways. On a bill in equity then filed by inhabitants and taxpayers of the cities to restrain the commissioners from making the new draw in one of the bridges, *Held*, 1. that the bridge fund could be lawfully employed in needful alterations of the bridge, and that of the question whether the making of a new draw was a needful alteration the legislature was the sole judge; 2. that the provision of the St. of 1869, c. 272, requiring the commissioners to apportion and assess the expense of maintaining the bridge on the two cities was not unconstitutional, either as limiting the judicial discretion granted to them by the St. of 1868, c. 322, or as imposing a disproportionate and unreasonable assessment; 3. that the St. of 1869, c. 272, was not unconstitutional as imposing legislative and executive functions on judicial officers; and 4. that the commissioners, having been sworn under the St. of 1868, c. 322, need not be sworn anew under the St. of 1869, c. 272.

After this decision, the commissioners made the new draw in that bridge, and were proceeding to make a new draw in the other bridge, when the legislature passed the St. of 1870, c. 303, which directed the said commissioners to put the bridges forthwith into good repair for travel, and in terms repealed the St. of 1869, c. 272, §§ 1-6, but substantially reenacted all its provisions relating to making an award apportioning in such manner and amount as they should deem just and equitable the future maintenance of the bridges, and the surplus of the fund, between the two cities, and to constituting the bridges highways upon the acceptance of the award by the court. The commissioners thereupon put the bridges into good repair for travel, and, after due notice to and hearing of the cities, returned into the court an award apportioning in equal parts between the two cities the

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surplus of the fund and the future maintenance of the bridges. On objections made by one city to the acceptance of the award, *Held*, 1. that no new decree of appointment was necessary to authorize the commissioners to make it, other than the decree passed originally under the St. of 1868, c. 322; and 2. that the fact that there was a great disproportion between the numbers of inhabitants, areas of territory, and total valuations of property, in the two cities, did not necessarily render the award unjust or inequitable.

THE FIRST CASE was a bill in equity filed by Moses A. Dow and nine other inhabitants of Charlestown and taxpayers in both Charlestown and Boston, to restrain the commissioners appointed under the St. of 1868, c. 322, from constructing, under the St. of 1869, c. 272, a new draw in Charles River Bridge, leading from Charlestown to Boston. The case was reserved by Ames, J., on the bill and answer, for the determination of the full court, and is stated in the opinion.

G. W. Warren, (*H. W. Bragg* with him,) for the plaintiffs.

T. L. Wakefield, for the defendants.

AMES, J. It was the purpose of the St. of 1868, c. 322,* to

* The material parts of the St. of 1868, c. 322, are as follows :

SECTION 1 provides that the supreme judicial court shall appoint three commissioners "for the purposes hereinafter named."

"SECTION 2. Said commissioners shall be sworn to the faithful and impartial discharge of their duties, and shall then, after due public notice and hearing of all parties in interest, proceed to determine and award what counties, cities or towns receive particular and special benefit from the maintenance of Charles River Bridge and Warren Bridge and to apportion and assess the expense of maintaining the same upon such of said counties, cities or towns, and in such manner and amount as they shall deem equitable and just. And the said commissioners shall likewise at the same time assign or divide the moneys, funds, properties and other things now belonging to said bridges or the bridge fund to or between any of said corporations in such manner as to justly and equitably apportion the same with reference to the burden imposed.

"SECTION 3. When such award has been returned into the supreme judicial court, sitting for the county of Suffolk, and has been accepted by said court, the same shall be a final and conclusive adjudication of the matters herein referred to them, and binding upon all parties, and said court may enforce the same if necessary by proper process.

"SECTION 4. Upon the acceptance of said award by the court as aforesaid the said bridges shall become highways, and the cities of Boston and Charlestown respectively shall severally be liable for all damages arising from any want of repair in those portions thereof within their respective limits."

convert these bridges, which were the property of the Commonwealth, into public highways, and to provide that they should afterwards be maintained and kept in repair at the expense of the counties, cities and towns which receive particular and special benefit from their maintenance. On January 9, 1869, the defendants were duly appointed commissioners, in pursuance of the act and in order to carry it into effect; and have entered upon the execution of their duties. Before any award or adjudication was had, the legislature saw fit to make a material change in the proposed system of maintaining the bridges, and to require that the entire burden of their support as highways should fall upon the two cities principally interested, namely, Boston and Charlestown. St. 1869, c. 272.* The same statute

"SECTION 5. The commissioners appointed under the first section of this act, in their estimate of the expense of maintaining said bridges, shall include the expense of opening the draws thereof and affording all necessary and proper accommodations to vessels having occasion to pass the same by day or by night."

"SECTION 8. The said commissioners shall have power to sell and dispose of a certain triangular piece of land belonging to the Commonwealth, situated at the Boston end of the Warren Bridge," "containing about twenty thousand square feet, and to add the proceeds of the same to the fund for said bridges."

* The material parts of St. 1869, c. 272, are as follows :

SECTION 1 provides that the commissioners appointed under the St. of 1868, c. 322, § 1, "shall forthwith cause to be made, in lieu of the existing draws in Charles River and Warren Bridges, a draw in each bridge with a clear opening of forty-four feet in width, in such position and of such form and construction as the harbor commissioners shall determine."

"SECTION 2. Said commissioners are hereby authorized and directed to apply to the construction of said draws so much as may be necessary of the unexpended balance of the Charles River and Warren Bridges fund, and the same is hereby appropriated for that purpose; provided, that until the completion of said draws, said commissioners shall have the sole charge and management of said bridges and draws, and may apply such portions of said fund as may be necessary to keep the same in repair.

"SECTION 3. Said commissioners, after due notice and hearing, shall, in such manner and amount as they shall deem just and equitable, apportion and assess upon the cities of Boston and Charlestown the expense of maintaining and keeping in repair said bridges and draws, and shall also at the same time in like manner assign and divide to and between said cities any surplus of said

also imposes upon the commissioners the additional duty of constructing a new draw in each bridge, and authorizes them to use the bridge fund for that purpose. The plaintiffs, who are taxpayers in the city of Charlestown, insist that in passing this latter statute the legislature has exceeded its authority, and that the statute for that reason is unconstitutional and of no validity. They therefore apply to this court to restrain the commissioners, by writ of injunction, from any attempt to carry it into effect.

The first, and apparently the principal, objection is, that it conflicts with the constitutional rule that no state shall pass any law impairing the obligation of contracts, inasmuch as it contemplates (in the view of the plaintiffs) a diversion of the fund created under St. 1854, c. 451, from its legitimate uses as prescribed by that statute.* The bill insists that the draws already

fund remaining unexpended after said draws shall have been widened as above provided, and all other funds and property now belonging to said bridges; and if said fund shall prove insufficient to pay the expense of widening said draws, they shall in like manner assess and apportion such deficiency upon said cities.

"SECTION 4. Said commissioners shall return their award into the supreme judicial court, sitting for the county of Suffolk, and when said award shall have been accepted by said court, the same shall be a final and conclusive adjudication of all matters herein referred to said commissioners, and shall be binding upon all parties; and said court may enforce the same by proper process.

"SECTION 5. Upon the acceptance of said award by the court as aforesaid, the said bridges shall become highways, and thereafter said bridges and draws shall be managed, maintained and kept in repair by the cities of Boston and Charlestown according to the terms and proportions established by said award.

"SECTION 6. The commissioners designated in the first section of this act, in apportioning the expense of maintaining said bridges and draws, shall include the expense of opening the draws thereof and affording all necessary and proper accommodations to vessels having occasion to pass the same by day or by night."

SECTION 9 repealed the St. of 1868, c. 322, §§ 2-9.

* The 1st section of St. of 1854, c. 451, passed April 29, enacts that "for the purpose of raising a fund for the rebuilding of the Charles River Bridge, and the repairing of the Warren Bridge, and for the further purpose of raising a fund sufficient to repair and keep in repair said bridges as free public avenues, there shall be, from and after the first day of June next, levied and collected upon the said bridges" a certain "rate of toll." "And said tolls

existing are good and sufficient, and have always answered the purpose for which they were intended, and that the proposed expenditure is "in no way for the maintenance or repair of the bridges, but for a material alteration in their structure." Whether the statute can be said to amount to, or to have created, a contract with anybody, is a question which under the circumstances does not call for a decision. We have already had occasion to say that the statute under which these defendants were acting must be considered as a formal declaration by the legislature, acting in behalf of the Commonwealth, that the former provision for the passage of vessels through the bridges was insufficient, and that the public convenience required the proposed enlargement. *Middlesex Railroad Co. v. Wakefield*, ante, 261, 266. It is for the legislature alone to say what kind of bridge is best suited to the various and to some extent conflicting wants of the public, and what shall be the dimensions and general description of the draws in order to provide for the exigencies and increase of navigation upon the river. The statute for the creation of the fund does not confine its application to the mere and literal repairs of the existing bridges, or in case of their decay or accidental destruction to the rebuilding of others upon exactly the same model. It is no diversion of the fund from its appointed uses, to employ it in all such needful repairs, and also in all such needful alterations and improvements in structure as the public exigencies from time to time may require. And of the reality and extent of those exigencies the legislature is the final and only judge.

Another objection relied upon by the plaintiffs is, that the new

shall be levied upon said bridges until a sum shall be collected thereby sufficient to rebuild said Charles River Bridge, to repair the Warren Bridge, and to leave in the treasury of the Commonwealth a fund of one hundred thousand dollars, which fund, with all accumulations thereof, shall be applied to the future maintenance and repair of said bridges."

The 6th section is as follows: "When the fund aforesaid shall have accumulated to the amount of one hundred thousand dollars more than is needed for the rebuilding of the Charles River Bridge, and the repairing of the Warren Bridge, the treasurer of the Commonwealth shall give notice thereof to the governor, who thereupon shall publicly declare said bridges free from toll."

statute is an interference with a judicial proceeding, compelling the commissioners, before whom it is pending, to adjudicate and award in a manner which may be contrary to their own judgment, as to the corporations that should be required to assume the burden of the support of the bridges; and also that the proposed assessment of that burden on Boston and Charlestown alone is "disproportionate and unreasonable;" and that for these reasons also the act is unconstitutional and of no validity. We think, however, that there is no foundation for either of these objections. The St. of 1868, c. 322, like any other statute, was subject to be repealed or modified at the pleasure of the legislature. It makes no difference that the commissioners had appointed a time and place for hearing all parties supposed to be interested, and had given notice accordingly. No rights had been acquired under it, or will be lost or impaired by its repeal. Its operation did not depend upon the acceptance of any city or town, and it had none of the characteristics or elements of a contract. If the legislature had power to authorize commissioners to select the corporations that should maintain the proposed new highways, it has the power to make the selection for itself. The attempt to apportion that burden according to the special and peculiar advantages derived by various towns, cities and counties, respectively, from the use of the bridges, can never be more than partially successful. Under any apportionment, much the greater part of that burden would fall as a matter of course upon these two cities. If the legislature decided that they, according to the general rule in the case of highways, might reasonably be charged with the whole cost of the future maintenance of the bridges, it is impossible for us to say that their decision was unconstitutional. Its expediency was for them to consider, and not for us.

The plaintiffs take the further objection that the statute imposes executive and legislative duties upon judicial officers. But the defendants, whose appointment proceeds from, and whose award is to be reported to this court, are not in our judgment judicial officers in the strict constitutional sense of the word. They more nearly resemble masters in chancery, assess

ors, auditors and other officers whose functions are partly ministerial and partly judicial. *New London & Northern Railroad Co. v. Boston & Albany Railroad Co.* 102 Mass. 386. It is nothing new that officers of the court, who are expected to report to it, should also be charged with ministerial functions. Such is the case with commissioners to set out dower, or to make partition of real estate. Commissioners appointed by the court in proceedings for the reclaiming of meadows are authorized by statute to erect dams and dikes, and to remove obstructions from watercourses. Gen. Sts. c. 148, §§ 4, 5. In questions as to the use of water power, commissioners are sometimes appointed by the court to make measurements, to erect monuments and set up limits. Masters in chancery, and other officers, are frequently required to make sales of property, or to superintend experiments, sometimes of a costly description. Under the original statute, against which we do not understand these plaintiffs to make any objection, these commissioners were required to make sale of a lot of land belonging to the Commonwealth, and to add the proceeds of the sale to the bridge fund. So long as the ministerial acts required are necessarily incident or practically appropriate or auxiliary to the general trust and duty of a commissioner or other officer appointed by the court, we do not understand the constitutional objection to be applicable. In this case, the bridge fund is to be apportioned by these commissioners among the two cities, and it is certainly reasonable that the expenditures to be charged against that fund should be under their superintendence. At any rate, there is no conflict or incompatibility in the various duties imposed upon them. It is to be remembered that the bridges are themselves the property of the Commonwealth, that the fund is also its property, and that the proposed expenditure is one which it has a perfect right to make. It has the right to select its own agents to superintend that expenditure. The fact that those agents as officers of the court have already been intrusted with the duty of making an investigation, and are to report to the court, in reference to the same general subject, in another aspect, does not disqualify them from performing this additional duty

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We decide therefore that upon this point also the plaintiffs' objection cannot be maintained.

The views above expressed dispose also of the remaining objection, namely, that the commissioners were not duly sworn. The modification of their powers and duties after they were sworn under their original appointment did not render it necessary that they should be sworn anew. *Bill dismissed.*

After this decision, the commissioners proceeded with and completed the making of a new draw in the Charles River Bridge, and had procured plans and specifications for a new draw in the Warren Bridge, (all in conformity with the St. of 1869, c. 272,) when on June 1, 1870, the St. of 1870, c. 303, was passed, the substance of which, so far as material to this report, is printed in the margin.*

* SECTION 1 provided that the commissioners appointed under the St. of 1868, c. 322, § 1, should forthwith cause the two bridges to be put in good repair for public travel.

SECTION 2 appropriated so much as might be necessary of the unexpended balance of the bridges' fund for that purpose, and directed the commissioners to apply it accordingly.

SECTION 3 was as follows: "Said commissioners, after due notice and hearing, shall, in such manner and amount as they shall deem just and equitable, apportion and assess upon the cities of Boston and Charlestown the expense of maintaining and keeping in repair said bridges and draws, including the expense of opening and closing the draws thereof, and affording all necessary and proper accommodations to vessels having occasion to pass the same by day or night; and shall also at the same time and in like manner, assign and divide to and between said cities, any surplus of said fund remaining after said repairs shall have been completed as in this act provided, and all other funds and property now belonging to said bridges; and if said fund shall prove insufficient to pay the expense of said repairs and the care and management of said bridges and draws, they shall in like manner assess and apportion such deficiency upon said cities."

SECTION 4 directed the commissioners to complete the repairs on or before October 1, 1870, and to return their award into this court at the October term 1870 for Suffolk, "and when said award shall have been accepted by said court the same shall be a final and conclusive adjudication of all matters herein referred to said commissioners and shall be binding upon all parties, and said court may enforce the same by proper process."

The commissioners thereupon put the two bridges into good repair for public travel; and then, after due notice to and hearing of the cities of Boston and Charlestown, which appeared by their solicitors, they returned into this court at October term 1870 for Suffolk an award, by which it appeared that there remained unexpended of the bridges' fund on October 1, 1870, \$14,575.09; and which, after reciting all their proceedings from the time of their original appointment under the St. of 1868, c. 322, ended as follows: "They do now find, adjudge, award and report, and this is their final adjudging, finding and award: namely, in accordance with the provisions of the statutes under which they act, they apportion and assess upon the cities of Boston and Charlestown the expense of maintaining and keeping in repair said Charles River and Warren Bridges and the draws therein, including the expense of opening and closing the draws thereof, and of affording all necessary and proper accommodation to vessels having occasion to pass the same by day or night, in the proportion of one half part thereof to and upon each of said cities. And they further assign and divide between said cities of Boston and Charlestown the surplus of said Charles River and Warren Bridges' fund, after the payment of all the expenditures authorized by the commissioners and by said acts, and all other funds and property now belonging to said bridges, in the proportions aforesaid." The decree of January 9, 1869, appointing the commissioners, was appended to the award, and the material parts of it are printed in the margin.*

SECTION 5 provided that "upon the acceptance of said award by the court as aforesaid the said bridges shall become highways, and thereafter said bridges and draws shall be managed, maintained and kept in repair by the cities of Boston and Charlestown, according to the terms and proportions established by said award."

SECTION 7 repealed the St. of 1869, §§ 1-6, and "all other acts and parts of acts inconsistent herewith."

* "This cause having been fully heard and considered, this court, sitting as a full court in said county of Suffolk, doth order and decree that Thomas L. Wakefield, Edward S. Philbrick and William T. Davis, be and they hereby are appointed commissioners, for the purposes named in an act of the General Court of the year one thousand eight hundred and sixty-eight, entitled 'An act

Upon the return of the award, the attorney general moved for its acceptance by the court; and the city of Charlestown filed the following objections to such acceptance: "1. Because the commissioners in this investigation and inquiry have acted under the decree of the court appended to the award, which directed them to proceed according to the manner and form pointed out in § 2 of *c. 322* of the St. of 1868, which section was repealed by § 9 of *c. 272* of the St. of 1869, and these commissioners acted as officers of this court without obtaining a new decree according to the law in force at the time of the hearing. 2. Because the award does not appear to be based upon any of the facts which the decree requires the commissioners to find, nor does it appear that they found any such facts. 3. Because the commissioners have made an arbitrary division of the burden, contrary to a fair and reasonable construction of the Sts. of 1869, *c. 272*, § 3, and 1870, *c. 303*, § 3. 4. Because the award is neither just nor equitable, and this court has the power, on the application of an aggrieved party, at the hearing on the acceptance of the award, to examine into the grounds and merits of the same, and to direct, by recommitment or otherwise, such modifications thereof as to it may seem just and equitable." The case, on this motion and these objections, was reserved by *Wells, J.*, for the determination of the full court, and argued in April 1871.

relating to Charles River Bridge and Warren Bridge,' being the three hundred and twenty-second chapter of the acts of that year; and directed, after having been sworn to the faithful and impartial discharge of their duties, and after due public notice and hearing of all parties in interest, to proceed to determine and award what counties, cities or towns receive particular and special benefit from the maintenance of Charles River Bridge and Warren Bridge, and to apportion and assess the expense of maintaining the same upon such of said counties, cities or towns, and in such manner and amount as they shall deem equitable and just; and at the same time to assign or divide the moneys, funds, properties and other things now belonging to said bridges or the bridge fund, to or between any of said corporations, in such manner as justly and equitably to apportion the same with reference to the burden imposed upon said corporations;" "and to return into this court their award upon and concerning all the matters and things hereinbefore referred to."

J. C. Davis, Assistant Attorney General, for the Attorney General.

G. W. Warren & H. W. Bragg, for the city of Charlestown.

1. It was the duty of the commissioners, before proceeding to hear the two cities, to obtain through the attorney general a new decree following the statute then in force. Failing to do this, they acted without jurisdiction.

2. They do not, as they should have done, state the facts and reasons on which they base the award. They were charged with the duty of making an investigation, and were, in the language of the opinion in *Dow v. Wakefield*, "to report to the court," — not merely to return into court a naked award.

3. The intention of the various statutes was, that the commissioners should make a just and equitable apportionment, having regard to the relative abilities of the two cities; not that they should make an equal and arbitrary division of the burden. This the legislature might itself as well have done, by the statute; had it been deemed just or equitable. But it clearly was not deemed so by the legislature, and therefore a judicial inquiry was directed into the due proportions of the burden.

4. The division is in fact not just, nor equitable. The burden is apportioned equally between the cities; while public and official statistics show that Charlestown has but one eighth of the population, one nineteenth of the territory, and one twenty-first of the property valuation, of Boston, and indicate that this disproportion will increase in the future.

BY THE COURT. 1. The purpose and effect of the St. of 1869, c. 272, was to modify, and in some respects to limit, the duties of the commissioners who had been appointed under the St. of 1868, c. 322, but did not require a new decree of appointment.

2. It does not appear that the award is unjust or inequitable.

Award accepted.

CHARLES A. LOUD & others vs. CITY OF CHARLESTOWN.

Persons not residing in a town, and having therein no store, shop or wharf, are not subject to taxation there by reason of there hiring a yard in which they keep and sometimes sell lumber and have put up a small building for the convenience of men employed by them.

CONTRACT to recover taxes assessed by the defendants upon lumber of the plaintiffs, doing business under the name of Loud Brothers & Kreuger, and paid by the plaintiffs under protest.

At the trial in the superior court, before *Morton, J.*, the following facts appeared: None of the plaintiffs were ever residents of Charlestown; they were lumber dealers, had a place of business in Boston, and kept part of their lumber in Boston, and part on land in Charlestown, which they occupied as tenants at will, and on which they had erected a small one-story building, some eight feet square, having in it a chair and a lounge, and occasionally occupied by workmen employed by them to load and unload lumber. These men were sent there from time to time, but were not there regularly. The building had on it a sign, "Loud Bros. & Kreuger, Mahogany and Western Lumber: Office 8 Canal Street, Boston." A few sales had been made by the plaintiffs' men in Charlestown, but the plaintiffs testified that these were contrary to their orders.

The defendants requested the judge to instruct the jury, 1. that, if they were satisfied that the plaintiffs hired or occupied any shop, store or wharf in Charlestown, and of which they had actual possession, use and control, whether by written lease or as tenants at will, then they should find for the defendants, 2. that, if the jury found that the plaintiffs kept any property, which was a part of their stock in trade, upon premises leased by them in Charlestown, such property would be liable to taxation in Charlestown, whether they had a place of business there or not; and 3. that, if the jury were satisfied that the plaintiffs kept any of their stock in trade upon premises, leased by them, in Charlestown, and made any sales of such property on the premises, by their agents or otherwise, then they had such a

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place of business in Charlestown as would render them liable to taxation therein."

The judge instructed the jury as requested in the first prayer of the defendants, and also instructed them that "the plaintiffs would be liable to taxation in Charlestown, and could not recover in this action, if they carried on or had a place of business there; but that the mere storage of lumber there, if their sole place of business was in Boston, would not render them liable to taxation;" and refused to instruct them according to the second and third prayers of the defendants. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

H. W. Bragg, for the defendants.

C. P. Judd, for the plaintiffs, was stopped by the court.

WELLS, J. The defendants could have no authority to levy the tax in question otherwise than under Gen. Sts. c. 11, § 12, cl. 1. There is no pretence that the plaintiffs had any manufactory in Charlestown; and the jury have found that they had no store, shop or wharf there. The fact that they hired a lumber yard there, upon which they stored and sometimes sold lumber, and a small building for the convenience of men employed there, would not subject them to taxation for their personal property so being in Charlestown. They were liable to be taxed for it either in Boston, where they had a store and transacted their business mainly, or at their place of residence, and not wherever the property happened to be situated. The case seems to be entirely covered by the decision in *Huckins v. Boston*, 4 Cush. 543.

Exceptions overruled.

FREDERICK U. TRACY vs. CHARLES J. MERRILL & others.

An action cannot be maintained upon a constable's official bond, on proof of a judgment against him in a suit for official misconduct, without evidence of a demand upon him to pay the amount of the judgment.

To an action against a constable for breach of his official bond, a judgment in his favor in a former action on the bond for the same breach is not a bar, if it appears from the record that it may have been rendered for want of a sufficient demand upon him, which has since been made.

A person injured by the breach of the condition of a bond, given by a constable to the treasurer of Boston under St. 1860, c. 147, may sue thereon in the name of the treasurer.

CONTRACT, in behalf of Jonathan Cottle, on the bond given by Merrill, as principal, and the other defendants, as sureties, to the plaintiff, as treasurer of the city of Boston, for the faithful discharge of Merrill's duties as a constable.

At the trial in the superior court, at January term 1869, before *Morton, J.*, the plaintiff proved the appointment of Merrill as constable and the execution of the bond, and also introduced in evidence the record of an action of *Cottle v. Merrill* in that court, by which it appeared that Cottle, on December 21, 1867, recovered judgment in that action against Merrill, for attaching his property on a suit against another person. The plaintiff also introduced evidence of the issue of execution on said judgment, and of the return by the officer who served it of demand on Merrill for its amount, of Merrill's refusal to pay, and of the return of the execution in no part satisfied.

The defendants then introduced in evidence the judgment of that court in an action of *Tracy v. Merrill & others*, rendered in Merrill's favor at April term 1868, and the report of *Reed, J.*, before whom said action was tried. From this report it appeared that said action was brought in behalf of Cottle on the same bond on which the present action was brought; that the plaintiff introduced in evidence the record and judgment in the abovementioned action of *Cottle v. Merrill*; that it was admitted that no execution was issued on said judgment; that the defendants contended that the action could not be maintained, because no demand had been made on any of the defendants

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for payment of the said judgment, because the record in the case of *Cottle v. Merrill* did not show any official malfeasance of Merrill, because the evidence did not show any breach of the bond, and because the declaration was insufficient; that the judge ruled that upon the evidence the action could not be maintained, and directed the jury to return a verdict for the defendants, which they did; and that judgment was rendered thereon for the defendants.

The defendants asked the judge to rule that the judgment in their favor in this former action of *Tracy v. Merrill* was a bar to the present action; but the judge ruled that, inasmuch as it did not appear but that the former action had been decided in their favor on the ground that there had been no demand on the judgment, and as such a demand had been since made and proved in the present action, the judgment in the former suit was not a bar; and he directed a verdict for the plaintiff, which was returned. The defendants alleged exceptions.

F. W. Sawyer, for the defendants. The judgment in the former suit was a bar. *Arnold v. Arnold*, 17 Pick. 4. Cottle had no right to bring a suit on the bond in the name of the treasurer. *Commonwealth v. Hatch*, 5 Mass. 191. St. 1860, c. 147. The right of action was as good at the time of bringing the former suit as now; taking out execution and making demand gave Cottle no greater rights.

J. D. Thomson, for the plaintiff.

AMES, J. The record in the former suit between these parties is conclusive upon the point that, as the facts then stood, the plaintiff was not entitled to recover. But it does not necessarily follow that he is in the same situation now. It is true that he cannot bring a new action for the purpose of trying the same question over again, and putting in new evidence, which he had overlooked or considered immaterial. The first case may have been decided, not upon its merits, but on some technical informality; or it may have been prematurely brought. The former suit, it is true, was brought upon the same bond, but the plaintiff insists that the judgment in that action was rendered solely upon the ground that his right of action had not then ac-

crued, for want of demand upon Merrill before the commencement of the action. The record shows that precisely that ground of defence was insisted upon in the defendants' answer, and it was a full and unanswerable defence. Gen. Sts. c. 18, § 62, and c. 101, § 19. But since the determination of that suit, execution has been taken out in the case of *Cottle v. Merrill*; demand has been made upon Merrill for payment, which he has refused; and the execution has been returned in no part satisfied. The judgment in the former suit only decides that Merrill and his sureties are not liable in a suit on his official bond, without proof of neglect on his part, on demand made by the creditor, to pay the debt; a very different question from that presented by the case in its present position. In order that a prior judgment should be a conclusive bar, the parties should be the same, and the question at issue, or involved in the controversy, the same. *Norton v. Huxley*, 13 Gray, 285. *New England Bank v. Lewis*, 8 Pick. 113. *Wilbur v. Gilmore*, 21 Pick. 250. *Walbridge v. Shaw*, 7 Cush. 560. *Shears v. Dusenbury*, 13 Gray, 292. *Gilbert v. Thompson*, 9 Cush. 348. *Andrews v. Brown*, 3 Cush. 130. *Gage v. Holmes*, 12 Gray, 428. *Perkins v. Parker*, 10 Allen, 22. *Burlen v. Shannon*, 14 Gray, 433. *Same v. Same*, 99 Mass. 200. We see no ground whatever for holding the former judgment a conclusive bar to the prosecution of this action. The parties are the same, but the question at issue is very different.

The case of *Lowell v. Parker*, 10 Met. 309, and the recent case of *Tracy v. Goodwin*, 5 Allen, 409, are quite decisive as to all the other points taken by the defendants at the argument.

Judgment for the plaintiff

GEORGE KINGMAN vs. HENRY C. COWLES.

The mode of authenticating records of the courts of other states prescribed by the U. S. Sta. of 1790, c. 11, and 1804, c. 56, is not exclusive; and, under the Gen. Sta. c. 131, § 61, a copy of the record of the court of a territory may be introduced in evidence, although it does not bear the certificate of the judge that the clerk's attestation thereto is in due form.

Under the Gen. Sta. c. 131, § 61, a copy of the record of a court of a territory, bearing the seal of the court and the certificate of the clerk, is admissible in evidence, although the certificate does not state that the clerk has custody of the records.

CONTRACT upon a judgment recovered by the plaintiff against the defendant in the district court of the second judicial district of the territory of Nebraska.

At the trial in the superior court, before *Dewey, J.*, the plaintiff offered in evidence "a document called a judgment roll, purporting to contain a copy of the record of the proceedings of the court wherein the judgment declared on was rendered, attested by the clerk, and with the seal of the court attached." The certificate of the clerk was as follows: "Territory of Nebraska, County of Otoe, ss. I, Rienzi Streeter, clerk of the second judicial district court within and for said county, do hereby certify that the foregoing is a full, true and complete transcript of the whole record in the case of George Kingman against Henry C. Cowles, as the same remains of record on file in said court. In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Nebraska City, in said county, this 29th day of December, A. D. 1866. Rienzi Streeter, Clerk."

The defendant objected that the copy of the record thus offered was inadmissible, "for the reason that it was not accompanied with a certificate annexed thereto, from the judge or presiding magistrate of the court wherein the judgment was alleged to have been rendered, showing that the attestation of the clerk was in due form, and for the further reason that the certificate of attestation of the clerk, attached to the same, was not in due form, and did not show that the person signing the same had charge of the records of the court;" but the judge admitted the copy. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

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I. H. Wright, for the defendant.

R. D. Smith, for the plaintiff.

WELLS, J. The statutes of the United States, 1790, c. 11 and 1804, c. 56, passed in pursuance of the Constitution, art. 4, § 1, require that records, authenticated in the manner therein prescribed, shall be admitted in all courts within the United States, and have full faith and credit therein. Neither the Constitution nor the statutes forbid the states from authorizing the proof of records in other modes, in their own courts. The statute of Massachusetts, Gen. Sts. c. 131, § 61, has provided another mode. It is not in conflict with the law of the United States, but simply omits one requisite which that law prescribes. It does not require a certificate of the judge that the attestation of the clerk to a copy of a record of the court is in due form. The objection, therefore, that the copy of the judgment roll offered in evidence in this case did not bear the certificate of the judge of the court, cannot be sustained.

The authentication conforms in all respects to the requirements of our statute. It bears the seal of the court and the certificate of the clerk. The clerk is the proper custodian of the records; and the seal of the court attached to his certificate attests the possession of the record in the person who certifies. Records so certified are always received as true, *prima facie*, without proof in the first instance of their genuineness or of the official character of the person who assumes to act in such official capacity. *Bultrick v. Allen*, 8 Mass. 273. *Commonwealth v. Chase*, 6 Cush. 248. 1 Greenl. Ev. § 503. *Chamberlin v. Ball*, 15 Gray, 352. *Webber v. Davis*, 5 Allen, 393. *Commonwealth v. Connell*, 9 Allen, 488.

When any other officer than the clerk or prothonotary makes the certificate, it may be necessary that it should be made to appear, by the certificate, that the officer certifying has charge of the records. But the clerk is presumed to have such charge, and therefore his certificate to that effect is unnecessary.

Exceptions overruled.

Sykes v. Meacham.

SKIFF F. SYKES vs. GEORGE A. MEACHAM & another, administrators.

A creditor cannot maintain a bill in equity under the St. of 1861, c. 174, § 2, against the administrators of his debtor, to recover a debt barred by the special statute of limitations, Gen. Sts. c. 97, § 5, on the ground that he is an alien residing in a foreign country, and never knew of the decease of the debtor or the appointment of the administrators until more than two years after the latter had given bond.

BILL IN EQUITY, filed July 29, 1869, under the St. of 1861, c. 174, § 2, against the administrators of the estate of George Meacham, of Cambridge, deceased. The bill alleged that the plaintiff was on February 17, 1863, and had since continued to be, a resident of Montreal, in Canada, and an alien, and had not resided in the United States since 1829; that, on said February 17, he authorized said Meacham to collect the money due to him on a mortgage, and Meacham collected the money and promised to keep it and pay the plaintiff interest thereon; that the plaintiff, not having any use for the money, left it in the hands of Meacham, relying on his promise, and believing that the money would be paid to himself whenever demanded; that Meacham died in June 1864, and, in the September following, the defendants were appointed administrators of his estate, and gave bonds in due form of law; but that the plaintiff did not know of the death of Meacham, or of the appointment of the defendants, till June 1, 1869.

The bill further alleged that the plaintiff was not chargeable with negligence in not bringing his suit within the two years limited by law; that more than two years before the filing of the bill he caused inquiries to be made concerning Meacham of John Osborn, a merchant in Boston, who knew Meacham, and was informed through Osborn that Meacham was a man of wealth, and that the plaintiff's claim was secure; that Osborn did not then know of the death of Meacham; that the defendants never informed the plaintiff of the death of Meacham nor of their appointment as administrators, though one of the defendants well knew of the plaintiff's claim; and that the plain-

tiff was out of the Commonwealth from February 1863 till July 1, 1869, when he came here and made his claim on the defendants.

The defendants demurred, and the case was reserved on the bill and demurrer, by *Morton, J.*, for the determination of the full court.

J. L. Stackpole, for the defendants.

C. G. Keyes, for the plaintiff.

AMES, J. It seems to be impossible to sustain this bill without overruling the recent case of *Wells v. Child*, 12 Allen, 333. Indeed, that case was perhaps a somewhat stronger one for the plaintiff, as there was certainly some ground for the belief that the assurances and excuses offered by the executor from time to time had been the cause of the delay, which enabled him successfully to defend against a just debt by pleading the statute of limitations.

In the present case, no fraud has been practised upon the plaintiff, and he does not take the ground that he has been misled or thrown off his guard by any declarations of the defendant. The only ground on which he can rest his claim is, that he resided in the remote city of Montreal, and had not been informed of the debtor's decease. The facts upon which he rests his claim to relief, as detailed in the bill, can hardly be said to present anything more than a case of mere neglect and inattention. He failed to make any effective inquiry, and in that way remained in ignorance of a fact which was of course perfectly well known, and which no attempt was made to conceal. The formal notice required by law and directed by the probate court was given, in order to inform all parties interested of the appointment of the defendants as administrators, and although the plaintiff failed to receive actual notice, it is difficult to see why the statute of limitations should be set aside in his favor on that ground, or why any other creditor who failed to see the notification, or to have heard of the debtor's decease, might not on precisely the same ground claim exemption from the operation of that statute. The object of the statute was, to protect the estates of deceased persons, and insure their speedy settle-

ment, without embarrassment from creditors who slumber upon their rights and take no pains to inform themselves of facts as to which information is easily to be obtained. In the case cited, the court say that "they are not aware of any instance in which a party knowing, or having reasonable means of knowing, his rights, and the facts on which they depend, has been allowed in equity to avoid the bar of the statute, upon the ground of misrepresentation or mistake as to the proper remedy to enforce those rights, or the time within which such remedy must be pursued." In this case there is no misrepresentation, and the only mistake is the failure to know a fact about which he made no proper inquiry.

It is hardly necessary to consider the question whether the phrase "culpable neglect," as used in the statute, means anything more than "gross neglect," or failure to make "reasonable inquiry." It is sufficient that the plaintiff does not present a case in which "justice and equity," in any sense which a court of chancery can give to those words, require that judgment should be rendered in favor of this claim.

Bill dismissed, with costs.

GEORGE T. BIGELOW, administrator, *vs.* JOHN MORONG & others.

Under the provisions of the Gen. Sta. c. 91, § 1, c. 3, and c. 94, § 16, that the estate of an intestate who leaves no issue nor father shall go "in equal shares to his mother, brothers and sisters, and to the children of any deceased brother or sister by right of representation," the children of a deceased child of a deceased sister are not entitled to share in the distribution.

On a bill in equity by an administrator for instructions whether, on a correct construction of the statute of distributions, a quarter of his intestate's estate should be divided among all the defendants or among some of them only, the costs of all parties as between solicitor and client were ordered to come out of said quarter, and not out of the whole estate.

BILL IN EQUITY by the administrator of the estate of Samuel Nicolson, praying for instructions as to the distribution of one quarter part thereof.

From the bill and answers, on which the case was reserved by *Morton, J.*, for the determination of the full court, it appeared that Samuel Nicolson died intestate, leaving no issue nor father nor mother; that he left, living at the time of his decease, a sister, all the children of a deceased sister, and the only child of another deceased sister, who were entitled to three quarters of his estate after payment of his debts and the charges of administration; that he had also another sister, Hannah Nicolson, who died before him, four of whose children, and six of whose grandchildren, the children of deceased children of hers, were living at the time of his decease. The only question was, whether the other quarter of the estate was to be divided among the four children of Hannah Nicolson, or whether the six grandchildren were also entitled to share by right of representation through their deceased parents.

L. S. Dabney, for the administrator.

H. W. Paine & J. W. Rollins, for Hannah Nicolson's children.

I. F. Redfield, for the grandchildren of Hannah Nicolson.

GRAY, J. The existing statute of distributions (Gen. Sts. c. 91, § 1; c. 94, § 16) declares that the estate of an intestate shall be distributed as follows:

"First. In equal shares to his children, and the issue of any deceased child by right of representation."

"Second. If he leaves no issue, then to his father."

"Third. If he leaves no issue nor father, then in equal shares to his mother, brothers and sisters, and to the children of any deceased brother or sister by right of representation."

"Fourth. If he leaves no issue nor father, and no brother nor sister, living at his death, then to his mother, to the exclusion of the issue, if any, of deceased brothers or sisters."

"Fifth. If he leaves no issue, and no father, mother, brother nor sister, then to his next of kin in equal degree."

These provisions are substantial, and nearly verbal, reenactments of the corresponding clauses in the St. of 1805, c. 90 §§ 1, 2; and the Rev. Sts. c. 61, § 1, and c. 64, § 1. By another provision, originally inserted in the statute of distributions, but since transferred to the statute of definitions, the word "issue"

is declared to include all the lawful lineal descendants of the ancestor. Rev. Sts. c. 61, § 13. Gen. Sts. c. 3, § 7, *cl.* 9.

Two leading rules are affirmed by these statutes; the one, that all lineal descendants, in whatever degree, shall share in the estate; the other, that, in distribution among collaterals, only those in equal degree shall share, except in the single case of collaterals in the nearest possible degree to the intestate, namely, his brothers and sisters, with whom those of one degree further off, being the children of a deceased brother or sister, may partake. The distinction between the words "children" and "issue" is carefully preserved throughout. "Issue" necessarily includes children; but "children" does not include more remote issue. The third clause of the statute in terms limits the right to share to "the children of any deceased brother or sister." The additional restriction in the fourth clause, excluding all issue, even children, of deceased brothers and sisters, when all the intestate's brothers and sisters are dead and his mother survives, does not extend the right to partake, already clearly limited by the third clause, when some of the brothers and sisters are still living.

This construction of the third clause is the most natural, if not the unavoidable, interpretation of its words; it has been often, and we believe uniformly, acted on in this Commonwealth and in the state of Maine, under the St. of 1805, and the reenactments thereof, expressed in the same words; and it accords with the practice, judicially sanctioned, under the statutes of England and of Massachusetts upon this subject for more than a century before the passage of that statute. St. 22 & 23 Car. II. c. 10, § 7. 2 Williams on Executors, (5th Am. ed.) 1363. Prov. Sts. 1692, (4 W. & M.) c. 14, § 1; 1710, (9 Anne) c. 2, § 1; Anc. Chart 230, 390; 1 Prov. Laws, (State ed.) 43, 652. St. 1783, c. 36. *Sheffield v. Lovering*, 12 Mass. 491, 493, 494. 4 Dane Ab. 538, 539. Commissioners' notes on Rev. Sts. c. 61, § 1. *Quinby v. Higgins*, 14 Maine, 309.

The result is, that the quarter of the estate of the intestate, as to which the administrator asks the instructions of the court, is to be distributed among the children, to the exclusion of the grandchildren, of the deceased sister.

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As this suit does not affect the rest of the estate, nor arise out of an ambiguity in a will, but depends upon the application of the statute of distributions to that quarter only, the costs of all the parties to the suit, taxed as between solicitor and client, are to be paid out of the quarter in controversy.

Decree accordingly.

AARON C. MAYHEW & others vs. BENJAMIN D. GODFREY
& others.

A testator gave "the improvement" of a lot of land to his wife, "so long as she shall occupy the same, free of rent, she remaining my widow." "But should my wife marry again, and improve and occupy the estate above mentioned, she shall do so, so long as she shall annually pay to my sister \$300; and should my wife at any time abandon the occupancy of the estate aforesaid, then I give and devise the same" to trustees in trust "to dispose of said estate, and invest the moneys received from the sale of the same in stocks, or place the same securely at interest, and annually, or more frequently, if the dividends or interest accrue and be paid more frequently, pay the same to my wife and my sister in equal proportions." After other gifts, he gave the residue of all his estate to his wife, sister and brother in equal shares. The wife abandoned the occupancy, and the trustees sold the land and invested the proceeds. Held, that, on the wife's death, the trust terminated, and the principal of the fund, with all after accrued income, went under the residuary clause; and that, the interest under that clause being vested, the wife's share passed under her will.

MORTON, J. The clause in the will of David S. Godfrey, under which the principal question submitted to us arises, is in substance as follows: "I give and devise the improvement of a portion of my real estate, bought of the heirs of the Rev. David Long to my wife Elizabeth so long as she shall occupy the same, free of rent, she remaining my widow." "But should my wife, the said Elizabeth, after my decease, marry again and choose to improve and occupy the estate before mentioned, she shall do so, so long as she shall annually pay to my sister Mary Fiske, widow of the late Dr. James Fiske, the sum of three hundred dollars; and should my wife, the said Elizabeth, at any time abandon the occupancy of the estate aforesaid, then I give and devise the same" to John S. Scammell, William Claffin and Aaron C. Mayhew, "upon trust that they shall jointly and together dispose of said estate, and invest the moneys received

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from the sale of the same in stocks, or place the same securely at interest, and annually, or more frequently, if the dividends or interest accrue and be paid more frequently, pay the same to my wife, Elizabeth, and my sister Mary Fiske, in equal proportions."

The will also contains a residuary clause giving all the residuum of the testator's estate to his wife Elizabeth, his brother Benjamin D. Godfrey and his sister Mary Fiske, to be equally divided between them.

It appears from the bill and answer, that, after the death of the testator, his widow abandoned the occupancy of the said estate, and the trustees thereupon sold the same and invested the proceeds as a trust fund in accordance with the provisions of the will, and for several years paid the income thereof, one half to the said Elizabeth and one half to said Mary Fiske. The said Elizabeth married the defendant Hamilton B. Staples in June 1858, and died in July 1867, leaving a will in which the said Staples is named as residuary legatee and of which he is the executor. Upon these facts, the trustees seek the direction of the court as to the proper disposition of the above named trust fund.

The language of the will directly applicable to this trust fund contains no provision as to the duration of the trust, except so far as is implied in the direction that the income shall be paid to the testator's widow and sister "in equal proportions." But construing this provision in connection with the other parts of the will, we are of opinion that it was the intention of the testator to give his widow and sister an estate in this trust fund for the life of the former. The purpose of the clause, of which the substance is cited above, seems to be, to dispose of the estate bought of the Long heirs, during the life of Elizabeth only, leaving the remainder, after the life estate is terminated, to fall within the residuary clause. It provides for three contingencies: First. If the widow occupies the estate and remains unmarried, she is to have the improvement of it, free of rent. Second. If she marries and occupies the estate, she is to have the improvement of it, subject to a charge of three hundred dol-

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lars a year to be paid to Mrs. Fiske. Third. If she abandons the occupancy, the estate is to be sold and converted into a trust fund, the income of which is to be divided equally between her and Mrs. Fiske.

In either of the first two contingencies, it is obvious that the widow would take only a life estate; and that the remainder, being undisposed of, would fall within the residuary clause. *Thayer v. Wellington*, 9 Allen, 283. It is equally clear that in the second contingency Mrs. Fiske would take only an interest during the life of the said Elizabeth. In the third contingency, provision is made for a trust fund to be substituted for the Long estate; and, by dividing the income equally between the two objects of his bounty, the testator makes substantially the same provision for each as she was entitled to before the change. There is nothing in the will which indicates that he intended to give them a larger or different interest in the trust fund than they would have in the estate for which it was substituted. Construing the clause in question as a part of the testator's scheme for the disposition of the Long estate, we are of opinion that the limitations in the first two contingencies are applicable to the third, and that the widow and Mrs. Fiske took an interest in the trust fund for the life of the widow only.

It follows, from these considerations, that upon the death of the widow the trust terminated. The trustees took an estate coextensive with the requirements of the trust, and, these having been accomplished, the trust ceased, and the fund is to be distributed under the residuary clause. Under this clause, the three residuary legatees took an estate in remainder, which vested at the death of the testator, as tenants in common. *How v. Waldron*, 98 Mass. 281. The interest of the said Elizabeth as residuary legatee, being a vested interest, upon her death passed under her will. The result is, that Benjamin D. Godfrey, Mary Fiske, and the defendant Staples, are each entitled to one third of the trust fund, and of such income thereof as has accrued since the death of the said Elizabeth. All the income which accrued before her death is to be divided equally between her and Mrs. Fiske, and that portion thereof which accrued and

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vested in her previously to her death passed to the defendant Staples. The same rule applies to the income of the other trust fund created by the will. To such proportion of it as accrued and vested in Mrs. Staples before her death, her executor is entitled, and the balance and such as has since accrued is to be divided according to the provisions of the will applicable thereto, in regard to which no question has been raised.

Decree accordingly.

W. F. Slocum & F. P. Goulding, for Hamilton B. Staples.

T. G. Kent, for Benjamin D. Godfrey.

J. S. Scammel, for Mrs. Fiske.

DANIEL B. STEDMAN & another, executors, *vs.* MIRIAM W. PRIEST & others.

A testator, having eight children, and three grandchildren, A., B. and C., children of a deceased daughter, and another grandchild, child of another deceased daughter, by his will divided his estate into ten equal parts, six of which he gave to six of his children by name, two to trustees for his other two children, one to A., B. and C. by name, and the tenth to the other grandchild. As to each of the shares given in trust, in event of the *cestui que trust* dying without issue, he directed that it should be divided among all his children and grandchildren, the issue of such of his children as should then have deceased taking by representation their parents' share, and, "to do equal and exact justice to all my children and grandchildren," he directed any advancements made to be deducted from the share of each child or grandchild. B. died before the testator. *Held*, that B.'s share did not lapse, but went to A. and C.

BILL IN EQUITY by Daniel B. Stedman and George Stedman, executors of the will of Josiah Stedman, praying for instructions as to the disposition of his estate. The material facts in the case, as alleged by the bill and admitted by the answers, on which the case was reserved by *Gray, J.*, for the determination of the full court, were as follows:

The testator's will, dated February 1, 1865, after giving a legacy, continued thus: "I do will, order and direct, that the whole of the residue and remainder of my estate," "shall be divided into ten equal parts, shares, or portions, and I do hereby give, devise and bequeath to my sons, Daniel B. Stedman and

George Stedman, to my daughters Miriam W. Carey, Hannah M. Jackson, Henrietta S. Alleyne and Lucy Stedman, and to their several and respective heirs and assigns forever, (one share to each,) of the said ten shares, parts or portions, named as aforesaid, to have and to hold the same, the said Daniel B. Stedman, George Stedman, Miriam W. Carey, Hannah M. Jackson, Henrietta S. Alleyne and Lucy Stedman, and to their several and respective heirs, executors, administrators and assigns, forever, as an absolute estate in fee, one tenth part, share or portion to each as aforesaid."

"I give, devise and bequeath one of the said tenth parts, shares or portions, of my estate so divided as aforesaid, to my grandchildren, Ellen M. Dobson, (wife of Isaac F. Dobson,) John W. Atkins, and Sarah S. Atkins, to be equally divided between them, the said Ellen M. Dobson, John W. Atkins, and Sarah S. Atkins, in equal shares to them and their several and respective heirs and assigns forever.

"I give, devise and bequeath one of the said ten parts, shares or portions, of my estate so divided as aforesaid, to my grandchild Emma Atkins, daughter of Josiah Atkins and Anna B. Atkins, to have and to hold the same to her, the said Emma Atkins, her heirs, executors, administrators and assigns, and their use and benefit forever.

"The remaining two shares, parts or portions of my estate so divided as aforesaid, intended for the use of my son, Josiah Stedman, Jr., and my daughter Clarissa S. Bates, wife of M. G. Bates, I do hereby give, devise and bequeath to my said before named sons, Daniel B. Stedman and George Stedman, and to the survivor of them, his executors, administrators, heirs and assigns forever," in trust, to pay over and distribute the income of said two shares, or portions, equally between the said Josiah Stedman, Jr. and the said Clarissa S. Bates, and "upon the decease of my son Josiah Stedman, Jr., and my daughter Clarissa S. Bates, as the same shall or may happen in the order of Providence, leaving issue, then to grant and surrender to such issue, to be divided between them in equal shares, and to their several and respective heirs and assigns forever, the said share, portion

or tenth part, so divided as aforesaid, with all additions or accumulations thereof, of which the parent had then, before, or was to have received, the rents, income and interest according to the provisions herein contained; and moreover, in case of decease of my son Josiah Stedman, Jr., or my daughter Clarissa S. Bates, as the case may be, so deceasing without issue, embracing all accumulations thereon unexpended, I will and direct shall be equally divided among all my children and grandchildren, the issue of such of my children as shall have then deceased taking by representation equally their parent's share."

"In order to do equal and exact justice to all my children and grandchildren, I do further will, order and direct, that, in the division and distribution of my estate as aforesaid, the advancements heretofore made to my said daughters, Miriam W. Carey, and Hannah M. Jackson, shall be deducted from their respective shares or portions of my estate, as also any other advancements heretofore or hereafter to be made to any of my children or grandchildren, which shall be by me charged in my books as such advancements against such children or grandchildren; and also, moreover, that such promissory notes, claims, or evidences of debts, as now are, or at the time of my decease may be, held by me against my two sons, hereinafter constituted executors of this will, are not to be extinguished by such appointments, but are to be considered a part of my estate, in the division and distribution aforesaid; and I do nominate and appoint my two sons, heretofore named, Daniel B. Stedman and George Stedman, sole executors of this my last will and testament."

Ellen M. Dobson, John W. Atkins, and Sarah S. Atkins, now the wife of John Holmes, were all the children of a deceased daughter of the testator, the first wife of the said Josiah Atkins; and Einma Atkins was the only child of another deceased daughter of the testator. John W. Atkins died in 1866; and the testator died in 1867. The only question was, whether the share of John W. Atkins had lapsed, or whether it passed to his sisters Ellen M. Dobson and Sarah S. Holmes.

H. W. Paine, for Mrs. Dobson and Mrs. Holmes.

R. D. Smith, for the other legatees.

COLT, J. Technical rules of interpretation will not be permitted to control the general rule, that the intention of the testator, as gathered from the whole will, must govern in its construction. Thus, although it is a rule that, when an aggregate fund is given to several, to be divided among them, *nominatim*, in equal shares, if one of them dies before the testator, his share will lapse; yet the mere fact that he mentions by name the individuals who make up the class is not conclusive, and if the intention to give a right of survivorship is collected from the remaining provisions, applied to the existing facts, such intention must prevail.

We think the manifested intention in this case requires us to disregard the technical rule of construction alluded to. The testator, leaving eight children, and grandchildren representing two deceased daughters, divides the residue of his estate into ten equal parts, six of which he gives to six of his children, two to trustees for the remaining two children, and, of the other two parts, one he gives to three grandchildren, children of one deceased daughter, and the other to one grandchild, child of another deceased daughter. He divides the shares given in trust, in the event of the death of the devisees without issue, by the rule of representation. And he directs all advancements to be deducted from each child's share. He gives to one grandchild as much of his estate as he gives to her half sisters and brother, children of another daughter, three in number; affording the strongest evidence that he intended it all to be devised *per stirpes*.

The children of each of the deceased daughters constitute a class by themselves, representing their mothers; and the surviving grandchildren, Mrs. Dobson and Mrs. Holmes, take the share that would have gone to their brother John, had he survived the testator. *Jackson v. Roberts*, 14 Gray, 546, 550. *Schaffer v. Kettell*, 14 Allen, 528. *Balcom v. Haynes*, Ib. 204.

Decree accordingly.

**HORACE B. SARGENT, executor, vs. LETITIA S. SARGENT
& others.**

A testator, who died in June 1867, by his will directed that certain United States bonds in his possession should be sold, as soon as might be after his decease, and the avails paid over to a trustee, in trust to pay the interest thereof to L. during her life, and the principal at her death to her children. Attached to the bonds were coupons for interest, payable semiannually in May and November. The executor collected and retained the amount of the coupons which fell due in November 1867, May and November 1868 and May 1869; and in October 1869 sold the bonds with the coupons then not fully due attached, and paid the avails to the trustee. The delay in the sale was caused by adverse claims, and not by any fault of the executor or beneficiaries. On a bill in equity by the executor, for instructions, against L. and the children, *Held*, that the amount of the four coupons collected by the executor was payable as income to L., after deducting therefrom the costs of all parties as between solicitor and client.

GRAY, J. The executor of the will of Lucius M. Sargent prays the direction of this court, sitting in equity, as to the construction and effect of the following clause in the will:

"I will and direct that twenty bonds of the United States, of one thousand dollars each, now in my possession, be sold, as soon as may be after my decease, and the avails paid over to the Massachusetts Hospital Life Insurance Company, in trust to pay the interest thereof annually to Letitia S. Sargent, wife of Lucius M. Sargent, Junior, during her natural life, and the principal at her death to his children, share and share alike."

Lucius M. Sargent, Jr., died before the testator; and his widow and children are the defendants in this suit.

The testator died, and his will was proved, in June 1867. A demand was afterwards made, and on the 9th of November 1867 a bill was filed, in behalf of his widow, claiming these bonds as her property; and that bill, after a full hearing, was dismissed on the 23d of September 1869, upon the ground that the bonds were the property of the testator. *Dunn v. Sargent*, 101 Mass. 336.

The bonds had coupons attached, for three per cent. interest each, payable in gold semiannually, on the first days of May and November. The executor from time to time collected, and has retained in his hands, the amount of the interest on the coupons which fell due on the first day of November 1867,

the first days of May and November 1868, and the first day of May 1869; and on the 9th of October 1869 sold the bonds, with the coupons not fully earned attached, for the sum of \$23,949.60, and paid that amount to the Massachusetts Hospital Life Insurance Company, upon the trust set forth in the will.

The manifest intention of the testator was, that this fund should be kept apart from the residue of his estate, for the purpose of securing an annuity for his son's widow during her life, and a provision for their children after her death; and that the manner of carrying out this purpose should be by forthwith converting the bonds into an investment with the trust company named in the will.

The delay in making the sale of the bonds and investment of the proceeds was not contemplated by the testator, nor owing to any fault of the executor or the beneficiaries, but was rendered necessary by an adverse claim to the whole fund, and by the suit brought to assert that claim, pending which the executor could not safely proceed to invest the fund according to the will, because, if the adverse claim should prevail, the fund would be ascertained not to have been subject to the disposal of the testator.

In the case of a bequest of a residue in trust to be sold as soon as may be and invested in a particular kind of security, and the income paid to one person for life, and then the principal to others, without any direction that such investment shall include intervening income by way of accumulation, it is now, after much variety and conflict of opinion, well settled in England, that the tenant for life is entitled to income from the death of the testator; that the conversion from one form of security to another, if not made sooner, is to be taken as if made at the end of one year from the testator's death; and that the tenant for life is to receive the income computed accordingly from that time, and the income of the actual investment for the first year, if in public funds or such other securities as a trustee might lawfully invest in. *Angerstein v. Martin*, Turn. & Russ. 232. *Hewitt v. Morris*, Ib. 241. 2 Spence Eq. 558-568. *Macpherson v. Macpherson*, 1 Macq. 243, 249-252. *Brown v. Gellatly*, Law Rep 2 Ch. 751.

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In this court, the general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death; because any other rule would take away the income from the tenant for life, and apply it to the increase of the capital for the benefit of the remainderman. *Lamb v. Lamb*, 11 Pick. 371. *Minot v. Amory*, 2 Cush. 377, 388, 389. *Lovering v. Minot*, 9 Cush. 151, 157. The rights of the tenant for life certainly can be no less in a special fund set apart by the testator than in a residuary bequest. The necessary delay in carrying out the secondary and incidental intention of the testator, as to the form of investment, should not be allowed to defeat his primary intention, as to the immediate benefit of the fund.

The securities in which the testator left the trust fund invested, as well as those into which he directed it to be converted, would produce a safe and regular income in money, and were such as a trustee might lawfully invest in, unless controlled by express directions. The income received by the executor before the conversion was equivalent to an interest of six per cent. on the principal, and payable in money. The case, as presented to the court, shows no such difference in kind or amount of income upon the two forms of investment, as should prevent the income thus actually received by the executor from being paid to the tenant for life.

The coupons or dividends on the bonds of the United States were made payable by law at certain times; and the whole of each belonged to the person entitled to the income at the time when it fell due, without apportionment. *Pearly v. Smith*, 3 Atk. 260. *Wilson v. Harman*, 2 Ves. Sen. 672; *S. C. Ambl.* 279. *Wiggin v. Swett*, 6 Met. 194.

The effect of the application of the general rules of law to this case is in harmony with those prescribed in the Gen. Sta. c. 97, §§ 23, 24, by which it is declared that, when an annuity or the income of any fund is bequeathed to or in trust for a person for life or until the happening of a contingent event, he shall be entitled to the same from the death of the testator, unless otherwise provided in the will, or required for the payment of debts

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or preferred allowances; and that, if such person dies or such contingent event happens in the midst of a year, the annuity or income for the current year shall be apportioned, unless otherwise provided in the will. The first of the rules thus declared accords with the conclusion that the tenant for life is entitled to the income of the fund from the death of the testator; and the second does not cover any time before the testator's death, nor affect a case of a change of investment during the life of the person entitled to the income. In such a case, the tenant for life will be entitled on the next day of payment to the income then received from the new investment.

The result is, that the amount of the four coupons, received by the executor while he held the bonds — deducting, of course, the reasonable expenses of this suit, including the costs of all parties, taxed as between solicitor and client — is to be paid to Letitia S. Sargent.

Decree accordingly.

H. W. Paine, for Letitia S. Sargent.

R. D. Smith, for the children of Lucius M. Sargent, Jr.

CATHERINE MCCLUSKEY vs. PROVIDENT INSTITUTION FOR SAVINGS.

In an action by a widow against a savings bank for money deposited by her therein in her own name, proof that it did not belong to her, and was so deposited, in her husband's lifetime, at his request and for his benefit, and that the administrator of his estate has demanded it from the bank, rebuts any presumption that it was a gift to her from her husband.

Money earned by a married woman, if not earned in a business carried on upon her sole and separate account, nor given to her by her husband, cannot be held by her as against her husband's representatives after his death; and if she has mixed it with her own separate funds so that the amount of it cannot be ascertained, and deposited the whole in a savings bank, from which her husband's representatives have demanded the deposit, she cannot maintain an action against the bank for the amount thereof.

CONTRACT to recover money deposited with the defendants by the plaintiff under the name of Catherine Shea. The answer alleged the defendants' ignorance of the facts set forth in the

declaration, and that, if the plaintiff made such deposits, she was at the time of making them the wife of Daniel Shea ; " that said deposits belonged to him and not to the plaintiff, and were made by the plaintiff for him, at his request and for his benefit ; that, prior to the commencement of the plaintiff's suit and since said deposits were made, Daniel Shea died, and Patrick J. Shea, his son, has been duly appointed administrator of his estate, and now claims said deposits as such administrator, and has demanded the same of the defendants and notified the defendants not to pay over any money to the plaintiff out of the moneys so deposited ; and that the plaintiff has not duly notified and demanded of the defendants said deposits of money, as required by the plaintiff's contract, if any, with the defendants, and as required by law." Trial in the superior court, before *Reed, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions substantially as follows :

" The pleadings make a part of the case. The defendants answered, among other things, that the moneys, when deposited by the plaintiff, belonged to Daniel Shea, the former husband of the plaintiff ; that the moneys were all deposited while the plaintiff was the wife of said Daniel Shea ; that Patrick J. Shea, son of Daniel Shea, had been duly appointed administrator of his estate, and had notified the defendants of those facts, and forbade payment of said money to the plaintiff, and required payment thereof to him as such administrator.

" For the purpose of a ruling by the judge upon the sufficiency of said defence, if proved, the parties admitted, for the time being, that the moneys claimed were deposited in the name of Catherine Shea ; that a book in the usual form and containing the contract usual in such cases was delivered by the defendants to the plaintiff (said book may be referred to for the contract, and to show the times of deposit) ; that a demand had been made upon the defendants therefor by the plaintiff before suit was commenced ; that the plaintiff was now married to Philip McCluskey ; and that Patrick J. Shea, as administrator of the estate of Daniel Shea, had demanded the money of the defendants. Upon this statement, the judge ruled that said

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defence could not be maintained, and ordered a verdict for the plaintiff; to which ruling the defendants excepted." The case was argued in writing in November 1868.

E. S. Cutter & I. J. Cutter, for the defendants.

J. Nickerson, for the plaintiff.

COLT, J. The recitals from the defendants' answer, contained in the bill of exceptions, do not state, nor was it agreed as a fact, that the deposits in the lifetime of the plaintiff's former husband, were made without his knowledge or assent, or that the money was required for the payment of his debts existing at the time. If this were all, it would be fair to presume that they were made in her name with his consent, and that they are not now claimed in behalf of creditors. The fact that the deposit was made in her name, with his knowledge and consent, would be sufficient evidence, if uncontrolled, of a gift of the money from the husband to his wife, perfected by delivery, which would give her a valid title to the same after his death, as against his legal representatives. This, undoubtedly, was the view taken by the court below. Gen. Sts. c. 108, §§ 1, 7. *Fisk v. Cushman*, 6 Cush. 20. *Adams v. Brackett*, 5 Met. 280, 285. *Ames v. Chew*, Ib. 320.

But the pleadings are made part of the case, and, on turning to the answer, we find it there alleged that these deposits were made by the plaintiff for her husband, at his request and for his benefit, and do not belong to the plaintiff; that, since the death of her husband, his administrator has demanded them of the defendants, and now claims them as such administrator.

The court ruled, as we understand the exceptions, that the facts so alleged, in connection with the facts admitted, would not constitute a defence. But we are of opinion that they would, if proved, defeat the inference of a gift arising from a deposit in the wife's name, showing that it was not so intended, and that she acted as the agent of her husband in the transaction.

Exceptions sustained.

After this decision, the defendants amended their answer by alleging that two of the deposits were made by the plaintiff

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after the death of Daniel Shea, of money belonging to his estate.

At the new trial in the superior court, before *Dewey, J.*, it appeared that the plaintiff was the wife of Daniel Shea, and made deposits with the defendants at various times, in her name of Catherine Shea, till November 17, 1866, when her husband died; that after his death she made two small deposits, one on November 28, 1866, and the other on March 13, 1867; that all the rules of deposit with the defendants were complied with by the plaintiff; that she made a proper demand on the defendants before action brought; that Patrick J. Shea was duly appointed administrator of the estate of Daniel Shea on June 17, 1867, and made a demand on the defendants for the money deposited by the plaintiff as the property of the estate, before the beginning of this action; and that the plaintiff was married to Philip McCluskey in May 1867. There was conflicting evidence on the question whether the deposits made by the plaintiff consisted of money acquired by her in trade or labor carried on upon her sole and separate account, and whether Daniel Shea supported his family by his labor.

The judge instructed the jury that the plaintiff was entitled to recover unless the defendants proved that the title to the money was in Patrick J. Shea, as administrator of his father's estate; that if the money was received by the plaintiff from any trade, labor or services carried on or performed by her on her sole and separate account, she was entitled to the same as against her husband or his administrator; that, if the money was her husband's, he might give it to her, and if he did so, and she deposited it with the defendants in her own name, she was entitled to hold it against all persons except the creditors of her husband, and there was no evidence that her husband had any creditors; but that, "if the money deposited was the money of Daniel Shea, earned by himself, by his minor children and by his wife, (save from any labor, trade or services carried on or performed on her sole and separate account,) and was deposited as his money in her name, as a matter of convenience in keeping the account, and was never given to her, then the plaintiff could not maintain this action."

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The plaintiff asked the judge to rule that "in any event in this form of action, and under the pleadings, the defendants were liable for the money deposited since the death of the plaintiff's husband, notwithstanding the same may have been the estate of the husband." The judge so ruled, but added: "Not if the specific money left by him was deposited by the plaintiff to the same account she had deposited the husband's money in his lifetime." The plaintiff further asked the judge to rule, "that it was the duty of the husband to support his family, and if the jury find that he did not contribute more than sufficient for that purpose, the plaintiff can recover." But the judge declined so to rule. The plaintiff also asked the judge to rule that, "if the jury find that the husband gave any money to his wife, or made a gift to her of any of the money in controversy, the wife is entitled to it as against his heirs at law." The judge so ruled, but added: "Unless she so mixed it with money of the husband that the amount of it cannot be ascertained." The judge also ruled that "the husband was entitled to the earnings of the plaintiff and their children, other than the earnings excepted by statute; and that, if the plaintiff had earned money, outside of what she might earn for her services as wife and mother, and had allowed those earnings, or any part, to be mixed with her earnings as wife and mother, so that the same could not be separated and ascertained, she could not recover for such earnings." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

J. Nickerson, for the plaintiff.

I. J. Cutler, for the defendants.

CHAPMAN, C. J. By the Gen. Sts. c. 108, § 1, it is provided, among other things, that the property which a married woman "acquires by her trade, business, labor or services, carried on or performed on her sole and separate account," shall "be and remain her sole and separate property." This provision leaves the property which she acquires by trade, business, labor or services, not carried on or performed by her on her sole and separate account, to be as it was at common law, the property of her husband.

In this case, the property acquired by her was deposited by her with the defendants in her own name, and remained there till after her husband's death. It was held, at the former hearing, that, even if the property did not belong to her under the statute, yet the presumption would be that her husband had made a gift of it to her, perfected by delivery and by the deposit in her name, so that she could hold it after his death. The rulings now excepted to are in conformity with this decision. It was ruled that the burden was on the defendants to prove that the title was in the husband's administrator, and that it was not her sole and separate property, and had not been given to her by her husband, but was deposited by her with the defendants as his agent. As to the two deposits made by her after his death, the jury were correctly instructed that the money was hers unless the specific money left by him was deposited by her to the same account to which she had deposited the husband's money in his lifetime. There can be no doubt that, if, after his death, these sums, which had been his till his death, were taken and specifically deposited by her with the defendants, they would not thereby become hers.

The instruction prayed for, "that it was the duty of the husband to support his family, and if the jury find that he did not contribute more than sufficient for that purpose, the plaintiff can recover," was properly refused; for, on the principle contended for, the plaintiff could recover, though the property had not been acquired as her sole and separate property, and though the husband had never parted with his title to it.

The instruction prayed for, "that if the jury find that the husband gave any money to his wife or made a gift to her of any of the money in controversy, the wife is entitled to it as against his heirs at law," was given with a proper qualification, namely, that she was entitled to it "unless she so mixed it with money of the husband that the amount of it cannot be ascertained." If he made her a gift of money during his lifetime, it would not by that mere act become her sole and separate property. The doctrine of the common law would apply to it. In order to hold it after his death, it would be necessary for her

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to keep it separate. *Fisk v. Cushman*, 6 Cush. 20. To mix it with his money in his lifetime, so that the amount remaining after his death could not be ascertained, would be, in effect, returning it to him. And another insuperable difficulty in the way of her recovery would be, that the jury could not fix upon any amount for which their verdict should be rendered. So if she possessed money earned as her sole and separate property, and allowed those earnings, or any part of them, to be mixed with her other earnings, so that the same could not be separated and ascertained, it would be impossible to render a verdict in her favor. The statute does not protect her property except so far as it is sole and separate; and it fails to be so when she herself so mixes it with her husband's property that it cannot be separated and ascertained. The instruction to this effect was correct.

Exceptions overruled.



ROBERT L. DAY & others vs. DAVID W. HOLMES.

SAME vs. SAME & trustee.

DAVID W. HOLMES vs. ROBERT L. DAY & others.

The order of a customer to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, does not authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission; and a usage of brokers so to do is bad; nor is the exchange of bought and sold notes between the broker and his customer, nor the giving of his note by the customer in payment for the stock, in ignorance of the broker's conduct, a ratification of his acts.

A person to whom certificates of mining stock with blank assignments had been pledged filled up the assignments, had new certificates made out to himself, and afterwards had some of the stock transferred to J. S., as trustee, and the rest by assignments, absolute on their face, to other persons. *Held*, that it was competent for him to prove, in defence to an action by the pledgor against him for the conversion of the stock, that he made these transfers because he thought that it would injure his credit to have so many mining stocks standing in his name; that no consideration was paid for any of these transfers; that he took back blank assignments from all the transferees except J. S.; and that all the stocks remained in his control and ready for delivery to the owner on the payment of the amount for which they were pledged. *Held, also*, that these facts, if proved, were a good defence to the action.

THE FIRST TWO actions were on promissory notes made by the defendant; the third action was brought by the defendant in

the former actions against the plaintiff in those actions, to recover for the alleged conversion of shares of mining stock. The cases were referred to George W. Phillips, Esq., as auditor, and submitted to the judgment of the superior court upon his report as an agreed statement of facts.

The auditor found that "there was a general, well known usage, among stockbrokers in Boston, in filling orders for stock" deliverable at any time, at buyer's option, within a certain period, with interest, at a sum not exceeding a certain price, "to buy the stock for cash, or on a shorter time than ordered, in their own names, not disclosing the names of their principals, and to turn the same, as it is called, or carry it till the maturity of the contract, and to charge therefor a brokerage, in addition to the usual commissions for buying, as compensation for the risk of such carrying; that the amount of such extra brokerage differed with different stocks, and with the length of time for which they were carried, being greater in the case of some stocks and smaller in that of others, and greater for a long time and less for a short one; that such usage was well known among persons dealing in stocks of the description in question;" but that "there was no evidence of actual knowledge by the defendant of such usage."

The superior court ordered judgment for the plaintiffs, in the first two actions, for a sum in computing which the amounts of two of the notes sued on, given by the defendant in settlement of purchases of stock in the Pontiac and Hancock Mining Companies, were excluded; and in the third case, for the defendants; and both parties appealed. The other facts are stated in the opinion.

T. Weston, Jr., for Day & others.

J. D. Bryant & F. Goodwin, for Holmes.

MORRIS, J. The able report of the auditor, and his clear marshalling of the complicated facts of these cases, have greatly aided the court in determining the principles of law which underlie the rights of the parties.

The first controverted question which arises is, as to the validity of two notes given by the defendant in settlement of

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the purchase of the Pontiac and the Hancock stocks. The transactions in regard to each of these notes are substantially the same. It is therefore necessary to consider in detail only one of them. The facts as to the Pontiac stock are as follows: On August 30, 1866, the defendant gave to the plaintiffs (who were stockbrokers) an order which it is admitted meant, when filled out in words, "Buy for D. W. Holmes 500 shares of Pontiac mining stock, deliverable at any time at buyer's option, in 60 days and 3 days grace, with interest, at a price not exceeding \$2 per share, the order to stand open for two weeks." On or about September 6, 1866, the plaintiffs exchanged with the defendant bought and sold contracts, in which the said 500 shares of Pontiac stock were stated as bought at \$1.75 per share, deliverable in sixty days, at buyer's option, and the words "and brokerage" added at the foot. At the expiration of said sixty days and grace, namely, on November 8, 1866, the plaintiffs made to the defendant the written statement of which the following is a copy:

" R. L. Day & Co. Boston, November 8, 1866.
 Bought for D. W. Holmes, 500 Pontiac Mining
 Co., 1½, \$875 00
 ½ Brokerage, 31 25
 906 25
 63 days' interest, and stamp, 10 36
 \$916 61"

Thereupon the bought and sold contracts were mutually surrendered, and the defendant gave the plaintiffs the note in question for \$916.61. The plaintiffs were unable, at the time when the said order was given, to buy the stock in question on sixty days; they could have bought it for \$1.50 cash per share; but they did in fact buy it, through other brokers, on thirty days, at \$1.62½ per share, and not at \$1.75 as charged in said written statement. At the end of said thirty days and grace, the plaintiffs paid for said stock at \$1.62½ per share, and interest and commissions, and a certificate was issued in their names, they

holding the same as collateral to cover this contract with the defendant. The defendant had no knowledge of the manner in which the plaintiffs procured this stock, or of the amounts paid therefor. Upon these facts, we are of opinion that the defendant is not liable upon the note in question. The course of the plaintiffs in buying the 500 shares of stock, as above stated, was not an execution of the order of the defendant, and was unauthorized by him. It was a departure from the instructions of their principal, and he was not bound to take and pay for the stock thus purchased. *Pickering v. Demeritt*, 100 Mass. 416. The defendant gave his note in settlement for this stock without knowledge that his order had not been duly executed. The exchange by the plaintiffs of the bought and sold contracts, and the rendering of the account of November 8, without notice to the defendant of the real facts, amounted to a legal fraud upon him. These acts of the plaintiffs were equivalent to a misrepresentation by them of material facts, the natural and necessary effect of which was to mislead the defendant and induce him to give his note under a deception thus practiced upon him by the plaintiffs.

The argument that by exchanging the bought and sold contracts the defendant ratified the act of purchase by the plaintiffs is unsound, because at the time of doing so the defendant was ignorant of the fact that his order had not been duly executed.

The usage alleged by the plaintiffs to exist among stockbrokers in Boston cannot avail them. There are many forcible objections to its validity; but a conclusive one is, that it is against sound policy and good morals. It authorizes the broker, in his discretion, to disregard his instructions, and, instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into the contract of agency. Such a usage, unknown to the principal, cannot be supported.

It follows from these considerations that the plaintiffs are not entitled to recover on the two notes given for the Pontiac and Hancock stocks.

The remaining notes held by the plaintiffs are admitted to be valid. The auditor has found certain payments and credits, which it is conceded should be applied in partial extinguishment of these notes. But the defendant claims that, in addition thereto, he should be allowed the value of the stocks sold by the plaintiffs as collateral, in February and March 1867, upon the ground that the acts of the plaintiffs in regard to them in law amounted to a conversion. Upon this claim two questions arise:

1. It appears from the auditor's report that the defendant lodged with the plaintiffs certificates of 200 shares of Humboldt Mining Company, and 200 shares of Petherick Mining Company, not purchased by the plaintiffs, as general collateral security for his indebtedness to them, with assignments in blank, and on the 15th and 16th of February 1867 the plaintiffs filled up the blank assignments by inserting their own names, and new certificates were issued to them. This was in no sense a sale of the stock to themselves. The delivery to them of the assignment in blank necessarily implied the right to insert their own names, and the doing so and taking out of new certificates was in accordance with the implied contract of the parties, and a lawful and reasonable measure to protect their security, and can upon no principle be deemed an unlawful conversion.

2. We are of opinion that the transfers of this stock, made March 4, 1867, did not in law amount to a conversion. It appears from the evidence, which was clearly admissible, that these transfers were made by the plaintiffs in good faith, for the purpose of relieving themselves from supposed damage to their credit by reason of holding so many of these stocks, that there was no contract of sale of any of them, that no money or other consideration was paid or agreed to be paid therefor, that they took back from the transferees, except in the case of the transfer to Charles E. Eddy, Jr., as trustee, blank assignments, and that all the said stocks, including the Eddy stock, remained under their control and ready for delivery to the defendant on payment of his notes held by them. It was obviously not the intention of the plaintiffs to exercise any dominion over these stocks in-

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consistent with the rights of the defendant. His rights were not in fact violated or injuriously affected. He could at any time have received his collaterals upon payment of his debts. There having been no demand and refusal, and the defendant having sustained no injury from the acts of the plaintiffs, we are of opinion that they did not amount to a conversion. *Wood v. Hayes*, 15 Gray, 375.

The only other question presented is, as to the sum of \$512.39 indorsed on the note given for the Pontiac stock as of December 15, 1866. The plaintiffs' claim, that this sum should not be credited to the defendant in general account, cannot be sustained. The auditor finds that it is to be credited on general account, and nothing appears to impeach the correctness of his finding. It is clear that a different finding could not be sustained.

The result is, that the judgment of the superior court must
Affirmed.

EDWARD L. GIDDINGS & another vs. RICHARD W. SEARS.

Brokers, having been ordered by a person to buy stock for him, bought and paid for it, took the certificate in their own name, offered to transfer the certificate to him, and demanded payment, but he neglected to pay. *Held*, that they could recover from him the price paid by them, and not merely the difference between that price and the market value of the stock on the day of their demand.

CONTRACT to recover money paid for two hundred shares of stock in the Huron Mining Company, bought for the defendant.

At the trial in this court, before *Gray, J.*, the plaintiffs testified that, on February 28, 1867, the defendant, being in New York, ordered them by telegraph to buy the stock in question for him in Boston; that they did so, and telegraphed him that they had bought it "regular;" "that 'regular' was buy today and pay tomorrow on delivery of the stock;" "that the usage was, where brokers bought stock for another, and paid for it with their own funds, to buy the stock in their own names, have it

transferred to their personal credit at the time of paying for it, and hold it until reimbursed by their principal;" that they paid for the stock on March 1, and took a certificate thereof in their own names; that the defendant subsequently acknowledged that the stock was bought for him; that "on March 11 the plaintiffs called on the defendant, tendered him an account of the purchase, demanded payment, and offered to transfer the certificate to him, and the defendant promised to pay for the stock but asked for time;" that "the defendant never directed or suggested a sale of the stock, and the plaintiffs never did sell it, or tell him that they had sold it; and that the stock was now worthless." No objection was made to the competency of any of this testimony.

The defendant was permitted, "against the objection of the plaintiffs, and for the purpose of showing the relation in which the parties stood at the time of the order to buy the stock, to testify that he had for two or three years had dealings with the plaintiffs, in which he had ordered them to buy stocks 'regular,' and the usual course was for them to buy and pay for the stocks, and hold them a short time, and then sell them and receive or pay the difference in price." He also testified that on March 11 he instructed the plaintiffs to sell the stock now in question, and on the next day they told him they had sold it for the market price on that day, and demanded of him the balance, which was \$2612; and that he promised to pay that sum if they would give him a little time.

"The defendant requested the judge to instruct the jury that, as the plaintiffs held the stock, they could recover only the difference between the price paid for it and its market value on the day of their demand. The judge declined so to rule; and instructed the jury that, if the stock was bought and held by the plaintiffs for the defendant, and he did not order it to be sold, they might recover the amount paid by them for the stock, with interest from the date of payment." The jury returned a verdict for the plaintiffs for the full amount claimed, and the judge reported the case for the determination of the full court; "if the ruling requested was rightly refused, judgment to be entered on

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the verdict; otherwise, judgment to be entered for the plaintiffs for \$2612, and interest from March 12, 1867."

G. O. Shattuck & C. W. Huntington, for the defendant, cited *Thompson v. Alger*, 12 Met. 428.

N. Morse, for the plaintiffs.

COLT, J. There is nothing in the case which seems to require the instruction which the defendant requested. Upon the defendant's evidence, it is plain that the plaintiffs purchased for him upon his order, and held the stock only as agents for him. The rule asked for is applicable only where the plaintiff seeks to recover damages for the breach of an executory contract of sale. The jury must have found, under the instructions given, that the stock was bought and held by the plaintiffs for the defendant, and that he did not order it to be sold.

Judgment on the verdict.

BENJAMIN BROWN & others vs. CHARLES A. PHELPS.

A broker, employed to purchase stock, contracted for it in his own name with J. S., who owned it at the time but had made a prior contract for its sale. The employer, for groundless reasons, repudiated the contract; but the broker, having no knowledge of or reason to suspect the prior sale by J. S., paid for the stock when tendered to him. *Held*, that the Gen. Sts. c. 105, § 6, making void contracts for the sale of stocks not owned by the seller, did not debar the broker from recovering from his employer the amount so paid.

CONTRACT by stockbrokers to recover the price paid for three hundred shares of stock in the Hancock Mining Company, purchased by them for the defendant from Aaron W. Spencer. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts, the material part of which is stated in the opinion.

R. M. Morse, Jr., for the plaintiffs.

H. D. Hyde, for the defendant.

CHAPMAN, C. J. The plaintiffs acted as agents of the defendant in contracting for the purchase of the stocks which are th

subject of controversy, and the question presented is, whether they made contracts which they were justified in fulfilling after the defendant's refusal to adopt them. If they were void contracts, it is because they were in contravention of the Gen. Sta. c. 105, § 6, making void all contracts for the sale of stocks, unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or authorized by the owner or assignee, or his agent, to sell or transfer the certificate or other evidence of stock.

The plaintiffs contracted with Spencer on November 27, 1867, for the purchase of 100 shares in the Hancock Mining Company, to be delivered in two months, at buyer's option. Spencer then had 3550 shares. He had received 300 of them from one Sheafe as collateral security for a loan. But the loan was unpaid, and it was agreed that Spencer should have the absolute right to dispose of the shares, and, when the loan should be paid, he was to return the same or other shares. His contract to sell shares thus held by him would not be a violation of the statute, because he had a right to sell them. But he was under a contract to deliver 300 shares to one Farley and 3150 shares to other persons, on time, at buyer's option, so that he had only 100 shares remaining which he could legally contract to sell to the plaintiff. But this was sufficient to make the first contract legal. On the 29th of November he purchased 100 shares more, and on the 30th he contracted to sell 100 shares to the plaintiffs. This contract appears to be legal also, as he owned the shares. But on December 2 he contracted to sell the plaintiffs 100 shares more; and at that time he had no shares that he had not contracted to sell, and did not have them till December 10, when he became possessed of a large number.

The defendant contends that the case of *Stebbins v. Leowolf*, 3 Cush. 137, is a decisive authority against the plaintiffs' claim in respect to these shares. That case related to a statute of the state of New York; but our own statute is substantially like it, and must receive the same construction. In that case, the plaintiff had contracted to purchase the stocks, as agent of the defendant; but he was conversant of all the facts, and of the

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objections to the validity of the contract entered into by him, and volunteered to pay the claims of the vendors of the stock without any legal liability on his part. Under these circumstances, the court say that he must be taken to have paid the money in his own wrong, if the contract he entered into was in fact illegal. And they held that the burden of proof was on him to show a legal contract in order to make a *prima facie* case. The decision was in conformity with the elementary law of agency, according to which, if an agent knowingly pays money on an illegal contract after it has been repudiated by his principal, he cannot thereby bind his principal. But in the present case no such knowledge of facts appears in the agreed statement. The plaintiffs contracted to purchase the shares of one who actually owned them. They were not bound to presume that he had previously contracted to sell them; and there was nothing to put them on inquiry, nor does it appear that they had any means of ascertaining, by the use of reasonable diligence, what private contracts Spencer had made with other persons. Moreover, they gave the defendant notice of what they had done for him. He at first sanctioned the contracts, and afterwards refused to perform all the contracts alike; principally because he could not raise the money to pay for the stocks; and also because of an allegation of fraud which appears to have been groundless. The tendency of this was to put the plaintiffs off their guard in respect to the defence now set up. The plaintiffs were bound only to use reasonable diligence in ascertaining whether there was any defect in the contract. Story on Agency, §§ 183, 186. And they were not bound to subject themselves to litigation on the defendant's behalf, when they had no notice, or even any ground of suspicion, that Spencer had made a prior contract to sell the shares. They used all the diligence that could reasonably be required of them in transacting the defendant's business, and are entitled to recover the money they paid for him.

Judgment for the plaintiffs.

ROBERT M. CARY & others vs. JOHN M. COURTENAY.

The acceptance, payable here, of a bill of exchange for £100 drawn in England, may be paid at the rate of \$4.84 per pound in treasury notes.

CONTRACT on a bill of exchange, dated at London in England July 31, 1868, for £100, drawn on the defendant in Boston and accepted by him, payable at a bank in Boston.

The defendant was defaulted in the superior court. The plaintiffs contended that in assessing damages the pound sterling should be estimated at \$4.84 in coin, but the court ruled that it should be estimated at \$4.84 "in currency," and the plaintiffs alleged exceptions.

J. L. Thorndike, for the plaintiffs, cited *Bronson v. Rodes*, 7 Wallace, 229; *Butler v. Horwitz*, Ib. 258.

No counsel appeared for the defendant.

CHAPMAN, C. J. The value of the pound sterling is four dollars and eighty-four cents. *Commonwealth v. Haupt*, 10 Allen, 38, 47. The defendant, by his acceptance of the draft, payable in Boston, became liable to pay one hundred pounds, or four hundred and eighty-four dollars. Neither the fact that the bill was drawn in London, nor that its amount is expressed in pounds, can be construed as an expression that it is to be paid in coin rather than in treasury notes; so that there is no occasion to discuss the recent decisions of the United States supreme court, which are referred to; for they relate to contracts payable in coin.

Judgment is to be rendered for the sum above mentioned with interest. *Exceptions overruled.*

DORCAS SEAVEY vs. JOSEPH B. MOORS.

If interest at a greater annual rate than six per cent., in accordance with the terms of a contract made before the repeal of the usury laws by the St. of 1867, c. 56, is voluntarily paid after such repeal, no action can be maintained on the Gen. Sts. c. 53, §§ 4, 5, to recover threefold the amount paid, or the amount itself, although the St. of 1867 provides that such repeal "shall not affect any existing contract, or action pending, or existing right of action."

GRAY, J. This action is brought to recover back threefold the amount of unlawful interest paid in 1868 according to the terms of a contract made in 1866; or, if that cannot be done, to recover back the simple amount so paid.

The statutes in force when the contract was made gave two remedies for usury; the one, by allowing a defendant to deduct threefold the amount of unlawful interest reserved, taken or received, and to recover full costs, in a suit against him upon the usurious contract; and the other, by allowing a person paying unlawful interest to sue for and recover threefold the amount thereof. Gen. Sts. c. 53, §§ 4, 5.

By the St. of 1867, c. 56, those statutes and all usury laws were repealed; and it was provided that "this act shall not affect any existing contract, or action pending, or existing right of action." This saving clause was manifestly inserted, in the sweeping repeal of the usury laws, to remove the objection of impairing the obligation of existing contracts, and the injustice of taking away rights of action already accrued. It might perhaps secure the right of a party sued upon an existing contract on which unlawful interest had been reserved, taken or received, to deduct threefold the amount thereof; but that question is not now before us. Upon existing contracts to pay unlawful interest, the previous law, so far from obliging the promisor to pay it, gave the promisee a *locus penitentiae* until its actual payment, and, if he insisted upon its payment, enabled the promisor to recover back threefold the amount; and no right of action accrued to the latter before actual payment. *Saunders v. Lambert*, 7 Gray, 484. *Smith v. Robinson*, 10 Allen, 130. *Ramsay v. Warner*, 37 Mass. 8.

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As this plaintiff, when the St. of 1867 took effect, was under no legal obligation to pay, and had not actually paid, the amount now sued for, but voluntarily paid it afterwards, he cannot recover either threefold the amount, or the amount itself.

Exceptions overruled.

J. F. Pickering, for the plaintiff.

C. T. Russell, for the defendant.

THOMAS P. AKERS & others vs. CHARLES DEMOND.

In an action on a bill of exchange, in which the defence of usury is set up, conversations between the drawer and first indorser are competent evidence, so far as they relate to and form part of the transactions of indorsing and negotiating the bill and disposing of the proceeds.

In an action on a bill of exchange, the admission of the holder that he discounted it at a usurious rate is competent evidence, although made at an interview had for the purpose of an adjustment.

The refusal of a deponent to answer an impertinent cross-interrogatory is not sufficient reason for rejecting the deposition.

A party to a suit who has taken the deposition of a witness may take a second deposition of the same witness.

An objection that interrogatories in a deposition are leading cannot be first taken when the deposition is offered in court.

In an action on a bill of exchange, the drawer and indorser are competent witnesses to show usury to which the holder was a party.

The St. of 1863, c. 242, does not preclude the defence of usury in an action on a bill of exchange, if the holder was a party to the usury.

Bills of exchange, drawn in New York and payable in this Commonwealth, accepted and indorsed for the accommodation of the drawer, were, at the request of the indorser, discounted in New York by the plaintiffs at a rate of interest greater than was at the time lawful by the laws of New York or of this Commonwealth. Part of the proceeds was paid to the drawer, and the rest was lent by him to the indorser. *Held*, that as by the law of New York the bills were void in the hands of the plaintiffs, they could not recover against the acceptor, even if he held property of the drawer as collateral security.

CONTRACT by Akers, John W. Russell and Robert L. Pease, partners under the name of Akers, Russell & Pease, on two bills of exchange, each for \$1500, dated March 21, 1867, signed by Gilbert B. Reed, payable to the order of William H. Russell, indorsed by said Russell, drawn on the defendant, "Charles De-

mond, 91 Washington Street, Boston," and accepted by him. One of the bills was on sixty, and the other on ninety days. The answer alleged that the acceptance of the bills was for the accommodation of Reed; that the plaintiffs lent money upon them in New York, reserving interest at a rate usurious by the laws of New York; and that therefore they were void in the hands of the plaintiffs.

At the trial in the superior court, before *Reed, J.*, it appeared that the plaintiffs were, at the time of the transactions in question, residents of New York, and the defendant a resident of Boston. The defendant testified that he received the bills in a letter from New York, accepted them for the accommodation of Gilbert B. Reed, and returned them to him; that he had at the time property of Reed in his hands; and that Reed had since consented that he should hold the property to secure him from liability on these bills.

The defendant offered in evidence the deposition of Reed, in which he testified that he had a conversation with William H. Russell, in which it was agreed that Russell should get the bills discounted and return the proceeds of one of them to him, and he should lend the proceeds of the other bill to Russell; that Russell handed him the check of the plaintiffs for \$1455 as the proceeds of the sixty days' bill; and that he had since had a conversation with the plaintiff Pease, when he went to see him "for the purpose of adjustment," in which Pease admitted that the plaintiffs took one and a half per cent. a month on the bills. The plaintiffs objected, at the time of taking this deposition and at the trial, to the statements as to the conversations between Russell and Reed, and between Pease and Reed, and also as to the competency of Reed to testify to anything showing usury. But the judge admitted the deposition.

The defendant further offered in evidence the deposition of William H. Russell, in which he testified that he indorsed the bills at Reed's request; that Reed agreed to lend him half the money when the bills were sold; that he sold the bills to the plaintiffs; that he did not remember how much they paid him, but that he paid to Reed about one half of what he received

from them. The plaintiffs objected, at the time of taking this deposition, to the competency of Russell to testify to anything tending to show usury or impeach the bills. The plaintiffs filed cross-interrogatories to Russell, of which the fourth was, "Did you tell Reed that the plaintiffs had refused to discount the bills, had not the money, and that you had to get it done at the house of Fiske & Belden, or words to that effect?" The answer to this was, "I believe I did report to him that I got the discount at Fiske & Belden's." The fifth cross-interrogatory was, "Were these statements made by you true or false?" The deponent replied, "I decline to answer this question." The plaintiffs at the trial objected to the admission of the deposition on account of the refusal of the witness to answer the fifth cross-interrogatory. But the judge, against the plaintiffs' objections, admitted the whole deposition.

The defendant also offered in evidence a second deposition of William H. Russell, in which, in reply to an interrogatory whether the agreement with Reed (testified to by him in his answers to the first deposition) was at the time of his indorsement of the bills or subsequently, he stated that it was at the time of the indorsement. The third, fourth, fifth and eighth of the interrogatories in this second deposition, and the answers thereto were as follows: *Int. 3.* "Whether or not were the said bills sold by you to the plaintiffs at a rate of interest exceeding seven per cent. *per annum*?" *Ans.* "They were." *Int. 4.* "Were or were not the said bills sold by you to the plaintiffs at a rate of interest exceeding twelve per cent. *per annum*?" *Ans.* "Yes; that is, the interest and exchange exceed that rate." *Int. 5.* "Were or were not said bills sold by you to the plaintiffs at a rate of interest of eighteen per cent. *per annum*?" *Ans.* "I cannot recollect." *Int. 8.* "Please state whether you paid to Reed the full amount of money received from sale of one of said bills; if yea, which?" *Ans.* "I paid to Reed the full amount of the proceeds of sale of the sixty days' bill." The plaintiffs, at the time of taking this deposition, objected "1. to taking the deposition of this deponent a second time; 2. to the competency of this deponent to testify to any fact tending to

show usury or impeach the bills negotiated by him; 3. to all the direct interrogatories, without exception." At the trial, besides insisting on the first and second objections, the plaintiffs objected to the third, fourth, fifth and eighth interrogatories as leading. But the judge admitted the deposition.

There was evidence that the rate of exchange between Boston and New York was twenty-five or fifty cents on a thousand dollars, on sight drafts. There was no evidence as to the rate of exchange on time drafts. The defendant also introduced in evidence the statutes of New York relating to usury.

On this evidence, which was all the material evidence in the case, the judge ruled that the defence was not established, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

J. B. Thayer, for the defendant.

S. Wells, for the plaintiffs.

WELLS, J. The defence to this suit is, that the bills of exchange are void for usury, under the laws of New York, where they were first negotiated. The statute of New York, Rev. Sts. part 2, c. 4, tit. 3, § 5, declares such securities void "whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken," a greater rate of interest than seven per cent. The superior court ruled that, upon the testimony offered, no defence was established; and instructed the jury to return a verdict for the plaintiffs. The testimony is reported for our consideration, so far as admissible and competent, subject to the several objections made thereto by the plaintiffs.

1. Conversations between the drawer and first indorser of the bill are competent, so far as they relate to and form part of the transactions of indorsing and negotiating the paper and disposing of the proceeds.

2. The conversation between Reed and one of the plaintiffs, in regard to the rate of discount charged by them upon the bills, was competent to show that fact. It was no part of any negotiation for an adjustment, although occurring at an interview for that purpose, but was an independent statement of a collateral fact.

3. The refusal of William H. Russell to answer the question, whether certain statements made by him at the time he negotiated the bills to the plaintiffs, and which had been called for by two previous questions, were true or false, is not a ground for rejecting the whole deposition. If the purpose of the inquiry was to prove what the facts were in those particulars, it should have been made by questions directly as to those facts. If the purpose was to show false representations made at that time, it was immaterial to the issue. The question being impertinent, the answer is excusable.

4. We know of no rule of law or of practice which forbids a second or supplementary deposition of the same witness to be taken, either for the proof of additional facts, or to supply omissions in the answers to the interrogatories of the first commission.

5. The objection that certain interrogatories are leading is an objection to the form merely, and cannot be taken for the first time when the deposition is offered in court.

6. The drawer and indorser are competent witnesses to prove the usury; the plaintiffs not being innocent indorsers, but parties to the usury.

7. For the same reason, the defence is not precluded by the statute of Massachusetts of 1863, c. 242.

The testimony thus held to be admissible and competent tends to prove that the bills in suit were drawn by Reed and indorsed by William H. Russell, the payee, in New York, and accepted by the defendant in Boston, being upon their face addressed to him there. Both the acceptance and the indorsement were for the accommodation of Reed. The possession of collateral security, whether subsequent or at the time, does not change the character of the acceptance or the relations of the parties. *Dowe v. Schutt*, 2 Denio, 621. After the return of the acceptances to Reed, by an arrangement between him and the nominal payee, the latter procured the bills to be discounted by the plaintiffs, at the rate of one and a half per cent. a month. The proceeds of one of the bills were retained by William H. Russell, the payee, as a loan from Reed, and the proceeds of the other handed over by him to Reed.

Akers v. Demond.

As the case is now presented, in the absence of controlling testimony on the part of the plaintiffs, the foregoing statement must be taken as the result of the evidence. It shows that the transaction by which the plaintiffs became holders of the bills was the original negotiation of the paper; a loan upon discount, and not a mere sale of the bills. They are therefore open to the defence of usury. This is so clearly shown to be the law of New York, by the decisions of the courts of that state referred to in *Ayer v. Tilden*, 15 Gray, 178, as to require no further citations.

The defendant is entitled to set up the usury, although not paid by himself, and although the loan was not made to him nor on his account. *Van Schaack v. Stafford*, 12 Pick. 565. *Dunscorn v. Bunker*, 2 Met. 8. *Cook v. Litchfield*, 5 Selden, 279. *Clark v. Sisson*, 22 N. Y. 312.

The difficult question in the case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the laws of the place where the bills are made payable. The general principle is, that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the state where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. In a suit upon a contract founded on such a loan, the penalty for usury could not be set up in defence, under the statutes formerly in force in this Commonwealth. Neither can a penalty, as a partial defence, authorized by the laws of one state, be applied or made effective in the courts of another state. *Gale v. Eastman*, 7 Met. 14. Such penal laws can be administered only in the state where they exist. But when a usurious or other illegal consideration is declared by the laws of any state to be incapable of sustaining any valid contract, and all con-

tracts arising therefrom are declared void, such contracts are not only void in that state, but void in every state and everywhere. They never acquire a legal existence. Contracts founded on usurious transactions in the state of New York are of this character. *Van Schaack v. Stafford*, 12 Pick. 565. *Dunscomb v. Bunker*, 2 Met. 8. The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this operation of the laws of New York. They were mere "nude pacts," with no legal validity or force as contracts, until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That then was the legal inception of the alleged contracts. *Little v. Rogers*, 1 Met. 108. *Cook v. Litchfield*, 5 Selden, 279. *Clark v. Sisson*, 22 N. Y. 312. *Aeby v. Rapelye*, 1 Hill, 1. By the statutes of New York, that transaction was incapable of furnishing a legal consideration; and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the state in which it is first negotiated or delivered as a contract. *Hanrick v. Andrews*, 9 Porter, 9. *Andrews v. Pond*, 13 Pet. 65. *Miller v. Tiffany*, 1 Wallace, 298. *Lee v. Selleck*, 33 N. Y. 615.

There is no pretence that a discount of one and a half per cent. a month was justifiable by reason of any added exchange between New York and Boston; nor that it was otherwise than usurious, if any amount of charge upon paper payable elsewhere than in New York would be usurious there. It has often been held, in states where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with intent to evade the statutes relating to usury, and not in good faith as the legitimate proceeds of the contract, it is held to be usury. So also, if a greater rate is taken than is allowed by the law of either state, it is usury. Such a rate necessarily implies an intent to disregard the stat-

notes restricting interest. *Andrews v. Pond*, 13 Pet. 65. *Miller v. Tiffany*, 1 Wallace, 298. The legal rate of interest or discount in Massachusetts is six per cent. *per annum*; and, at the date of the negotiation of these bills, a greater rate than six per cent. was usurious and unlawful.

It follows, from these considerations, that, upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as, under the laws of New York, renders them utterly void. No action, therefore, can be maintained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled. The verdict for the plaintiff must be set aside, and a
New trial granted.

JACOB STERNBURG vs. HENRY BOWMAN & another.

Promissory notes given by a debtor to his creditor for twice the amount really due, for the purpose of enabling that creditor to obtain a larger dividend under a composition deed between the debtor and all his creditors, are void as between the parties to them.

GRAY, J. This case is too clear for argument. The jury have found that the notes sued on were made to the plaintiff to enable him to represent himself to other creditors of the defendants as having nearly twice as large a claim against the defendants as he really had, and thus obtain a proportionably larger dividend on his debt than the other creditors under the composition deed signed by all of them. The plaintiff, in taking the notes for this purpose, practised a fraud upon the other creditors. The consideration of the notes was therefore illegal, and the notes were wholly void as between the parties. *Case v. Gerrish*, 15 Pick. 49. *Ramsdell v. Edgerton*, 8 Met. 227. *Lothrop v. King*, 8 Cush. 382. *Partridge v. Messer*, 14 Gray, 180. The case differs from that of a conveyance or agreement to convey in fraud of creditors, which is good as between the parties; or in which one of the partners in a business carried on in fraud

Ames v. York National Bank.

of creditors has received profits from the business, as in *Harvey v. Varney*, 98 Mass. 118. *Exceptions overruled.*

B. J. Gerrish, for the plaintiff.

J. F. Clark, for the defendants, was not called upon.

AXEL AMES & another vs. YORK NATIONAL BANK.

A. in Boston sent to a bank in Maine a check for \$200, drawn on the bank by one who had funds therein, in a letter, saying "Please send me a check on some Boston bank for the inclosed check." The bank thereupon mailed to him a letter inclosing \$4.28 in currency and the check of C. on a Boston bank for \$195.72. This letter was never received. A. endeavored in vain to obtain a duplicate check from C., who subsequently became bankrupt. The usage of the bank, and of banks generally in Maine, was to charge one quarter of one per cent. for drafts on Boston. *Held*, that the bank should have sent the whole amount in one of their own checks on Boston, and that A. could recover it in an action against the bank for money had and received.

CONTRACT for money had and received. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon an agreed statement of facts, of which the material part was as follows:

"The plaintiffs are traders doing business in Boston; and the defendants a banking corporation in Saco, Maine. On November 22, 1867, the plaintiffs inclosed to the defendants a check of Bean & Sawyer on the defendants for \$200, and also a postage stamp, and wrote as follows: 'Please send us a check on some Boston bank for the inclosed check of Bean & Sawyer for \$200. Bean & Sawyer having funds in the hands of the defendants to more than \$200, the defendants' cashier, on receipt of the plaintiffs' letter, inclosed to the plaintiffs at Boston the check of Hiram Curtis on the Boylston National Bank of Boston for \$195.72, and \$4.28 in currency; duly stamped and addressed the letter to the plaintiffs at Boston; and deposited the same in the post-office at Saco. This letter never reached the plaintiffs. Due diligence was used at both points to find it. The check of Curtis was drawn against funds in the Boylston National Bank

Rommel v. Wingate.

and he and Bean & Sawyer were both in good standing at the time. The plaintiffs made efforts to obtain from Curtis a duplicate check, but never received from Curtis or the bank any check or money; and Curtis subsequently became bankrupt. The custom of the defendants and of the banks in Maine was to charge one quarter of one per cent. for drafts on Boston. If, in the opinion of the court, the plaintiffs can maintain their action on these facts, judgment to be entered for them for \$200, and interest from November 23, 1867; otherwise, for the defendants."

H. C. Hutchins, for the plaintiffs.

F. H. Appleton, for the defendants.

CHAPMAN, C. J. The fair construction of the plaintiffs' order is, that it requested the defendants to send them their own check for the exact amount that would be due to them. The defendants did not comply with this order; and we cannot say that the variance from it was immaterial. The defendants' check, payable to the plaintiffs, would have been less likely to be stolen than a letter containing bills; and, if lost, it could have been duplicated without depending upon the will of a third person.

If the defendants could prove the custom alleged, it would amount to a custom to hold that a material variance from the terms of an order should be regarded as equivalent to a compliance with its terms, which would not be a valid custom.

Judgment for the plaintiffs affirmed.

JOHN ROMMEL, JR., *vs.* WILLIAM A. WINGATE & another.

The plaintiff in New York wrote to the defendants in Boston, offering to sell them coal, and stating that he had a vessel of 375 tons which he could load "on Monday." The defendants telegraphed in reply, on the Monday next after the date of the letter, "Ship that cargo 375 tons immediately." The plaintiff did not begin to load till nine days afterwards, and then shipped a cargo of 392 tons. *Held*, that the defendants were not bound to take it.

CONTRACT for refusing to receive a cargo of coal, alleged to have been purchased by the defendants, who were coal dealers

in Boston, doing business under the name of Wingate & Field, from the plaintiff, who was a coal dealer in New York.

At the trial in the superior court, before *Dewey, J.*, the plaintiff introduced evidence tending to show that, on March 5, 1868, which was Thursday, the defendants wrote to him, "We want you to ship us at once a cargo of Lackawanna coal, half stove and half broken, and send it at once, as we are nearly out. Answer by return mail if you can send it;" that he replied by letter dated the next day, "Yours 5th received. The best we can do is to ship you half Scranton grate, half Wilkesbarre stove at \$5.25, or grate \$5.00, stove \$5.50. There is not a pound of Lackawanna to be had, and will not be for some time. The Wilkesbarre stove is very nice, and I have that on the wharf and ready to go on board. We have a vessel of 375 tons which we can load for Boston at \$3 freight, load on Monday. This will be as soon as a vessel can get into the port on account of ice. There is a panic here on coal, and a boat of stove, which succeeded in getting up to the city, was sold this morning at \$7 per ton. If this vessel is a little too large, likely some of your neighbors will be glad to help you out. If we don't hear from you to the contrary by telegram to-morrow, shall take up the vessel and go ahead loading her. If you want a smaller vessel, say so in your telegram;" but it did not appear when this letter was mailed or received; that on March 9, 1868, which was Monday, the defendants sent to the plaintiff about noon a telegraphic despatch, "Do not ship;" and about an hour later sent a second despatch, "Ship Wingate & Field that cargo coal 375 tons immediately;" that these despatches were received by the plaintiff in New York soon after one o'clock on the day they were sent; that on the evening of that day he engaged a vessel then lying at Staten Island to proceed to Elizabethport, the place where Scranton and Wilkesbarre coal was received, to load with coal for the defendants, and gave the master his shipping order early on the morning of March 10; that "the vessel left Staten Island at night on March 10, but was detained by obstructions, so that she did not enter the harbor at Elizabethport till noon on the 11th, and the order was handed in on that

day; that by the customs and regulations in force at Elizabethport, well known and recognized, each vessel is obliged to wait for its turn in loading; that, at the time of the arrival of the vessel, there were a large number of vessels that had precedence of her, and on account of the ice in the harbor, and the necessity of waiting for the loading of the vessels having precedence, she could not commence loading till March 18, nor complete the same till March 20; that the vessel sailed for Boston as soon as loaded, and, having been delayed by head winds, arrived there April 4;" that between the 9th and 14th of March one of the defendants called several times at the office of the plaintiff's agent in Boston, and inquired why their bill of lading did not come; that as early as Thursday, March 12, the plaintiff's agent told the defendants that he had information that their cargo was loading, and the defendants said they might not want the cargo unless they had the bill of lading on Saturday, March 14; "that the defendants had not at this time any information as to what vessel had been taken up, except as inferred from the telegraphic despatches and letters of March 5 and 6, and that there were no other communications, except as hereinbefore stated, between the parties, from March 9 to April 4;" that the defendants refused to take the coal; and that it was sold at a loss.

"Upon the plaintiff's evidence, it appeared that there was no unavoidable delay in engaging a vessel after the receipt of the second telegram on March 9, and no unnecessary delay on the part of the master in proceeding to Elizabethport, or in loading there, or in proceeding to Boston, the port of destination, but that the delays were without fault on his part or of the plaintiff. There is a communication by telegraph between New York and Elizabethport, and conveyance by steam by land and by water. The time occupied in passing from one place to the other is about three quarters of an hour by land and one quarter of an hour by water. The quantity of coal shipped by the plaintiff to the defendants on board the vessel was, as stated in the bill of lading, 392 tons."

At the close of the plaintiff's evidence, the defendants contended "that if the second telegram, taken in connection with

the letters of March 5 and 6, made a valid contract for a cargo of coal, it was for a cargo of 375 tons, to be shipped on board a vessel on that day at Elizabethport, taking on board or ready to take on board her cargo, and, as the cargo tendered to the defendants did not come within that description, the action could not be maintained; that, taking the said letters and telegrams together, they did not authorize the shipment of a cargo of 392 tons of coal, nor the shipment on board a vessel not at Elizabethport on March 9, nor ready to enter that day; and that the jury should be instructed to return a verdict for the defendants."

By agreement of the parties, the case was reported for the determination of this court. If, upon such of the evidence introduced by the plaintiff as was competent, the jury would not have been authorized to return a verdict for the plaintiff, judgment was to be entered for the defendants; otherwise a new trial to be had.

J. Nickerson, for the plaintiff, cited *Pembroke Iron Co. v. Parsons*, 5 Gray, 589.

J. C. Dodge, for the defendants.

MORTON, J. The evidence of the contract entered into by the parties to this suit is contained in the letter of the plaintiff of March 6, 1868, and the second telegraphic despatch sent by order of the defendants on March 9, 1868. The letter of the defendants of March 5, containing an order which the plaintiff did not comply with, and the first telegraphic despatch, are immaterial. The plaintiff's letter of March 6 was an offer to ship to the defendants the coal therein described, at the prices and upon the terms named, and was of no effect until accepted by the defendants. The minds of the parties did not meet in any agreement, until the second telegraphic despatch was sent. This despatch, and the letter of March 6, therefore, are the only evidence before us of the contract, upon the proper construction of which the rights of the parties depend. The contract of the defendants was, in substance, that they would purchase a cargo of 375 tons of Scranton and Wilkesbarre coal, at the prices named by the plaintiff, to be shipped on board a vessel ready to be loaded at once. It is obvious that both the quantity of

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coal and the time of delivery were essential elements of the contract. The plaintiff writes, "We have a vessel of 375 tons which we can load for Boston at \$3 freight, load on Monday." The reply of the defendants is, "Ship that cargo coal 375 tons immediately." This bound the defendants to receive a cargo of 375 tons to be loaded at once. It did not bind them to take a larger cargo, or one which could not be shipped substantially as speedily as proposed by the plaintiff in his letter. If by a change of circumstances the plaintiff was unable to comply with this order of the defendants, he should have so informed them. He had no right to substitute a larger cargo, deliverable at a more remote time, in place of the cargo ordered by the defendants; and the defendants were not obliged to receive the substituted cargo upon its arrival in Boston. Upon the case reported, there must be

Judgment for the defendants.

JOHN H. GOSSLER & others vs. EAGLE SUGAR REFINERY.

One who agreed to sell "Manila sugar" to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation or warranty, recover the agreed price, though the article delivered contained more impurities than sugar known under that name usually does.

At the trial of an action for the price of Manila sugar sold and delivered, it was admitted that the article delivered contained four per cent. of sand. A witness who had testified that he had no knowledge of refining, but was agent for a sugar refinery, and had bought sugar for it, was allowed, against the defendants' objection, to testify that a lot he had bought contained three per cent. of sand and was superior Manila sugar; and on cross-examination he testified that he did not test this lot, but that it was reported to him. The question submitted to the jury was, whether the four per cent. of sand was such an adulteration as to prevent the article delivered from being called in commerce Manila sugar. *Held*, that allowing the witness to testify as an expert was not a good ground of exception.

CONTRACT on an account annexed for Manila sugar sold by the plaintiffs to the defendants. Trial, and verdict for the plaintiffs, in the superior court, before *Brigham*, C. J., who allowed the following bill of exceptions:

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"There was evidence tending to prove that the sale of the sugar in dispute was made through a broker, and the sale note was as follows: 'Boston, May 12, 1868. Sold to Eagle Sugar Refinery, for account of Messrs. Gossler & Co., 3400 bags Manila sugar. Ex Medena. @ 10½ less 2½ cash. Duty to be at rate of 39½ % premium. Jos. B. Glover & Co., Merchandise Brokers;' that after the delivery of the sugar, and in the process of refining, it was found to contain four per cent. of sand; that the defendants and the brokers were notified thereof; and that at the time of the sale neither buyer nor seller knew of the existence of sand proper in the sugar. The plaintiffs submitted evidence tending to show that four per cent. of sand in sugar of that grade was not an unusual quantity; and the defendants submitted evidence tending to show that of sand proper there was none, that four per cent. would be an unusual quantity, and that the lot in question contained three per cent. more than was usual in sugar of this description.

"In the examination, as a witness, of Samuel T. Lamb, the agent of the defendants, he was asked 'if he did not figure with a certain degree of nicety in fixing the price of sugar by its quality,' which, being objected to, the judge refused to allow the question to be put, and the defendants excepted.

"The plaintiffs called Warren Fisher as an expert, who testified that he was agent of the Adams Sugar Refinery; that he had no knowledge of refining, but bought for the company; and that he bought in 1866 one lot of 19,000 bags of Manila sugar. The defendants objected to the witness testifying as an expert. The judge allowed him to so testify, and he stated that said lot contained three per cent. of sand, and that it was superior Manila sugar. On cross-examination, he testified that he did not test the sugar referred to; and that it was reported to him. There was no evidence offered to show any custom among merchants to consider Manila sugar containing four per cent. of sand merchantable sugar or Manila sugar in the market, and the examination of the witnesses was confined to the question whether this lot of sugar contained more than the usual quantity of sand in Manila sugar of that grade.

"The defendants requested the judge to instruct the jury as follows: 'The sale being of Manila sugar, it is for the jury to find whether there was four per cent. of sand in the goods delivered, and, if they find there was, then the verdict should be for the defendants. If the jury are satisfied that the sugar delivered contained an amount of sand unusual in Manila sugar, then the defendants will be entitled to a verdict, or a deduction from the bill to the amount of the price charged for the weight of sand. If the jury are satisfied that the sugar delivered contained an amount of sand unusual in Manila sugar, then the defendants are entitled to a deduction from the bill of the price charged for the weight of sand in excess of the amount shown to have been usually found in such sugar.'

"The judge declined so to instruct the jury, and charged them substantially that the question for them to decide was, simply, whether the sugar delivered answered the description in the sale note in being sugar; that the four per cent. of sand was not in dispute; that the question for them was, whether the four per cent. was such an adulteration as prevented it being called in commerce Manila sugar; that, if it was sugar, the plaintiff could recover; that the existence of the four per cent. of sand was not a decisive circumstance for the defendants in any event; that the defendants complained that they did not get what they bought; and that, if what they got was an article which, in commercial language, passed for sugar, the plaintiffs could recover; and he instructed them to answer the following question: 'Did the plaintiffs deliver to the defendants an article which in commercial language might properly be said to come under the denomination of Manila sugar?' The jury answered in the affirmative, and the defendants alleged exceptions."

A. Cottrell, for the defendants.

E. D. Sohler, for the plaintiffs.

AMES, J. The only approach to a warranty in the sale to the defendants is to be found in the descriptive words "Manila sugar," contained in the bill of sale. Upon this point the jury were correctly instructed that, in deciding whether the article

actually delivered corresponded to that description, they were simply to make up their minds whether it was such sugar as is usually known in commerce under that name. Was it an article which in commercial language passes for, and is properly and usually known as, Manila sugar? This question the jury have answered in the affirmative, and it therefore must be considered as an established fact that the defendants received what they undertook to buy, or, in the language of the court, they have got what they bought.

It appears that they bought the sugar for the purpose of refining it. They must be considered as having expected to find in it more or less of impurity. Their complaint is, that it has proved more impure than they expected to find it, and more so than sugar known under that descriptive name usually is, but they neither asked nor received any warranty as to its quality or purity, and they do not impute to the plaintiffs any fraud, or charge them with having made any representation except what appears on the face of the bill of sale, or with having had any knowledge as to the purity of the sugar that they did not communicate. They do not claim that they bought by sample, or that they were prevented from examining the property, or that it was not merchantable Manila sugar, or that they ever offered to return it. If they had doubts about the goodness of the article, or did not choose to run the risk of latent defects, they should have refused to purchase without a warranty upon these points. If the plaintiffs sold it as Manila sugar, in good faith and believing it to be so, without any warranty of its quality or purity, and if it actually was Manila sugar, as that term is understood in commerce, it is difficult to see why they are not entitled to be paid. The defendants made up their mind what they would give, and bought entirely on their own judgment. In the absence of warranty, or deceit or misrepresentation of any kind, on the part of the plaintiffs, it is difficult to see any ground on which the defendants can be relieved from their contract.

The question addressed to the witness Lamb was unimportant and immaterial, and properly excluded. In regard to the

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witness examined as an expert, the question whether he should have been received as such was for the presiding judge to pass upon; and usually that question is left to his discretion. His decision upon it is not a matter of exception, unless a report of the entire evidence upon the point presents a question of law. *Quinsigamond Bank v. Hobbs*, 11 Gray, 250. *Bierce v. Stocking*, Ib. 174. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115. The case does not disclose any sufficient reason for overruling the decision of the presiding judge upon this point. The cross-examination appears to have brought out a material qualification of what he stated in chief, as to the transaction which he described, but it does not appear that any ruling was asked for in relation to that testimony as given, or that its admission was injurious to the defendants in its bearing upon the question actually submitted to the jury by the court.

A majority of the court concur in the decision that the entry must be
Exceptions overruled.

WILLIAM H. CLARK & others vs. JOHN H. DEARBORN.

One to whom the pledgee of goods has, with the pledgor's consent, consigned them for sale, can in his own name make demand, under the Gen. Sta. c. 123, §§ 62, 63, for payment of the amount for which they were pledged, upon an officer who has attached them on a writ against the pledgor; and, on refusal of the officer to pay the amount or release the attachment, can in his own name maintain an action against him for their conversion.

The lien of a pledgee covers freight paid by him on the goods pledged.

A demand, under the Gen. Sta. c. 123, §§ 62, 63, by one having a lien on property attached, is good, though made for an amount larger than is due, if the amount due exceeds the value of the property.

An officer who had paid freight due on property attached by him, afterwards, on the demand of a person who had a lien on the property for advances, refused either to pay the amount of the lien or to release the attachment. *Held*, that, in estimating damages, in an action by such person against the officer for conversion of the property, the sum paid for the freight must be deducted from the value of the property.

TORT against a deputy sheriff for conversion of a cargo of lumber, alleged to be property of the plaintiffs. Writ dated December 24, 1867. The answer denied every allegation in the declaration, and set up a special property in the lumber in the

defendant, by reason of his having attached it November 23 1867, on a writ in favor of Amos Pike against Edward A. Forbush, alleged to be the owner thereof.

At the trial in the superior court, before *Lord, J.*, the plaintiffs introduced evidence tending to show that Forbush, living at Kinston, North Carolina, and being the owner of the lumber, sent it, on October 31, 1868, to Mitchell, Allen & Company, of Newbern in that state, to be held as "a pledge for a debt due August 20, 1868, and other indebtedness in their store account which they were then contracting," with authority to ship and sell the same; and that Mitchell, Allen & Company paid freight on the lumber from Kinston to Newbern. A bill of items, containing the particulars of indebtedness of Forbush to Mitchell, Allen & Company, was put into the case. This bill contained charges, amounting to \$717, for a cotton press, gin and condenser; \$350.59, for the "store account;" \$95, "cost of well;" and \$183.40, for the freight of the lumber from Kinston to Newbern.

The plaintiffs further introduced evidence tending to show that Mitchell, Allen & Company sent the lumber by vessel to Boston, consigned by bill of lading to the plaintiffs or assigns, with a letter of instructions directing the plaintiffs to sell it, and that the plaintiffs "took possession of the cargo on its arrival, and offered to pay the freight to the master of the vessel."

The defendant asked the judge to order a nonsuit, on the ground that the plaintiffs had shown no sufficient interest in the property to enable them to maintain an action in their own name; but the judge refused to do so.

It appeared that the defendant, as deputy sheriff, attached the lumber on November 23, 1867, as the property of Forbush, on a writ against him in favor of Amos Pike, and paid to the master of the vessel \$600 for the freight from Kinston to Boston; that, on December 13, 1867, the plaintiffs notified the defendant in writing that the lumber was consigned to them for sale by Mitchell, Allen & Company, who had a lien thereon for the sum of \$1245.99, due to them from Forbush, and for the freight; and that, as the defendant had paid the freight, they demanded pay-

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ment of the said sum of \$1245.99. It further appeared that the defendant did not comply with this demand, but retained possession of the lumber; that the action of Pike against Forbush was entered, and, as appeared by the record, proceedings were regularly had therein, and judgment ordered for Pike; and that, on February 6, 1868, within thirty days after the date of the judgment, the defendant in the present action caused the lumber to be sold on execution.

The defendant contended that the demand should have been made not by the plaintiffs, but by Mitchell, Allen & Company; and that the sum demanded was too large, because it included the freight on the lumber from Kinston to Newbern, and also the store account and the cost of the well, neither of which should have been included. The judge ruled that the freight was, as matter of law, properly included, and that "as to the other two items they were questions of fact to be determined by the jury."

The plaintiffs then offered evidence tending to show "that the attachment was a mere device by Pike to get possession of the property; that, as soon as the defendant got possession of the property, he abandoned the attachment and delivered the property to Pike, who took possession of it and caused it to be offered for sale and did actually sell it; and that the subsequent sale on execution was a mere form, the property having already been sold by Pike." The defendant denied this, and much evidence was offered on both sides. The judge then, "with consent of counsel, submitted certain specific questions to the jury, which they answered, with the understanding that he would order such a verdict as the findings upon the questions required. Upon all the questions full instructions were given to the jury to which no objection was made." These questions and answers were as follows:

"Did the defendant make an attachment of the property, and did such attachment continue up to the time of selling on execution, and did he lawfully seize and sell the same on execution?" *Ans.* "No."

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" Was the lumber in question pledged by Forbush to Mitchell, Allen & Company, and actually delivered to them on such pledge, with authority to send the same to Boston to a consignee of their selection?" *Ans.* " Yes."

" Does the demand made by the plaintiffs upon the defendant contain a just and true account of the debt for which the lumber is claimed to have been pledged by Forbush to Mitchell, Allen & Company?" *Ans.* " Yes."

" What was the value of the property at the time it was taken by the defendant, not deducting the amount of the freight?" *Ans.* " \$1300."

The judge ruled " that, under the findings of the jury, the defendant was a trespasser *ab initio*, and his payment of the freight was in his own wrong, no request having been made by the plaintiffs, or any one having the same interest with them, to him to pay it, they being willing and having offered to pay it; ordered a verdict for the plaintiffs for \$1300; and reported the case to this court for its determination; " if the verdict was right, judgment to be entered upon it; if the freight should have been deducted, the plaintiffs to remit \$600; if the verdict was wrong, and the plaintiffs can recover in any event, the verdict to be set aside and a new trial granted; if the plaintiffs have no such title as to enable them to maintain an action, judgment to be entered for the defendant."

W. W. Warren, for the defendant.

A. A. Ranney, for the plaintiffs.

WELLS, J. There appears to be no dispute about most of the facts necessary for the decision of this case, namely: that Forbush was the general owner of the property sued for; that he was indebted to Mitchell, Allen & Company for advances or otherwise; that he consigned this lumber to them to secure that debt, " with authority to ship and sell the same;" that Mitchell Allen & Company consigned it to the plaintiffs for sale on their account, and forwarded to them the bill of lading and their letter of instructions.

The consignment to Mitchell, Allen & Company gave them a special property in the lumber to the extent of their debt, com

missions and expenses, including freight. The terms and nature of the consignment implied a power of substitution by consignment, like that to the plaintiffs. It was accompanied by possession in Mitchell, Allen & Company; and their letter of instructions and the bill of lading gave to the plaintiffs the right of possession. *Prima facie* that is sufficient to enable them to maintain an action for the possession, or for any injury to the goods. As against trespassers, and those showing no title or right, it is sufficient for all purposes. The only defence set up in the answer is the attachment made by the defendant as a deputy sheriff upon a writ against Forbush, and the proceedings in pursuance thereof. All those proceedings, from the attachment November 23, 1867, to the sale on execution February 6, 1868, within thirty days from the date of the judgment in that suit, are regular in form. No objection is made to them on the ground of any defect in the record. The justification of the officer is thus shown to be complete, unless the attachment was dissolved by the demand and neglect to pay the amount due upon the lien of Mitchell, Allen & Company; or unless he became a trespasser *ab initio*, by reason of the alleged abuse of his process. This action was commenced December 24, 1867. It is contended that the first special finding of the jury sustains the position of the plaintiffs, that the officer abandoned the attachment at once and delivered the property to Pike, and that the subsequent sale on execution was not a real sale, but only a cover for previous abuse of his authority under the attachment. If so, the officer would be liable as a trespasser *ab initio*. *Mc Gough v. Wellington*, 6 Allen, 505.

But the form of the question, to which the jury returned their answer, does not make it certain that they did find this fact to be as the plaintiffs contend. As the facts of attachment, and sale on execution within thirty days after judgment, were shown by the record, we may assume that the answer of the jury negatives the other proposition contained in the question; to wit, that the attachment continued up to the time of selling on execution. But that would be negatived, whether the attachment had been dissolved by the abuse of process by the officer, or by

demand and neglect to pay the amount due under the lien. It is necessary therefore to consider the effect of the third special finding of the jury, and the rulings of the court below in relation thereto.

Upon this question, we are of opinion, 1. that the plaintiffs were rightful holders of the property, entitled to receive the amount due to Mitchell, Allen & Company under their lien, and to make the necessary demand therefor; Gen. Sts. c. 123, §§ 62, 63; *Pettis v. Kellogg*, 7 Cush. 456; 2. that the court below correctly ruled that the freight upon the lumber, from Kinston to Newbern, paid by Mitchell, Allen & Company, was properly included in the amount claimed as due under that lien; and 3. that the question whether the "store account" and the "cost of the well" were covered by the lien, or improperly included in the demand, was rightly left to the jury. *Harding v. Coburn*, 12 Met. 333. Besides, even if it were a question for the court, we think the jury have decided it rightly, upon the report as it stands, so far as the "store account" is concerned, and so the defendant has no ground of exception. The "cost of the well" was only \$95. Deducting that from the whole amount demanded, the debt would still largely exceed the value of the property, as found by the jury, after deducting from the verdict the amount of the freight paid by the officer. It would thus be made to appear that the defendant was in no way prejudiced by the over-statement, if it were such. *Rowley v. Rice*, 10 Met. 7.

We are of opinion that the amount so paid for freight should be deducted from the verdict, in accordance with the terms of the reservation. There is nothing in the case to show that the lien for the freight was not in force when the property was attached. The jury have not found that it was not in force, and we cannot assume it from the statement in the report that the plaintiffs offered evidence tending to show that they "took possession of the cargo, and offered to pay the freight to the master of the vessel." The property was apparently subject to a lien for the freight, and its value should be estimated with reference to that condition of incumbrance. *Adams v. O'Connor*, 100 Mass. 515. If the jury have already made a reduction on that

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account; or if they have improperly rendered a verdict of about the amount due under the lien, upon the supposition that no deduction would be made by the court; they have done so contrary to the instructions given them, and the remedy is to be sought by an application to that court for a new trial. There is no question raised by this report upon which we can consider the suggestions of the plaintiffs in that regard.

The plaintiffs were entitled to have interest added, in the assessment of their damages. But the attention of the judge does not appear to have been called to it; and the reservation does not permit us to sustain the verdict in their favor, otherwise than upon the condition that they remit \$600, the sum fixed in the court below as the amount paid by the officer for the freight. The case will still be open there to any motion for a new trial. The order, now to be made, must be, that the plaintiffs are to remit \$600 from the verdict, and to have judgment for the balance.

Ordered accordingly.



JOHN P. TARBELL & wife vs. SYLVESTER BOWMAN & others.

B., a tenant in common of land, agreed with the other tenants, that, if they would join in a sale of the land, he would pay them certain amounts out of the proceeds, and retain only the surplus. A purchaser at the sale, who had made an overpayment, brought a bill in equity against B. to recover the amount thereof. *Held*, that if such amount, by increasing the surplus, inured only to the benefit of B., the other tenants in common were not necessary parties.

Land belonging to an insolvent estate was sold by the assignees, by auction, in May 1859, in lots, each of which was bid for and sold by the square foot, and the purchasers signed a memorandum referring to a plan and giving the number of square feet in each lot, and the price per foot. The plaintiff purchased one of these lots at the auction, and in September 1859 paid for the same and received a deed which described the lot by metes and bounds, referred to the plan, purported to give the exact length of the four sides, and stated the consideration in one sum ascertained by the price paid for the supposed number of feet. In January 1860, having then for the first time ascertained that the length of one of the sides of the lot was incorrectly given in the deed and upon the plan, and so that the number of square feet was considerably less than he had supposed and had paid for, he made a demand on the assignees, who then had sufficient assets of the estate in their hands, to return the amount overpaid; but the assignees refused, and distributed the assets among the creditors. On a bill in equity filed by him in 1865 against the assignees, *Held*, 1. that he had a right to recover from them the amount paid by

mistake; 2. that there had been no such laches on his part as to bar that right; and 3. that it was not open to them, after filing a general answer, to object that he had an adequate remedy at law.

BILL IN EQUITY, filed May 25, 1865, by John P. Tarbell and Catherine E. Tarbell, his wife, against the assignees in insolvency of the firm of Trull Brothers. The case is stated in the opinion.

J. G. Abbott & H. G. Parker, for the plaintiffs.

H. W. Paine, for the defendants.

COLT, J. The facts upon which the plaintiffs' title to relief depends are sufficiently plain, as they finally appear upon the bill, answer and agreed statements, both original and supplemental. The defendants, as assignees in insolvency, were interested in certain real estate in Boston, with other parties, including the plaintiff John P. Tarbell, who was seised in fee and as tenant in common, as trustee of his wife, the other plaintiff, in part thereof. In order to secure a sale of the property to the best advantage for the estate of the insolvent, the defendants obtained the consent of all the other parties interested, that the entire property should be sold at auction in lots, and, as inducement to them for joining in the sale, it was agreed, in advance, that they should receive certain fixed amounts, at all events, out of the proceeds. The sale was at the instigation and for the benefit of the assignees. The other parties were under no necessity to sell, and the net results, after paying them according to agreement, were received by the assignees to their own use. If, therefore, under a mistake, there has been an overpayment by a purchaser at the sale, the defendants are the parties who have received the money, and should, under ordinary circumstances, be held responsible for it. From the nature of the transaction, the overpayment increases the surplus which goes to them, after settlement with the other interested parties. And we see no reason for joining any one with them as necessary and proper parties in this suit, on the ground that they were directly or indirectly the recipients of the money so paid.

The sale at auction of the premises, by lots, took place May 26, 1859. The plaintiff Mrs. Tarbell became the purchaser of

lot No. 2, and Dexter D. Bowman of the adjoining lot on the west. Each lot was bid for and sold by the foot, and a contract or memorandum of sale, referring to a printed advertisement and plan, and giving the number of square feet in each lot, and the price per foot, was signed at the time of the sale by the several purchasers. A deed, executed by the defendants and the other parties interested, was made through a third person, acting as a conduit, to the plaintiff Mrs. Tarbell, which described the lot by metes and bounds, referred to a plan, purported to give the exact length of the four sides, and stated the consideration in one sum, ascertained by the price paid for the supposed number of feet. The deed was delivered on the 28th of September following, when the money was paid and the whole matter settled, as it was supposed. In January following, some eight months after the sale, it was ascertained by the plaintiffs, for the first time, that the length of the west line of the lot was incorrectly given in the deed and upon the plan, and that the real quantity of land in the lot was three hundred and fifty-one and three quarters feet less than Mrs. Tarbell was supposed to have purchased, and which she paid for, while the lot bought by Bowman and conveyed to him contained the same quantity more than was estimated and paid for by him.

Although, by reason of the nature of the title, and the many adjustments necessary between vendors and vendees, the computations and conveyances connected with the business were somewhat complicated, yet it is now agreed that the alleged error in no way affected the relations of the several parties to the transaction, otherwise than as above stated.

As soon as the error was discovered, demand was made on the defendants for the return of the amount overpaid; but though, as assignees, they then had funds of the estate sufficient to respond, they refused to comply with the demand, and divided the money among the creditors of the insolvent estate.

The prayer of the bill is, that the defendants may be decreed, either to return the amount so paid by mistake, or to correct the deed, so that the quantity of land purchased may be conveyed to Mrs. Tarbell.

The question, in cases of this description, has usually been whether the sale was by estimation or by measurement. If the former, and the sale was fair, there is no hardship in applying the rule that the buyer takes the risk. If the latter, then exact quantity becomes an essential element, and the plaintiff will be entitled to relief, unless it appears from the terms of the conveyance to him, or otherwise, that he has waived the precise quantity called for by the contract. Such waiver has been held to have been made, when the description in the deed was by metes and bounds, with the words "containing by estimation," or "more or less," added. In the recent case of *Noble v. Googins*, 99 Mass. 231, it is held that the words "more or less," or equivalent words, will control the statement of the quantity, or of the length of one of the lines, so that the purchaser will not be entitled to relief under a written contract to sell. The authorities which bear upon this point are there fully collected, and need not be referred to here. See also *Stebbins v. Eddy*, 4 Mason, 414.

In the case at bar, there can be no doubt that the defendants intended to sell, and the plaintiffs to buy, a quantity of land specified and accurately measured in square feet; that the price paid was computed by the exact quantity; and that the deed was made and the whole business transacted, under a mutual mistake of fact, as to the quantity of land.

There is nothing in the form of the deed given and accepted which manifests an intention to waive or change the original terms of the sale. Nor do we perceive that the plaintiffs are properly chargeable with such laches, in not earlier ascertaining the contents of the lot, and not sooner commencing this suit, as should deprive them of the relief sought. The mere lapse of time which is here disclosed, without circumstances importing negligence, with no evidence of an intention to abandon the claim, and no conduct which induced the defendants to change their position injuriously, is not sufficient. The defendants were seasonably notified of the claim while yet in funds. They are alone at fault in not adjusting it; and, at all events, were afforded an opportunity in time to protect themselves from loss.

The defendants, having sold and conveyed all the real estate in question, can only be decreed to pay back the amount paid by mistake. And this relief the plaintiffs are entitled to in this suit, although it might have been had by suit at law; because it is not open to the defendants to object, after filing a general answer, that the plaintiffs have an adequate remedy at law. *Massachusetts General Hospital v. State Assurance Co.* 4 Gray, 227
Decree for the plaintiffs.

EDWARD D. SOHIER vs. ELIZABETH ELDREDGE & others.

Succession and legacy duties payable under the U. S. St. of 1864, c. 173, in respect to the interest of the *cestui que trust* in a gift by a will, made before the passage of that statute, of a fund to trustees, "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to said *cestui que trust* during her life, are a charge upon the income of the fund.

If the owner of land leased for a rent payable quarterly dies between two quarter-days and devises the land to trustees "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to A. during her life, and on A.'s death the capital to B., the rent which falls due on the quarter-day next after the death is not apportionable between the income and capital of the fund, but goes to the life tenant.

A fund, consisting partly of two wharves out of repair, was devised to trustees "to receive and collect the income and produce thereof, and after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to A. during her life, and on A.'s death the capital to B.; with "full power and authority" to the trustees "to invest, reinvest and change any and all property of which the trust premises shall be at any time composed, in such manner as they may deem most beneficial for the parties interested in the fund." *Held*, that the trustees had power to invest capital of the fund in repairing and reconstructing the wharves in such a manner as to increase their value to the full extent of the amount expended.

BILL OF INTERPLEADER filed by one of the executors and trustees under the will of John W. Trull.

The bill alleged that Trull died at Newton April 12, 1867, leaving a will, made November 11, 1858, which was proved and allowed in the probate court for Middlesex May 28, 1867, as his last will and testament, and the probate thereof affirmed in this court on appeal; that by this will he devised to Elizabeth Eldredge (who was his only child, and at the time of his death was fifty-one years old and a widow without issue) the use

and improvement during her life of his dwelling-house in Boston, and then, after giving certain legacies, (not material here to be stated,) gave the residue of his estate, including the reversion of the dwelling-house, to John T. Heard and Edward D. Sohier (the plaintiff) in trust "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income, from time to time," to Mrs. Eldredge, for her sole and separate use, and made these further provisions: "At and after the decease of my said daughter, I give the said trust premises to her issue." "If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate. I give my said trustees and their successors, and any persons acting as trustees under this will, full power and authority to sell any and all real estate of which the trust premises shall be at any time composed, and to make any and all deeds, and do any and all acts necessary or proper for carrying into full effect any and all such sales; and the purchasers from such trustees shall not be bound to see to the application of the purchase money. And I give my said trustees, and their successors, and any persons acting as trustees under this will, full power and authority to invest, reinvest and change any and all property of which the trust premises shall be at any time composed, in such manner as they may deem most beneficial for the parties interested in the fund, but I recommend them, whenever a good opportunity offers, to invest the trust moneys in real estate, situate in the city of Boston, which I consider the best and safest investment, or in notes secured by mortgages of real estate in said city." "I constitute and appoint the said John T. Heard and Edward D. Sohier executors of this my will."

The bill further alleged that, on October 22, 1867, the plaintiff and Heard were duly appointed by the court executors and trustees under this will, and assumed the trusts; that the real estate devised to them as trustees consisted of parcels in An-

dover, of the value of \$450; in Dorchester, of the value of \$15,000; and in Boston, (exclusive of the reversion of the dwelling-house,) of the value of \$206,750; and that the personal estate which came to them was of the value of \$446,064.42; that Mrs. Eldredge then was, and still remained, without issue; that her beneficial interest in the real estate in Andover was \$312.79, in Dorchester, \$10,615, and in Boston, (not including the reversion of the dwelling-house,) \$143,707; that "by the laws of the United States the trustees were bound to pay, and did pay, a succession duty [specified particularly, in amount] upon the beneficial interest which said Eldredge took under the will in said real estate;" that "by the laws of the United States the said Heard and the plaintiff, as executors or trustees, were also bound to pay, and did pay, a legacy duty [also specified, in amount] upon her beneficial interest in said personal estate," the value of which beneficial interest was \$310,049; and that, "as matter of convenience, the said Heard and the plaintiff paid the United States succession duty [also specified, in amount] assessed upon said Eldredge's life interest in said dwelling-house."

It also alleged that, "at the death of said testator, different portions of his real estate were under lease, or hired by tenants who paid rent quarterly therefor, and the quarters had commenced, but were not terminated, on the day of his death, and the rents therefor were accruing, and had not then become due and payable."

It further alleged that the testator, before his death, became insane, and was put under guardianship; that a large part of the real estate then owned by him, and devised to Heard and the plaintiff as trustees, consisted of two wharves on Causeway Street in Boston, of the value, respectively, of \$50,000 and \$63,000; that the guardians entered into oral negotiations with William A. Kenrick to repair one of these wharves, and Kenrick, before the testator's death, made certain preparations for making the repairs; that, after the testator's death, the trustees finally agreed with Kenrick to repair the wharf substantially upon the terms and in the manner proposed by the guardians,

and spent \$7940.68 on the repairs; and that, through Kenrick, they also spent \$18,729.51 in repairing and partly rebuilding the other wharf; and the bill set forth minutely the repairs and alterations in the structure of the wharves, so made, and the condition of the wharves at the time of the testator's death, which rendered them needful, and also an account of all the expenses in detail.

The bill finally alleged that Mrs. Eldredge claimed that the said succession and legacy duties, or some part thereof, were payable by the trustees out of the capital, and not out of the income, of the trust fund; "that all the rents for the quarters which had commenced before, and did not end till after, the death of the testator, belong to said Eldredge as income," and that the sums paid by the trustees for repairing and reconstructing the wharves should be charged to the capital and not to the income of the trust fund; while, on the contrary, those entitled to the reversion after the death of said Eldredge either now claimed, or might hereafter claim, that said sums paid for duties and for repairs were properly charges on the income of the fund, and that the said rents should be apportioned.

The prayer of the bill was, that Mrs. Eldredge on one side, and those entitled to the reversion on the other side, might interplead as to these several issues; that the plaintiff might have the instructions of the court in the premises; and for general relief; and, besides joining Mrs. Eldredge and John T. Heard as defendants, it joined forty-six other persons, by name, as heirs of the testator.

Mrs. Eldredge, protesting that she was the only heir at law of the testator, that no other persons than herself and Heard were interested in his estate, and that all other parties joined in the bill as defendants, as if heirs of the testator, were improperly joined, answered, substantially admitting the allegations of fact in the bill, and making claim as therein alleged, and alleging further "that said repairs, so called, of the wharves, are permanent in their nature, and amount to the building of new structures of different kind and materials from the original, and that said wharves have been rendered thereby better and more

valuable than when said wharves were originally erected." All but three of the forty-six alleged heirs of the testator also answered making in like manner admissions of fact, and alleging claims as in the bill alleged. And the case was reserved by *Wells, J.*, for the determination of the full court, on the bill, answers, and a statement of facts agreed as to the negotiations of the guardians with Kenrick; which statement was signed by Heard with the other parties, and is now immaterial.

W. Minot, Jr., & F. V. Balch, for Mrs. Eldredge.

D. S. Richardson & G. F. Richardson, for some of the alleged heirs.

G. D. Noyes, for others of said alleged heirs.

AMES, J. 1. There can be no doubt that the money paid by the plaintiff and his coexecutor as the legacy and succession taxes upon the value of Elizabeth Eldredge's beneficial interest in the testator's real and personal estate, under his last will and testament, was properly chargeable against such funds belonging to her as came into their hands as income, and was not a charge against the capital or principal of the fund which they were to hold until her decease. It is plainly the meaning of the statute of the United States, usually known as the internal revenue law, passed June 30, 1864, (U. S. St. 1864, c. 173,) that whoever takes the benefit of a legacy must take it subject to the burden of the tax provided for by that statute; §§ 124, 125; and the rule is the same in regard to the succession of real estate. § 133. Where, by the operation of the bequest, devise or descent, the property passes directly to the beneficiary or successor, there is of course no question as to the interpretation of the statute. Where, as in this case, it goes into the hands of trustees, the statute leads to substantially the same result. She has in actual possession and enjoyment a beneficial interest in the bequest of the testator's personal estate, and also in the succession of his real estate. §§ 126, 127. In all such cases, where the property is in charge of trustees, they are declared to be subject to a tax, varying in amount according to the relationship of the party beneficially interested to the testator, but in all cases to be assessed upon the clear value of such party's inter-

est in such property. That is to say, the trustees were required to pay, and have paid, her tax; and by the terms of the statute, (as amended by the statute of July 13, 1866,) every tax so paid is to be deducted from the particular legacy or share on account of which the same is charged. U. S. St. 1866, c. 184, § 9. As no such taxes existed, or were anticipated, when the will was made, the testator of course made no provision in relation to them. Like the income tax, the tax on watches, or on carriages, and many other burdens growing out of public necessities, they must fall where for public reasons the sovereign power of the government has seen fit to place them. We cannot alter the last will of the testator to meet a new and unforeseen state of things in this respect. The clause in the will which requires the executors to receive and collect the income of the trust fund, and, after deducting all needful and proper costs, charges, and expenses, to pay the residue of said income to her, does not throw any light upon this subject. The costs, charges and expenses there spoken of evidently are such as are incidental to the management of the trust property, and the receipt, collection and disbursement of the income, and cannot in any sense include the payment of the tax by law imposed upon her beneficial interest in the property. She still has all that the will intended to give her, although the national legislature has seen fit to consider the inheritance of property as a fit subject of taxation.

2. With regard to the rents that became due from tenants soon after the testator's decease, we think that they constitute a part of the income or produce of the residuary fund; and that the fact that these rents were paid for a period of occupation, a part of which was before his decease, is wholly immaterial. No rent was due from any tenant till the quarter-day arrived, and then the whole became due to these executors. The terms "income and produce" are very comprehensive. There is nothing in the will to indicate that the testator meant that the property should be capitalized, and subjected to a precise valuation as of the date of his death. The provision is, that the residue, not required for the payment of legacies, debts and incidental ex-

penses, should constitute the trust fund, and whatever that fund should produce should go to his daughter for life. Rents that had not become payable at the testator's decease did not make a part of the residue then existing. There is nothing in the provisions of the Gen. Sts. c. 97, § 23, inconsistent with this construction of the residuary bequest; and § 24 is not applicable to it. The rents in question may be fairly included in the bequest of the income and produce of the residuary fund, intended for the benefit of the daughter.

3. A question is raised in relation to the large expenditures for the repair and reconstruction of the two wharves. It is insisted, on one side, that all of that outlay was in the nature of repairs, and for the purpose of increasing the income of the fund for the benefit of the daughter, Mrs. Eldredge, and for that reason should be charged to and paid from that income; while the other side contends that all that was done was necessary for the preservation of the property, or at least had the effect greatly to increase its value, and was so much to the permanent advantage of the estate as to be a proper charge against the principal of the residuary fund. The general rule undoubtedly is, that a tenant for life cannot make repairs or permanent improvements upon the estate, at the expense of the inheritance. This rule, however, is not absolutely without exceptions. Thus it has been held that a life tenant was justified in completing, at the expense of the estate, a mansion-house which had been begun by the testator. *Hibbert v. Cooke*, 1 Sim. & Stu. 552. *Dent v. Dent*, 30 Beav. 363. The expense of putting a building into a tenantable condition may be a charge upon the fund, while the expense of keeping it in repair afterwards should be payable from the income. *Parsons v. Winslow*, 16 Mass. 361. In *Caldcott v. Brown*, 2 Hare, 145, 146, the court say (Wigram, V. C.) that it is not to be laid down "as an imperative rule, that no case could arise in which the court would sanction the expenditure of moneys by a tenant for life for the benefit of the inheritance, by making such expenditure a charge upon the inheritance. The case may be suggested of a devise of lands in strict settlement, and a direction to lay out personal estate to the same

uses: it might be more beneficial to the remaindermen that a part of the trust fund should be applied to prevent buildings on the settled estate from going to destruction, than that the whole should be laid out in the purchase of other lands."

It appears to us, however, that the question whether these expenditures are chargeable to the principal or to the income of the residuary fund depends upon the terms of the will from which the trustees derive their authority, rather than upon any of the general rules of law as to the right of a tenant for life to charge expenses of that kind in whole or in part to the inheritance. It is to be remembered that none of these alterations and improvements were made by Mrs. Eldredge, or at her request; neither does it appear that she was consulted about them, or that they were made with any peculiar reference to her interest; and if the money expended upon them was a part of the trust fund, it was money of which she was entitled to the interest. For this reason, many of the authorities cited, and many of the arguments urged, by the learned counsel for the heirs at law, can hardly be considered applicable to the question. The whole of this business of repairing and improving the wharves was the act of the trustees in the course of their administration of their trust. It was left entirely to their discretion to decide whether the best interests of all parties required that the two wharves and their appurtenances should be sold, in order that the proceeds might be invested in some other form, or should be repaired and improved, with a view to their increased value and productiveness. We are bound to presume that in deciding this question they acted in good faith, and upon their best judgment, with a view to the proper administration of their trust. By the terms of the will, a very large discretion as to the management of the property was intrusted to them. They had "full power and authority to invest, reinvest and change any and all property of which the trust premises shall be at any time composed, in such manner as they may deem most beneficial for the parties interested in the fund." There is not the slightest ground for the suggestion that the testator intended that his daughter should be required to use and enjoy that par

ticular portion of his property in substantially the same condition as that in which he had himself enjoyed it in his lifetime, or that it should remain in the family, or that she should permanently derive her income, in part, from that particular investment. On the contrary, it was subject to change at the discretion of the trustees, like all the rest of the property. The testator expresses his own preference for real estate in the city of Boston, but he does that merely as a recommendation, and not as one of the rules of the trust. If, among the various modes of changing and reinvesting any part of the trust property, the trustees should see fit to purchase other real estate, they could lawfully do so. They would have an equally clear right, by judicious and proper improvement, to increase the value and productiveness of estates already in their hands. It is not claimed that the outlay which they have made was injudicious or unreasonable; and it does not seem to be denied that it has increased the value of the wharves to the full extent of the amount expended. If so, how can it be anything more or less than an investment in real estate such as the will authorized them to make? We can see no reason for supposing that it has diminished the general fund in their hands, although it may have changed the form in which a portion of it was invested. If it has had the effect to increase the income of the entire fund, (which is nowhere made to appear,) it is not at the expense of the inheritance, and gives the heirs at law no ground of complaint.

There seems to be no occasion to consider the question whether the negotiation with Kenrick had been carried so far in the lifetime of the testator as to constitute a contract that was binding upon his executors. If the reconstruction of the wharves was reasonable and judicious in itself, and constituted a proper investment of trust funds, the trustees had a right to cause the expense to be incurred, and the work to be done at the charge of the general fund in their hands. Additions and permanent improvements are properly so charged. *Watts v. Howard*, 7 Met. 478. And so would be the necessary expenses of putting the property into tenantable condition. *Parsons v. Winslow*, 16

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Mass. 361. All this would come within their power, and perhaps their duty, as trustees. The expense of keeping the property in repair after such renovation would ordinarily be a charge upon the income.

The conclusion then is, that the legacy and succession taxes paid by the executors to the United States are to be charged to Mrs. Eldredge, and deducted from such of her income as may come to their hands; that all rents becoming payable since the death of the testator, where the last preceding quarter-day or other pay day occurred in his lifetime, are to be included with the income; and that all expenses incurred in the improvement and reconstruction of the wharves, and putting them into proper tenantable condition, are to be paid from the principal of the trust fund.

Decree accordingly.

SEMANTHA M. WILLARD vs. ISAAC GAGE & another.

A person arrested on execution may, under the Gen. Sts. c. 124, §§ 12, 13, serve the notice of his desire to take the poor debtor's oath on the attorney who made the writ in the action; although he was not arrested on mesne process, and his attorney has been told that another attorney is acting for the creditor.

CONTRACT on a poor debtor's recognizance, wherein the defendant Gage was principal and the other defendant surety. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts substantially as follows:

The plaintiff, who lived outside of the Commonwealth, brought an action against the defendant in the municipal court of Boston. The writ therein was made by Byron Nason, an attorney at law living in this county, and his name was placed on the back of the writ and entered on the docket of the court as the plaintiff's attorney. Nason afterwards withdrew his name as attorney, and the names of the plaintiff *pro se*, and of C. D. Dunton as her attorney, were entered on the docket before judgment, which was in favor of the plaintiff. Dunton, after

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he had entered his name on the docket, told Gage's attorney that "he was acting for the plaintiff," and asked that the action might be continued one term. He did not live in this county, and had no place of business therein. Execution was issued on the judgment, and on April 24, 1867, Gage was arrested on the execution by a constable living in this county, and taken before a proper magistrate, and there gave the recognizance sued on, which was in the form prescribed by the Gen. Sts. c. 124, § 10. On May 11, 1867, Gage appeared before the magistrate and procured a notice to the plaintiff, in accordance with § 12, of his desire to take the poor debtor's oath. This notice was served upon Nason. At the hour named in the notice, Gage appeared before the magistrate; the plaintiff did not attend; and the magistrate administered the oath to Gage.

C. D. Dunton, for the plaintiff.

W. D. A. Whitman, for the defendants.

COLT, J. The service was sufficient. It is required to be made upon the creditor, his agent or attorney, and the statute declares in words that the person who made the writ may always be regarded as the attorney of the creditor, where an arrest is made on the writ, or any execution issued thereon. We are bound by this language. It is a provision for the convenience of the debtor, so that he may more readily find some person upon whom to serve the notice within the county. True, the attorney in this case had no duty to perform in consequence of the notice. And the plaintiff lost the opportunity to be present at the examination, for want of actual notice. But if the notice had been served on the officer who made the arrest, as the plaintiff claims it should have been, he would have been no better off, without some arrangement between them. Service on the officer has been held good, if neither creditor nor attorney resides or does business in the county, although the attorney may happen to be within the county. *Richardson v. Smith*, 1 Allen, 541. And if the attorney is temporarily absent, or cannot be found on reasonable search, service may be made on the officer. *Hyatt v. Felton*, 9 Allen, 378.

Judgment for the defendants affirmed.

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WINSLOW S. KYLE vs. EDWARD KAVANAGH.

Under an agreement to sell and convey land with a good title, the purchaser is not entitled to a warranty deed.

In an action for the price of land, in which the defendant set up as a defence that the land conveyed to him was not that which he agreed to purchase, the judge instructed the jury that "if the defendant was negotiating for one thing and the plaintiff was selling another, and their minds did not agree as to the subject matter, they could not be said to have agreed and made a contract, although there was no fraud on the part of the plaintiff," and that "mistake alone, if proved, was a good defence." *Held*, that the plaintiff had no ground of exception.

CONTRACT to recover the price of land sold and conveyed to the defendant. At the trial in the superior court, before *Brigham*, C. J., it appeared that the plaintiff signed and gave to the defendant the following agreement in writing: "Boston, July 2, 1868. I hereby agree to sell to E. Kavanagh four lots of land in Waltham on Prospect Street, so called, for 50 shares of Mitchell Granite stock, 9000 shares of Revenue Gold stock, also \$150 in lawful money for said land. Said Kyle is to give said Kavanagh a good title, if the title is in said Kyle, so he can give deed; if said Kyle cannot give a good title, then this agreement is null and void."

The plaintiff offered evidence tending to prove that "at the time of the bargain the record title to said land was in Charles E. Jackson, although the plaintiff was the equitable owner thereof; that it was orally agreed between the plaintiff and defendant, that the deed, conveying said land to the defendant, should run from Jackson; that the defendant appointed John Wright as his agent to examine the title of said land, and accept a deed, if the title should be found good in Jackson; and that a quitclaim deed from Jackson to the defendant was delivered to Wright and recorded by him, conveying" certain land "on Prospect Street" in Waltham.

The defendant contended and introduced evidence tending to show that, either by the fraud or misrepresentation of the plaintiff, or by mistake, the land conveyed by the deed was not the land which he bargained for, and that what he had agreed to

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purchase was a lot of land on another Prospect Street in Waltham, in no way connected with that mentioned in the deed, and a long way off; and he also contended that he was entitled to a warranty deed.

The plaintiff contended that, "if the defendant was to take his conveyance from Jackson, if he found the title good in him, all he could claim was a quitclaim deed, and that 'good title,' within the meaning of the writing of July 2, did not necessarily mean a warranty deed from the party who was to give the deed to the defendant;" but the judge ruled "in both cases that the defendant was entitled to a warranty deed, unless he waived it and agreed to take some other form of conveyance."

The judge, at the commencement of his charge, instructed the jury that, "if the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to the subject matter of the sale, they could not be said to have agreed and to have made a contract;" and furthermore, after the conclusion of his charge and at the request of the defendant, also instructed the jury that, "if the plaintiff or the defendant were in fact mistaken as to the location of the land, it was a good defence, although there was no fraud or misrepresentation on the part of the plaintiff," and that "mistake alone, if proved, was a good defence." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

L. W. Howes & E. B. Smith, for the plaintiff.

S. Z. Bowman, for the defendant. An agreement to give a "good title" to land entitles the vendee to a warranty deed. *Church v. Brown*, 15 Ves. 258. *Loyd v. Griffith*, 3 Atk. 264, 268. 2 Sugden on Vendors, (7th Am. ed.) 150. *Dwight v. Cutler*, 3 Mich. 566. *Fleming v. Harrison*, 2 Bibb, 171. *Hedges v. Kerr*, 4 B. Monr. 526. *Tremain v. Liming*, Wright, 644. *Clark v. Redman*, 1 Blackf. 379. *Rucker v. Lowther*, 6 Leigh, 259. *Linn v. Barkey*, 7 Ind. 69. Rawle on Covenants for Title, 549, 554, 557, and cases cited. In Pennsylvania, where it has been held that a general agreement to convey requires only a quitclaim deed, or deed with special warranty, it has been on the ground that a deed with special warranty was the usual form

of deed in that state, as is further shown by the question having been raised in the courts, whether a general warranty deed, being an unusual form of conveyance, did not throw a suspicion or cloud upon the title. *Withers v. Baird*, 7 Watts, 227. *Rawle on Covenants for Title*, 555. *Cresson v. Miller*, 2 Watts, 272. *Forster v. Gillam*, 13 Penn. State, 340.

Where it has been held, as in New York, Connecticut and Maine, that an agreement to convey is satisfied by executing a deed without covenants, it has been so held in the case of agreements, referring to the giving of a conveyance, rather than to the giving of a good title. *Gazley v. Price*, 16 Johns. 267. *Fuller v. Hubbard*, 6 Cowen, 13, 22. *Van Eps v. Schenectady*, 12 Johns. 436. *Ketchum v. Evertson*, 13 Johns. 359. *Potter v. Tuttle*, 22 Conn. 512. *Hill v. Hobart*, 16 Maine, 164. See *Tinney v. Ashley*, 15 Pick. 546, 552; *Vickery v. Welch*, 19 Pick. 523. The agreement should be construed most strongly against the plaintiff. *Barney v. Newcomb*, 9 Cush. 46, 56, and cases cited.

The instruction as to mistake was correct. *Ketchum v. Catlin*, 21 Verm. 191. *Wheadon v. Olds*, 20 Wend. 174. *Taylor v. Fleet*, 1 Barb. 471. Story on Sales, §§ 145, 146, 148, 377. Chit. Con. (10th Am. ed.) 694, 696. Met. Con. 31.

MORTON, J. This is an action of contract to recover the agreed price of land which the plaintiff alleged he had sold and conveyed to the defendant. It appeared at the trial, that the legal title to the land in question was in Charles E. Jackson, the plaintiff being the equitable owner thereof. The plaintiff introduced testimony tending to show that the defendant agreed to purchase said land and to take a conveyance from Jackson, if upon examination the title should be found good in Jackson; that the agent of the defendant examined the title, found it good, and thereupon Jackson executed a quitclaim deed to the defendant, which was delivered to his said agent and duly recorded. The defendant contended that the agreement was that he should receive a warranty deed from the plaintiff.

In this aspect of the case, the plaintiff requested the court to instruct the jury that if by the contract "the defendant was to take his conveyance from Jackson if he found the title good in

him, all he could claim was a quitclaim deed." The court refused this prayer, and instructed the jury that the defendant was entitled to a warranty deed unless he waived it and agreed to take some other form of conveyance. We are of opinion that this ruling was erroneous. If the whole agreement was as stated in the plaintiff's prayer, it would be complied with on the part of the plaintiff by delivering a quitclaim deed from Jackson.

A deed of quitclaim passes all the estate which the grantor could convey by a deed of bargain and sale. Gen. Sts. c. 89, § 8. If a grantor has in fact a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty. An agreement or covenant to convey a good title, therefore, does not necessarily entitle the covenantee to a warranty deed; the right of property and of exclusive possession, which constitutes a good title, being effectually vested in him by a deed of quitclaim. *Gazley v. Price*, 16 Johns. 267. *Ketchum v. Evertson*, 13 Johns. 359. *Potter v. Tuttle*, 22 Conn. 512. In this case, it should have been left to the jury to determine what the contract between the parties was, with instructions that, if the entire contract was that the plaintiff should give the defendant a good title by a conveyance from Jackson, there being no agreement as to the form of the deed, then the delivery to the defendant of the deed of quitclaim was a compliance with the contract on the part of the plaintiff.

For the same reasons, the written agreement of the plaintiff "to give said Kavanagh a good title" would be complied with by a deed of quitclaim, and the jury should have been so instructed, if the construction of the written agreement was material and called for in the case as presented upon the evidence.

The other exception taken by the plaintiff cannot be sustained. The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance

with the elementary principles of the law of contracts, and was correct. *Spurr v. Benedict*, 99 Mass. 463.

Exceptions sustained.

JOSIAH GOODING vs. JOHN SHEA.

A mortgagee, out of possession and without a right to possession, cannot maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger for breaking and entering the mortgaged premises.

In an action of tort, the declaration alleged that the plaintiff was third mortgagee of a house; that the defendant forcibly entered the house and removed fixtures; and that by reason thereof the plaintiff's security was impaired. At the trial, it appeared that the plaintiff was out of possession, and had not the right of possession, and there had never been a breach of the condition of his mortgage; and that, since the alleged tort, he had bought in the second mortgage; and it did not appear that the first mortgagee had ever made any demand on the defendant, or authorized him to resist the plaintiff's suit. *Held*, that the plaintiff could recover the full amount of the damages caused to the estate by the removal of the fixtures, without regard to the sufficiency of his security, and although the mortgagor had sued the defendant for the same acts.

TORT. The first count in the declaration alleged that the defendant forcibly entered the plaintiff's close, being the dwelling-house numbered 8 on Brookline Street in Boston, tore out, took and carried away certain fixtures in said dwelling-house, and converted them to his own use. The second count alleged that Hiram Curtis was the owner of said dwelling-house, "subject to two mortgages, one of \$5000 and the other of \$1000, and interest on the same, and the said Curtis conveyed the same to the plaintiff, subject to said mortgages, to secure the payment of \$3000 and interest, before that time loaned and advanced to said Curtis by the plaintiff, and the defendant afterwards forcibly entered said dwelling-house and tore out, took and carried away" certain fixtures "in said dwelling-house, and converted the same to his own use, by means whereof the plaintiff's said security for his said loan was greatly lessened and destroyed." The third and fourth counts were like the first and second, except that "dwelling-house numbered 9" was substituted for "dwelling-house numbered 8." Writ dated August 27, 1868.

At the trial in the superior court, before *Morton, J.*, without a jury, the following facts appeared: Curtis, being owner of both said houses, on September 16, 1867, mortgaged them to the Mechanics' Savings Bank of Lowell, each by a separate deed, and each to secure the payment of \$5000 in six months from date; on February 7, 1868, he mortgaged them to Mary A. Lewis, each by a separate deed, and each to secure the payment of \$1000 in four months from date; and on April 18, 1868, he mortgaged them to the plaintiff, each by a separate deed, and each to secure the payment of \$3000. Each of these six mortgages contained a provision that until breach of condition the mortgagee should have no right to take possession. On June 20, 1868, the defendant entered the premises and tore away and removed water pipes and other fixtures attached to the realty; at which time the premises were in the possession of the mortgagor, and there had been no breach of the condition in the mortgages to the plaintiff. On July 11, 1868, the plaintiff took an assignment from Mary A. Lewis of the two mortgages to her; on July 30, 1868, entered to foreclose; and on August 28, 1868, sold the houses under powers of sale contained in the said two mortgages, bought them in himself for \$2000 each, and had subsequently conveyed one of them for \$9400 by a warranty deed, and still held the other, which was of equal value. Since the alleged trespass, Curtis had been adjudged a bankrupt, and his assignee had brought suit against the defendant for the same trespass.

The defendant contended that, on these facts, the plaintiff could not maintain this action, and, even if he could, still 'if, on the evidence, the houses were of sufficient value over and above all prior incumbrances to pay the plaintiff his whole debt, he could recover in this suit only nominal damages, or only such sum as he had, by reason of the trespass, lost on his security, as the trespass was in the nature of strip or waste, and an injury to the freehold. But the judge ruled that the plaintiff might recover the full amount of the damages to the estate by the alleged trespass; and that the defendant could not go into the state of accounts between mortgagee and mortgagor; and found

for the plaintiff for the full amount of all damage caused by the trespass." The defendant alleged exceptions.

C. T. Russell, for the defendant.

A. F. L. Norris, for the plaintiff.

WELLS, J. There are two counts in the declaration relating to each lot of land and dwelling-house. The plaintiff is third mortgagee of each parcel, by separate mortgages, containing a clause against taking possession until breach. There had been no breach at the time of the alleged tort.

The first count, relating to each parcel, is in the nature of trespass *quare clausum fregit*, and cannot be maintained, because of the want of possession or right of possession at the time of the alleged trespass. *Page v. Robinson*, 10 Cush. 99. *Woodman v. Francis*, 14 Allen, 198.

The second count in each case sets forth the actual condition of the title, and alleges that the defendant "forcibly entered said dwelling-house" and removed certain fixtures, "by means whereof the plaintiff's said security for his said loan was greatly lessened and destroyed." We do not think this count sets forth the entry as a violation of the plaintiff's possession, or possessory right; but only as the means by which an injury was caused to his mortgage security.

No question is raised here in regard to the liability of the defendant to some one for the fixtures so removed. The points of the defence are, that the mortgagee in possession can alone recover; or, if either mortgagee may do so, it must be the first mortgagee only.

The mortgagor might undoubtedly maintain an action of trespass; and damages for the unlawful removal of fixtures would be recoverable in such action by way of aggravation. *Earle v. Hall*, 2 Met. 353. For the removal of crops, or other property connected with the land, which the mortgagor himself might have removed, his right of recovery would be exclusive. *Woodward v. Pickett*, 8 Gray, 617. But fixtures he could not himself remove, against the right of the mortgagee, nor permit to be removed; nor can he have any right to withhold the compensation or damages for them from the mortgagee, in whom the

legal title is. The mortgagee may recover their value against the mortgagor or any other party who may be responsible for their removal. *Cole v. Stewart*, 11 Cush. 181. Such right to recover depends upon the title, and not upon possession, or the right of present possession, of the land. The right of present possession only affects the form of action in such case. Although the mortgagor in possession may recover, in an action of trespass, for the value of fixtures removed by a stranger to the title, his right to their value is subordinate to that of a mortgagee, and therefore cannot be set up by the defendant to defeat a recovery for the same by such mortgagee. The mortgagor's right of action, based upon his possession, does not depend upon, nor necessarily include, the right to recover for the aggravation by removal of fixtures. *Phelps v. Morse*, 9 Gray, 207. The right to recover the value of the fixtures is separable from that to recover for "breach of the close." *Bickford v. Barnard*, 8 Allen, 314. It is incidental only to the action of trespass. But, as the injury affects the estate, it may be sued for directly by any one in whom the legal interest is vested. A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury. Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither, by merely showing that another may also sue, or has sued. If he would defeat the claim of either, he must show that another, having a superior right, has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, *pro tanto*, of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeem. It differs in this respect from the claim for insurance in *King v. State Insurance Co.* 7 Cush. 1, cited by the defendant. The defendant has the same means of protection against four judgments that any one has who is liable, for the same cause, to either of several parties

having different or successive interests in the subject matter. Due satisfaction will discharge all the claims, if made to a party having the prior right. But neither can be defeated without some appropriation of the claim to the use of him who holds a prior right. Thus it is no defence to this suit, that the mortgagor has also a right of action; nor even that he has brought such an action; because the right of the plaintiff is superior to that of the mortgagor. A superior right in Mary A. Lewis will not avail, as the plaintiff has since become the owner of that title. Nor is the existence of a superior right in the savings bank, as first mortgagee, a defence. The defendant shows no satisfaction of that claim, no demand made upon him by the savings bank, and no authority or right from the bank to resist the claim of the plaintiff here, in behalf of or for the benefit of the first mortgagee.

It is not contended that the plaintiff's mortgage has been satisfied and discharged by the proceeds of the sale under the power of sale in the Lewis mortgage. The correctness or fairness of those proceedings, and the responsibility of the plaintiff for the full value of the property, or the amount realized upon the second sale, may be open to the representatives of the mortgagor in a suit therefor; but this defendant is not in such privity as to be entitled to inquire into the relations or the state of the account, so far as it depends on equitable considerations, between the mortgagor and mortgagee.

The right of the plaintiff to recover in this action does not depend upon the sufficiency or insufficiency of his security. Until his whole debt is paid, he cannot be deprived of any substantial part of his entire security without full redress therefor. Upon the facts reported, we are satisfied that the ruling of the judge who heard the case, allowing the plaintiff the full amount of the damages to the estate caused by the removal of fixtures, was correct.

Exceptions overruled.

**HENRY W. BENHAM & another vs. THOMAS J. DUNBAR
& another.**

On an issue of the value of a lot of lowland and flats on an island in Boston harbor, it is no ground of exception that evidence was admitted of the price of lands sold at different times, from eight years to one year before, on islands and headlands in the harbor, from half a mile to six miles distant; in the absence of evidence of more recent sales, or of any great difference of the uses to which these islands and headlands were appropriated, although the island on which the lot in question was situated was much larger than the others, and had readier means of communication with the city, and the lot had a deposit of sand thereon.

PETITION under the Sts. of 1868, c. 292, and 1869, c. 7, by Henry W. Benham and John G. Foster, agents of the United States, for a jury to assess the value of the tract of lowland and flats on Long Island in Boston harbor, consent to the purchase of which by the United States was granted by the first named statute. Hearing by the jury in the superior court at April term 1869, before *Brigham*, C. J., who allowed the following bill of exceptions :

“ The tract of lowland and flats in question is on Long Island, one of the islands in Boston harbor, and distant from Long Wharf from five to six miles ; the tract of lowland being an isthmus connecting the east head of Long Island with the main portion thereof, and containing ten acres, the flats thereto appurtenant being four acres and a quarter. The whole island contains 250 acres, all of which, except the east head, embracing about 25 acres, and some twenty small building lots, none of them exceeding a quarter of an acre in extent, were the property of the respondents. There was evidence tending to show that there was, upon the part of the island belonging to the respondents, one hotel, built in 1851 and 1852, and recently repaired ; one small cottage, to be used for a hotel ; two cottages just repaired ; and several other small buildings, of but trifling value. There was also a wharf, which had cost some \$6000, built in 1851 and 1852, and recently largely repaired. There was evidence tending to show that the respondents, who became the owners in the fall of 1867, had expended, in improvements in the island,

\$30,000, and that they had built a steamboat for the purpose of running between Boston and this island, and other places, at a cost of \$30,000. It was admitted by both parties that the tract of lowland was utterly worthless for agricultural uses. Under proper instructions from the judge, and before any testimony was offered, the jury were taken to the premises for a view thereof. A chart of Boston harbor, with all the islands therein, and mainlands bordering thereon, with the depths of water around all the said islands and headlands, was admitted by both parties as evidence of the location, soundings, &c., of the water, and lands therein designated.

“ The respondents introduced testimony tending to show that the property they claimed had, within two years, passed into their hands as trustees of the Boston Bay Steamboat & Land Company; that the object this company had in view was to enhance the value of this property by creating a demand for it for building purposes as a place of resort upon the seashore; that, to accomplish this, they had, in addition to the steps taken as enumerated, contracted for bathing-houses, which they were about to erect upon the ten acres of lowland in question; that the said ten acres were of value to the whole island, as affording the best place at the least expense to build a wharf to deep water, and were also valuable because there was upon them a large deposit of sand suitable for building purposes, and because they furnished desirable fishing stations, for which they were in demand, and for which purpose the respondents had been offered \$10,000.

“ The petitioners then introduced testimony tending to show that the island was of value only for its agricultural uses; and that all previous efforts to make the island of value as a place of resort upon the seashore had proved failures. Without objection from the respondents, the petitioners also introduced testimony to show that the whole of the said 250 acres was leased in 1847 for about \$550 per annum for farming purposes, with the privilege of selling ballast; that in 1865 the same property was leased for \$500 per annum, without the privilege of selling ballast, and was used for cultivation and grazing; that the hote

Benham & Dunbar.

upon the property, which in 1851 and 1852 cost \$35,000, was sold in 1860 and 1865 for \$12,000, and paid for part in cash and part in stock of the incorporated company to whom the premises then belonged; that two efforts were made, in 1850 and 1860, to sell lands upon the island at auction, one of which was partially successful to a small amount, the other a failure; that in 1867 about 220 acres of the island, including the wharf designated, were sold for \$12,000; that, from 1851 to 1867, previous companies had attempted to make the premises of value for building purposes, but had failed; that at the present time there were but three or four houses on the island, these being, except the hotel, cottages of but little value; that the ten acres of lowland, for fishing purposes, were of inferior quality to other islands situated from three to six miles further from Long Wharf; that the deepest water was not off the ten acres as alleged; and that the sand found there was not the best for building purposes, and not such as the engineers would use for works to be erected there.

“The petitioners further offered the following testimony of actual sales of land in Boston harbor, and at the following dates: Apple Island: purchased by the city of Boston in 1867, containing nine and a half acres, situated in Boston harbor, two miles and three fourths northwest of the eastern end of Long Island. Peddick's Island: eight acres sold thereon in 1869; situated in Boston harbor, two and a half miles from Long Island. Gallop's Island: purchased by the city of Boston in 1860; containing sixteen acres, situated in Boston harbor, less than half a mile from Long Island; but no buildings had been erected thereon besides fishing and farm buildings, and they had no regular communication with Boston. The petitioners having introduced, without objection, testimony tending to show that these islands were similar in character and possessed the same agricultural value as the upland on Long Island, and were similarly situated thereto, asked of a witness the prices the city paid for Apple Island and Gallop's Island. The respondents objected, but the presiding judge ruled that the question was proper, and the answer admissible; and the question was put and answered.

"The petitioners also introduced, without objection from the respondents, testimony of recent sales of lands upon the points and headlands of the shore as follows: At Point Allerton, four miles from the said ten acres, in 1868; Sagamore Head, six miles therefrom, land sold in 1867; Strawberry Hill, four miles therefrom, lands sold in 1867; at Hull, two and three quarters miles therefrom, lands sold in 1868; also, of sales of common lands between Point Allerton and Hull, sold in 1865. They also introduced evidence tending to show that, with the exception of the common lands between Point Allerton and Hull, these lands were of the same agricultural value in soil as the upland on Long Island, and were similarly situated as to the sea, and that these common lands were of precisely the same character as the ten acres of the respondents, and similarly situated in relation to the uplands; but that none of the other islands had any but fishing or farm buildings on them, or regular communication with Boston. The petitioners then asked as to the prices paid for the lands. The respondents objected. But the presiding judge ruled that the questions were proper; and they were put and answered.

"The jury found the value of the fee of the tract of lowland and flats to be \$2850; and the respondents alleged exceptions."

H. W. Paine & C. S. Lincoln, for the respondents.

G. H. Gordon, for the petitioners.

COLT, J. Much must be left to the discretion of the judge who presides at the trial, in determining whether the lands, sales of which were admitted in evidence, were so similar in situation, and adaptation to profitable occupation, and the sales of them so recent, as to make such sales evidence proper to be submitted to the jury.

It certainly does not appear from the facts stated in these exceptions, that the lands upon other islands and headlands in Boston harbor were at such distances, or devoted to such dissimilar uses, or that the sales testified of were so remote in point of time, that the evidence became irrelevant or immaterial to the issue. It may be that there were no sales more recent to be shown. The rule must vary with the circumstances of each

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case. If the value of a town lot was in question, it is plain that the evidence should be confined to sales of comparatively recent date and of land in the near vicinity. If it was wild land, in a thinly settled part of the country, a more liberal rule would be applicable. Without some further evidence, we cannot suppose that the changes in the title to real estate in the islands and headlands of the harbor are so frequent, or the difference in situation and value so great, as to render the evidence here objected to inadmissible. *Paine v. Boston*, 4 Allen, 168. *Boston & Worcester Railroad Co. v. Old Colony & Fall River Railroad Co.* 3 Allen, 142. *Exceptions overruled.*

JOHN McGRATH vs. CITY OF BOSTON & another.

A., owning land in a city, signed and delivered to B. a writing of which the following is the material part: "I hereby agree to let to B." the land; "he agrees to pay \$400 per year, payable monthly," and do certain repairs; "I am to do all outside repairs, and at present to fence the yard, repair the cellar and lay a water pipe; and I will make a lease to B. of the premises for three, with a privilege of five years from date." B. entered into possession immediately, and paid the rent named till ejected. The city afterwards, but within the term first named, took part of the land to widen a street. *Held*, that the writing was not a lease; and that B. could not maintain a bill in equity against the city to recover any portion of the damages assessed for the taking.

BILL IN EQUITY against the city of Boston and Maurice O'Connell, alleging that the city had taken, for widening Oliver Street, a parcel of land belonging to O'Connell, and assessed damages therefor; and that the plaintiff had a leasehold interest in said land; and praying that the city might be ordered to pay him his proportional amount of the damages. The case was reserved by *Wells, J.*, for the consideration of the full court on an agreed statement of facts, of which the material part was as follows:

On October 3, 1863, the defendant O'Connell, being the owner of a house on Oliver Street, executed the following agreement, bearing that date: "I, the undersigned, hereby agree to let to John McGrath the dwelling-house numbered 29 on Oliver Street

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in Boston, on the following conditions: He agrees to pay four hundred dollars per year, payable monthly to date; to keep the inside of the house in good repair; do all inside repairs during the term for which he may hold it; pay the water taxes, and keep the vault and premises clean; and whenever he may leave, to give up the premises in as good condition as they are now in, reasonable wear and use excepted. I am to do all outside repairs, and at present to fence the yard, repair the cellar, and lay a water pipe to convey the water into the yard; and I will make a lease to McGrath of the premises for three with a privilege of five years from date. Maurice O'Connell.

"I agree to the above terms. John McGrath."

On the day of the date of this agreement the plaintiff entered into possession of the premises. On August 5, 1865, he notified the defendant O'Connell that he elected to hold the premises for five years; and he remained thereon till January 3, 1866, when he moved away, after Patrick A. O'Connell, to whom the defendant O'Connell had conveyed the estate, had given to him notice to quit and had removed his furniture. The plaintiff paid rent at the rate named in the agreement up to the time when he received the notice to quit.

On July 3, 1865, the city gave notice of an intention to take part of the premises for the purpose of widening Oliver Street, and on October 9, 1865, assessed the damages for the taking; but did not enter for that purpose till October 9, 1866. The city had never paid the damages, but was ready and willing to pay them as the court might order.

L. Child, for the plaintiff, cited *Fiske v. Framingham Manufacturing Co.* 14 Pick. 491; *Bacon v. Bowdoin*, 22 Pick. 401; *Dutton v. Gerrish*, 9 Cush. 89; *Doe v. Ashburner*, 5 T. R. 163, *Weed v. Crocker*, 13 Gray, 219.

G. O. Shattuck, for the defendant O'Connell.

WELLS, J. The plaintiff, in order to entitle himself to damages from the city, or to share in any manner in the amount awarded in gross for the injury to the property in question, by the laying out of the street, must show that, at the time those damages became payable, or at the time the land was entered

upon for the purpose of constructing the street, he had an estate or interest in the property injured. He claims that he was a tenant for years; and, in support of that claim, relies upon the contract set forth in the agreed facts, as being, in itself, a lease for years. As he was expelled from the possession, by the owner of the fee, before the city entered upon the land, he cannot maintain his claim upon the ground that he was tenant in fact, in possession of the premises, with an equitable right, as against the owner, to have a lease. He must stand upon the legal effect of the writing which he presents as his lease. Unless that operated to vest in him an estate for years, he has no title and no right to claim any part of the damages awarded for injury to the land or building.

The instrument, relied on as a lease, contains this as its last clause: "I am to do all outside repairs, and at present to fence the yard, repair the cellar, and lay a water pipe to convey the water into the yard; and I will make a lease to McGrath of the premises for three with a privilege of five years from date." The instrument commences with the words: "I hereby agree to let;" but it contains no mention of any length of term, except that in the stipulation "to make a lease;" and no agreement that McGrath may enter before the lease is made, or that he shall commence his occupation or accept a lease before O'Connell shall have fenced the yard, repaired the cellar and laid the water pipe. According to the distinctions upon which the question has usually been decided whether a particular instrument is to be construed as a present demise or an executory contract for a lease to be given thereafter, we think that this must fall within the latter class. *Goodtitle v. Way*, 1 T. R. 735. *Doe v. Ashburner*, 5 T. R. 163. *Poole v. Bentley*, 12 East, 168. *Tempest v. Rawling*, 13 East, 18. *Doe v. Grover*, 15 East, 244. The cases cited from our own reports, to which may be added that of *Weld v. Traip*, 14 Gray, 330, recognize the same principle. It is, that if the instrument, upon its face, purports to be the contract upon which the occupation is to be enjoyed, and the relations and rights of the parties to be defined, and it contains apt words to operate as a

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present demise, it will be so construed. Otherwise it will be regarded as an agreement only. Subsequent occupation, like other acts and conduct of the parties to a contract in relation to its subject matter, may aid, upon the question of intention, in the interpretation of their agreement; but they cannot control it against the meaning of the words used, nor supply a meaning which the words themselves will not reasonably bear. In this case, the only words in the writing which can be vouched in to give to the tenancy of McGrath the character of a term of years, relate to the limitations of a lease which O'Connell promises that he "will make." So long as McGrath remained in occupation, the agreement might be sufficient to protect him and to define the conditions of his occupancy. In equity he would be protected against ejection, and might compel the execution of a lease which would confer upon him the legal estate for the stipulated term. But he had not acquired the legal estate when he was virtually ejected from the premises, and he had ceased to be a tenant thereof before damages from the city became payable to anybody. In that state of facts, he would have no interest specifically in the land and buildings, or in the damages to be paid therefor. His remedy is against O'Connell personally, for breach of the executory contract.

The judgment upon the agreed facts must therefore be

Bill dismissed, with costs.

GEORGE GANNETT vs. MARGARET ALBREE.

Specific performance will not be decreed of an agreement to renew a lease which provides that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," if the assignee of the lease has allowed the premises to be used as a boarding-house, although the lessor has consented to his using them for sleeping-rooms in connection with a girls' school.

BILL IN EQUITY for specific performance of an agreement to renew the lease of a dwelling-house numbered 28 on Pemberton Square in Boston.

At the hearing in this court, before *Morton*, J, it appeared that the defendant demised the premises to George W. Bassett for the term of three years from August 1, 1866, by an indenture in which the lessee covenanted not to lease nor underlet the premises, nor permit any other person or persons to occupy or improve the same without the written approbation of the lessor, and the lessor agreed that the lessee should have the right to renew the lease at his option for the term of two years; that on the indenture, before its delivery, was made the following indorsement under the hand and seal of the defendant: "In case the lessee shall cease to occupy the premises as a residence, he shall have the right to underlet the same for the remainder of the term, to any respectable person, to be used strictly as a private dwelling, and not for any public or objectionable purpose;" and that on September 12, 1866, Bassett, with the written consent of the defendant, assigned the premises and all his interest therein to the plaintiff. It also appeared that the premises, "from the time of the assignment till April 9, 1868, were used and occupied by the plaintiff, in connection with his school for young ladies, for sleeping-rooms, with the knowledge and consent of the defendant; that on or about April 9, 1869, the plaintiff leased the same to Lucy E. Small, for the unexpired term of the lease, for the purposes of a boarding-house, though not mentioned in the written lease, reserving to himself one room which had been occupied by his brother, a clergyman, as a sleeping-room; that Small occupied the house for a boarding-house, using a portion of the house for her own family, and the balance for boarders who lodged in the house; and that the plaintiff agreed that, when he obtained a renewal of the lease from the defendant, he would renew the lease for the same term to Small."

The judge ruled "that such use of the house was in violation of the provisions of the lease and the agreement, and, by reason thereof, declined to order a specific performance of the agreement" for renewal, and reported the case for the determination of the full court.

J. F. Colby, for the plaintiff. The lease was assignable with

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out the defendant's consent. The provision against underletting does not embrace an assignment. The license to assign, once given, discharged the covenant. *Bleecker v. Smith*, 13 Wend. 530. *Jones v. Jones*, 12 Ves. 186. *Brummell v. Macpherson*, 14 Ves. 172. The consent of the defendant was not necessary to the use of the premises as a boarding or lodging-house. *Doe v. Laming*, 4 Camp. 73, 77. There was no violation of the provision that the premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose." If the plaintiff has agreed with Small to do what he has no right to do, the court will not assume that he will do it, and for that reason refuse specific performance. *Williams v. Cheney*, 3 Ves. 69. 1 Platt on Leases, 636.

E. D. Sohler & C. A. Welch, for the defendant.

AMES, J. By the terms of the lease, the lessor had a right to insist that the house should be occupied as a residence, and used "strictly as a private dwelling," and not for any "public or objectionable purpose." When the lease was assigned to the plaintiff, he took it subject to all the covenants which it reserved or contained, to be kept and fulfilled on the part of the original lessee. The consent of the lessor that the plaintiff might occupy and use the house himself, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not an appropriation to a public or objectionable purpose. But its conversion into a public boarding-house is an entirely different matter. In making the original lease, with its restrictions, the lessor may have supposed that such a use would subject the house to greater wear and tear, or to greater depreciation in value, or require more frequent repairs or increase the rate of insurance. All these considerations may have had their influence upon her mind as to the rate of the rent

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and the length of the term. The use of the house as a boarding-house is in violation of the terms of the lease, and would subject it to very different conditions. For that reason, the plaintiff is not entitled to a decree for the specific performance of the contract for its renewal. *Bill dismissed, with costs.*

GEORGE SPRINGALL vs. JOHN P. WHITTIER.

In an action on the Gen. Sts. c. 137, exceptions to the refusal of the judge to give instructions requested as to the existence of the relation of landlord and tenant between the parties cannot be sustained, if they show that, although the judge declined to give the instructions in the form asked for, yet he stated fully to the jury the different ways by which said relation could be created and its existence proved, to which statements no exception was taken.

ACTION under the Gen. Sts. c. 137, to recover possession of a shop in Boston. Writ dated May 18, 1868.

At the trial in the superior court, before *Dewey, J.*, the plaintiff introduced evidence tending to show that he held the shop by a lease under seal from Joseph P. Gardner, dated September 11, 1867, by which he became tenant of a building, of which it was part, for the term of three years from October 1, 1867; that for five years before October 1, 1867, he had been tenant of the building under a lease from Gardner, the term of which ended on said October 1; that on June 1, 1865, he underlet the shop to one Whiting, by a lease under seal, for the term of three years and one month from said June 1; that on June 10, 1865, Whiting, by an instrument under seal, assigned said lease to Chester Ball and Charles F. Hall, who thereupon occupied the premises under said lease until January 7, 1868, when Hall, by an instrument under seal, assigned said lease to one Sanderson, who thereupon occupied the premises under said lease, and continued in the occupation thereof until January 14, 1868, when he by an instrument under seal assigned said lease to the defendant. By this lease, rent was reserved payable weekly, at the rate of \$14.50 for each and every week during

the term, and there was no covenant against reletting. It was admitted that on January 6, 1868, the plaintiff received rent for the week ending on that day, from Hall, who at that date was the owner of said lease; that on January 13 Sanderson, who had become the owner of the lease, tendered rent to the plaintiff under the lease for the week ending on that day; that the plaintiff refused to receive the same or to recognize Sanderson as tenant under the lease; that Sanderson, when he assigned the lease to the defendant, told the defendant that the plaintiff had refused to receive rent from him or to recognize him as tenant under it; and that on January 20 the defendant tendered to the plaintiff rent under the lease for the week ending on that day, and the plaintiff refused to accept the same, or to acknowledge the defendant as tenant under the lease. There was no evidence, except as stated, tending to show that the plaintiff ever afterwards demanded payment of rent from the defendant under the lease, or notified the defendant that he accepted him as tenant under the lease and the several assignments to him, or that the defendant after January 20, 1868, ever offered to pay rent under the lease, or claimed to be a tenant under the lease and assignments, or to occupy the premises under them.

The plaintiff introduced evidence tending to show that, from early in January until after the beginning of this action, the defendant was in actual occupation of the premises in question; and the defendant introduced evidence tending to show that he never actually occupied the premises. The plaintiff also introduced evidence tending to prove that early in January 1868 the defendant made an oral contract with him, by which the defendant agreed to hire the shop, at the rate or rent of \$1100 per annum, payable quarterly, the term to continue so long as the plaintiff's lease from Gardner should continue; and the plaintiff contended that, under this contract, as well as by reason of the assignments of the Whiting lease, the defendant became, and was at the time of the commencement of this suit, tenant of the shop. The defendant admitted that he made an oral contract with the plaintiff as contended by the plaintiff; bu.

contended and introduced evidence tending to show that it was a part of the oral contract that the plaintiff should give him a lease in writing of the premises. This was denied by the plaintiff. There was also evidence introduced tending to show that the defendant afterwards demanded of the plaintiff a written lease of the premises, which the plaintiff refused, and that the defendant would not take the premises unless he could have a written lease thereof. The plaintiff introduced evidence tending to show that possession of the premises was given to the defendant; that the defendant took the keys from Sanderson and kept them from about January 6, 1868, and held possession and control of the premises from that time until after the date of the writ, neglecting and refusing to pay rent; and that on April 13, 1868, the plaintiff served upon him a notice to quit. "There was a conflict in the testimony as to the occupation by the defendant of the premises for possession of which this action was brought, and it was one of the controverted facts submitted to the jury. There was also other evidence in the case, as to the matters in controversy between the parties, beside the evidence hereinbefore stated."

The defendant requested the judge to rule that if Sanderson, on or about January 13, tendered a week's rent to the plaintiff, under the Whiting lease assigned to him, and the plaintiff refused to receive the rent, or to recognize Sanderson as tenant, and Sanderson communicated this fact to the defendant, and the defendant accepted the assignment of the Whiting lease on January 14, with knowledge that the plaintiff refused to recognize Sanderson as tenant and to accept rent from him; and if on January 20 the defendant tendered rent to the plaintiff under said lease, and he refused to accept rent from the defendant, and to recognize him as tenant under said assignment of lease, then the plaintiff was estopped afterwards to claim that the defendant was a tenant under said assignment of lease; and that no rent would become due and payable to the plaintiff from the defendant, under said lease, until demand therefor had been made by the plaintiff; that if the oral contract between the plaintiff and the defendant was in substance that the plaintiff was to

let or lease the shop to the defendant until the termination of the plaintiff's lease from Gardner, at an annual rent of \$1100, and nothing was expressly said as to whether the plaintiff should make a lease in writing, the legal effect of such agreement would be to require the plaintiff to make a written lease of the premises for that time; and that under said oral contract the defendant did not become a tenant of the premises, unless he afterwards actually occupied them and had not abandoned that occupation thereof on the day when the notice was served upon him.

"The judge declined to give the instructions in the form asked for, and instructed the jury that in order to maintain this action it was necessary that they should be satisfied that the relation of landlord and tenant existed between and was recognized by the plaintiff and the defendant prior to and at the time of giving the notice, and that rent was due and in arrear at the time of the giving of the notice. The judge stated fully to the jury the different ways by which said relation could be created and its existence proved, (to which statements no exception was taken,) and that, if they found that such relation existed, it was immaterial whether it was under the Whiting lease or under an oral contract, but they must find that the defendant was in possession of the premises as the tenant of the plaintiff, and holding them either under an oral lease or the assignment of the Whiting lease, that the relation of landlord and tenant was recognized by the parties as existing between them, and that rent was due and in arrear at the time of the giving of the notice; otherwise they must return a verdict for the defendant."

The jury found for the plaintiff; and the defendant alleged exceptions.

J. Nickerson, for the defendant.

A. A. Ranney, for the plaintiff.

MORTON, J. The instructions given at the trial were sufficiently favorable to the defendant. Under them, the jury have found that the relation of landlord and tenant existed between the parties; that the defendant, at the time of giving the notice, was in possession of the premises as tenant of the plain-

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tiff; and that rent was then due and in arrear. This is all the plaintiff is required to prove in order to maintain this process. *Kimball v. Rowland*, 6 Gray, 224. It is not material whether the jury found this relation to exist under the Whiting lease or under the oral contract. The bill of exceptions states that the court fully instructed the jury, without exception being taken, as to the different ways in which such relation could be created and its existence proved. We are to presume, therefore, that proper instructions were given as to what would create or prove an existing tenancy, either under an assignment of the Whiting lease or under a parol demise. It does not appear that any part of the defendant's requests, which was material and called for in the case, was not included in the instructions given.

Exceptions overruled.

THOMAS O. H. P. BURNHAM vs. LEWIS A. ROBERTS.

Rent due upon an indenture of lease cannot be recovered under a declaration for "the rent" of the premises, not alleging it to be due under a written instrument.

On a promise by a lessor to pay, towards repairs made by the lessee on the demised premises, a certain sum, to be retained by the lessee from the rent "as the same shall have been expended by him in such repairs; the lessee to exhibit bills as vouchers, satisfactory to the lessor;" the lessor is not liable for the amount of any bills for repairs, outstanding and unpaid.

CONTRACT. The declaration alleged that the defendant owed the plaintiff \$275 "for rent of chambers" in a certain building in Boston, "one month to November 1, 1868," and the defendant refused to pay the same. The answer denied each and every allegation of the declaration, and alleged that the defendant made repairs and improvements on the demised premises, the expense of which the plaintiff agreed might be deducted from the rent. The defendant also filed a declaration in set-off, for his expenses in repairs and improvements of the premises.

At the trial in the superior court, before *Reed, J.*, the plaintiff offered in evidence an indenture of lease between the parties;

and the defendant objected that it was not admissible under the declaration ; but the judge admitted it.

It appeared that, at the time of the execution of the lease, the plaintiff signed and gave to the defendant the following agreement under seal : " Boston, July 25, 1868. Whereas, I have this day executed a lease of premises numbered 143 Washington Street, in Boston, to Lewis A. Roberts, I do hereby agree with said Roberts that he may make repairs upon said premises during said term, and that I will pay towards such repairs the sum of \$450 in the whole, he to retain that sum from the rent to grow due upon said lease from time to time, as the same shall have been expended by him in such repairs. The lessee to exhibit bills as vouchers, satisfactory to the lessor." The judge ruled that the defendant could only recover, in set-off, and have deducted from the amount of rent due at the date of the writ, such sums as had then been paid for repairs, and not the amount of any bills for such repairs then outstanding and unpaid.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. Nickerson, for the defendant.

H. D. Hyde, for the plaintiff.

CHAPMAN, C. J. The indenture of lease under seal was not admissible in evidence to sustain the action, because it was not declared upon in conformity with the Gen. Sts. c. 129, § 2, cl. 9. See *Warren v. Ferdinand*, 9 Allen, 357. The exception to its admission must be sustained.

But the ruling as to the effect of the contract was correct. The requirement that the tenant should exhibit bills as vouchers, must be understood as requiring receipted bills. They would be useful to the lessor. Certainly they would be an important protection to him against mechanics' liens.

Exceptions sustained.

WILLIAM A. PRESCOTT vs. WINSLOW S. KYLE.

A lessor may, by an action under the Gen. Sts. c. 137, recover possession of the demised premises, without entry or notice to quit, against his lessee who has knowingly underlet them for the remainder of his term to be used for the illegal sale of intoxicating liquors and allows such use thereof.

ACTION under the Gen. Sts. c. 137, to recover possession of a shop in Boston. Writ dated May 28, 1868. At the trial in the superior court, before *Morton, J.*, without a jury, it appeared that the plaintiff, who was owner of the premises, leased them to the defendant by a written lease, to hold for three years from March 10, 1867; that the defendant underlet them to Charles Phillips by a written lease to hold for two years and one month from February 10, 1868; that Phillips took possession under his lease, had since continued in the use and occupation of the premises, and used them for the illegal keeping and sale of intoxicating liquors; and that "the defendant knowingly let the premises to Phillips to be used by him for the illegal keeping and sale of intoxicating liquors, and knowingly permitted the premises to be used by Phillips for such illegal keeping and sale." It was not shown that the plaintiff gave the defendant or Phillips any notice to quit the premises, or demanded possession thereof of either of them, or made any entry on the premises prior to the date of the writ.

The defendant contended that upon these facts the plaintiff was not entitled to maintain this action against him; but the judge ruled otherwise, and found for the plaintiff. The defendant alleged exceptions.

L. W. Howes, for the defendant.

J. B. Richardson, for the plaintiff.

COLT, J. The lease of the defendant to Phillips was absolutely void at the election of the plaintiff. It was made by the defendant with the knowledge that the premises were to be used for an illegal purpose, which by the statute made it a common nuisance. The act of making the lease subjected him to punishment as guilty of aiding in the maintenance of a nuisance

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Gen. Sts. c. 87, §§ 6-9. The defendant knowingly permitted such illegal use after making the alleged lease. Under the circumstances, a court must be justified in finding that he was a participator in such use. Otherwise a lessee might intentionally devote the leased premises to an unlawful use through his undertenant. By the same statutes, such use annuls and makes void the lease, and without any act of the owner causes the right of possession to revert and vest in him. He may, without process of law, make immediate entry, or avail himself of the remedy sought in this case. After notice of such use, he is required under severe penalties to take measures to eject the occupant. These stringent provisions imply that no notice is necessary to the tenant before commencing this process. The continuance of a nuisance is not protected by the law which requires notice to terminate a tenancy for nonpayment of rent, or entry for breach of condition. *Trask v. Wheeler*, 7 Allen, 109. *Way v. Reed*, 6 Allen, 364, 370. *Taylor Landl. & Ten.* § 521. *Healy v. Trant*, 15 Gray, 312. *Exceptions overruled.*

EBENEZER C. MILLIKEN vs. JAMES D. THORNDIKE & others.

In an action on a lease which the defendants allege that they were induced to execute by fraudulent representations of the plaintiff, evidence of the conversation of the parties at the time of its execution is admissible.

Evidence that a lessee of a store was induced to sign the lease by a statement of the lessor, that "it was built according to the plans in every particular," made after a question by the lessee, whether "the drains were where they were to be according to the plans;" and that the drains were not built according to the plans, and the store was materially damaged in consequence; warrants a finding that the lessee was induced to sign the lease by a false representation, made by the lessor, of a material fact, which he either knew was false when he made it, or positively affirmed as of his own knowledge.

To an action on a lease for rent, the fact that the defendant was induced to execute the lease by fraudulent representations of the plaintiff, as to a material point in the construction of the demised premises, is a good defence, although the defendant entered under the lease and remained in possession a week, if he left as soon as the fraud was discovered.

CONTRACT to recover rent of a store on Congress Street in Boston, under the covenants in an indenture of lease dated Oc-

tober 1, 1867, by which the premises were demised by the plaintiff to the defendants. The answer denied that the defendants had executed the indenture, and alleged that, if they had done so, they had been induced thereto by the false and fraudulent representations of the plaintiff. Trial in the superior court, before *Morton, J.*, who, after a verdict for the defendants, allowed a bill of exceptions, of which the material part was as follows:

"The plaintiff proved the execution of the lease, and that the rent, becoming due according to the terms of the lease, for the quarters ending December 31 and March 31, was demanded and not paid.

"It appeared that the store upon the leased premises had been recently built for the plaintiff, and completed about the latter part of September; that, before the building was completed, the defendants had by parol arranged with the plaintiff to hire the building, and had been shown the plans thereof; that on October 1, 1867, they entered into possession; and that, some weeks after this, the plaintiff brought to them the lease to be executed. The defendants contended that they had been induced to sign the lease by false and fraudulent representations made by the plaintiff, and introduced evidence tending to show that, when the plaintiff brought the lease to be signed by them, a communication was had with him. The plaintiff objected to the admissibility of this conversation, but the judge ruled that it was competent under the pleadings. Three witnesses testified to the conversation, whose statements differed somewhat as to the exact language used. The substance of their testimony was as follows: The plaintiff brought in the lease, and asked the defendants to sign it. The defendants said that they were not satisfied with the way the store was built; that it had settled, and was not properly built, and was not safe; and declined signing the lease. The plaintiff replied that it was built according to the plans in every particular. The defendants asked if the drains were where they were to be according to the plans. After some further communication, the defendants said, 'If the store is built according to the plans, we ought to sign the lease;'

to which the plaintiff replied, 'It is built according to the plans in every particular;' whereupon the defendants executed the lease.

"It appeared that, about a week after the lease was executed, the partition wall between this and the adjoining store settled, a portion of the front wall fell in, and the building became unfit for use, and dangerous, and the defendants at once moved out, obtaining a store elsewhere, and had not since occupied the leased premises.

"The defendants also introduced testimony tending to show that the store was not built according to the plans; particularly that the drain to empty the water-closets was not built as laid down in the plan, but much nearer the partition wall, and in some places was lower than the foundation of the wall, and thus caused or contributed to the settling of the wall. There was contradictory testimony as to the construction and erection of the plaintiff's drain, and as to whether its construction contributed to the settling of the wall. It did not appear by any direct testimony that the plaintiff knew where the drain was constructed, or anything in regard to its construction, till after the accident. The store was repaired and ready for occupancy in about a month after the accident.

"The judge instructed the jury that, if the defendants were induced to execute the lease by representations made by the plaintiff of material facts which were false, they would be entitled to avoid the lease upon proving, either that the plaintiff knew them to be false when he made them, or that the plaintiff, with a view to induce the defendants to execute the lease, positively affirmed them as of his own knowledge; that, whatever the language used, if it was intended only to express a belief or opinion founded upon information or other sources, it was not sufficient, but that the plaintiff must have intended and been understood by the defendants to affirm that he knew the facts of his own knowledge."

C. A. Welch, for the plaintiff, cited *Hazard v. Irwin*, 18 Pick. 95; *Haycraft v. Creasy*, 2 East, 92; *Medbury v. Watson*, 6 Met. 246; *Hemmer v. Cooper*, 8 Allen, 334; *Feret v. Hill*, 15 C. B. 207.

E. Avery, (*G. M. Hobbs* with him,) for the defendants.

COLT, J. The defence relied on in this case is fraud, and the conversation had at the time the lease was executed was admissible upon the issue raised.

The jury have found that the defendants were induced to sign the lease by a false representation, made by the plaintiff, of a material fact, which he either knew was false when he made it, or positively affirmed as of his own knowledge. It is objected that the evidence did not justify this finding, because it is apparent, from the subject matter, that the representation made was intended, and should have been understood by the defendants, as only an expression of strong belief. If a statement is honestly made as a matter of opinion, judgment or estimate, it is not in law a false representation, although the matter thus stated should turn out to be untrue. But if a fact which is susceptible of knowledge is stated by a party as of his own knowledge, and such representation is relied upon as the basis of a contract, and damage results to the party deceived, it is a legal fraud, the consequences of which must be borne by him who makes the statement. The representation in this case was of the latter description. It was of a fact, the existence of which was not open and visible, of which the plaintiff had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury. *Page v. Bent*, 2 Met. 371, 374.

The plaintiff further claims, in his argument, that the defendants cannot set up this defence in an action for rent due by the covenants in the lease; that the remedy is by action of deceit, to recover damages for the one month's time during which they were prevented from occupying the warehouse; that the lease was a good lease until avoided by the lessees, and the contract was an executed one.

The defence goes to the original execution and validity of the lease containing the covenants to pay rent. If consent to it was obtained from the defendants by fraud, then it was not such real and free consent as gives it validity. The false state-

ment by which it was procured must, indeed, be of some matter which is an essential element in the agreement, which goes to the substance of it, and upon which the consent was based. If it be of this material character, then there is no mutual assent to the contract, and the party deceived may rescind, provided he does it on discovery of the fraud, and returns to the other party everything of value which he has received under it. If the contract has been wholly executed on both sides, and the party injured cannot restore the other to his previous condition, the only remedy at law is by action for the deceit, or by recoupment of damages. But the mere possession of property which was the subject matter of the contract will not take away the right of rescission, if possession is surrendered as soon as the fraud is discovered. These familiar rules are equally applicable, whether the contract relates to real or personal property. *Whitney v. Allaire*, 4 Denio, 554.

It was held by this court, where a sale of certain lands in Maine was effected by false representations, and a deed taken, under which the vendees took possession, that they might rescind the sale, within a reasonable time, by an offer to release to the grantors; and that an offer to release, made after the occupation of the land nearly four years, and the enjoyment of certain benefits therefrom, and after a suit for the purchase money had been commenced, was made in time, and would vest in the plaintiffs their original title substantially as it was before. *Holbrook v. Burt*, 22 Pick. 546.

In an action to recover rent upon a written lease for three years, when the defendant had occupied the premises for about a year, paying something towards the rent, and then removed, and in which the defence was that the lease was obtained by false representations, it was held in Maine that, although a party may not be able to rescind a contract partly executed, and recover back what he has paid under it, yet the defence was good to an action to compel the further execution of such contract. *Irving v. Thomas*, 18 Maine, 418.

The case of *Feret v. Hill*, 15 C. B. 207, cited by the plaintiff, contains nothing at variance with these decisions. That was

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an action of ejectment, to obtain possession of rooms which had been leased by Hill to Feret, and of which, as lessee, he had been dispossessed by Hill; and the defence was that Feret had obtained the lease by a false representation that he intended to carry on a lawful trade therein, but had converted the premises into a brothel. It is carefully distinguished, in the decision, from a case where the plaintiff is seeking to enforce the stipulations of a contract; and at most it only decided that no intention, existing in the mind of the plaintiff, which could have been repented of in time, and which therefore did not affect the original validity of the instrument, would prevent the demise from taking effect, or give the defendant Hill a right forcibly to expel the lessee for using the premises for an unlawful purpose. The alleged fraud, if any, is admitted to have been collateral, and not of such a character as to defeat the title under the lease.

Exceptions overruled.

ALFRED M. FARLEY & others vs. ALDEN G. LOVELL.

In an action by three plaintiffs, who had been partners, to recover for partnership goods which, after the dissolution of the firm, had been delivered to the defendant by one of the plaintiffs, without the knowledge of the others, in payment of his private debt, the declaration contained a count in tort for the conversion of the goods, and a count in contract for goods sold and delivered. The answer to the first count denied the conversion, and to the second alleged payment. *Held*, that the plaintiffs could not maintain the action, although the defendant had conspired with the plaintiff who delivered to him the goods to defraud the other plaintiffs.

Tort by Alfred M. Farley, George H. Hill and William A. Quinn for the conversion by the defendant of five cases of glass, the property of the plaintiffs; a count in contract for goods sold and delivered, alleged to be for the same cause of action, was added. In the answer to the first count the defendant denied the conversion, and in the answer to the second count left proof of the sale and delivery to the plaintiffs, and alleged that if the goods had been sold and delivered to him, they had been fully paid for.

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At the trial in the superior court, before *Dewey, J.*, it appeared that the plaintiffs had been partners; that the partnership was dissolved on March 20, 1868; that on March 28 the plaintiff Quinn, without the knowledge of the other plaintiffs, delivered the glass in question, which was the property of the partnership to the defendant in payment of a private debt; and that the defendant at the time of the delivery knew that the glass was the property of the partnership and not of Quinn; and there was evidence which, the plaintiffs contended, showed that the defendant conspired with Quinn to get possession of the glass in fraud of the rights of Farley and Hill.

After the evidence was all in, the defendant contended that the joinder of Quinn as a plaintiff was fatal to the maintenance of the action; the plaintiffs objected that this defence was not open under the pleadings and at this stage of the case; but the judge overruled the objection.

The plaintiffs then requested the judge to rule "that if the jury find that Quinn and the defendant, in transferring the glass, and applying the same in payment of Quinn's private debt, fraudulently connived to cheat Farley and Hill, with full knowledge as to the ownership of the property, and that the *mala fides* was actual, as distinguished from the merely technical bad faith which the law implies from the payment of a private debt of one partner with the property of the firm, then the plaintiffs may recover in this action."

The judge declined so to rule, but instructed the jury as follows: "If Quinn, after the dissolution of the firm of which he was a member, sold and delivered to the defendant the property of the firm, in payment of his private debts, without the knowledge and consent of his partners, the defendant having knowledge that Quinn sold it for the purpose of paying his private debts, and without the knowledge and consent of his partners, this would not entitle the plaintiffs to maintain this action. But if the jury are satisfied that there never was a *bona fide* sale and delivery of the property by Quinn to the defendant, and that the defendant converted the same to his own use, then the plaintiffs can recover the value thereof in the present action."

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

W. H. Towne, for the plaintiffs.

J. W. Hammond, for the defendant.

MORTON, J. The appropriation by Quinn of the partnership property to the payment of his private debts was a fraud upon the firm for which the laws furnish a remedy to the defrauded partners. The only question in this case is whether they have adopted the proper remedy. We are of opinion that the case of *Homer v. Wood*, 11 Cush. 62, is decisive of this question. The principles upon which that decision is founded, and the reasoning by which the conclusion is reached, are equally applicable to the case at bar. The difficulty in maintaining the action in that case, which was found to be insuperable, was, that the plaintiffs could only do so by alleging and proving the fraudulent acts of one of the coplaintiffs in misapplying the partnership assets in payment of his separate debt, which would be "a manifest violation of the salutary principle that a party in a court of law shall not be heard to allege his own bad faith, as a foundation of his right of recovery." The full discussion of this principle, and of the reasons for its application to cases where the fraudulent partner sues jointly with other parties who are innocent of the fraud, renders it unnecessary to do more than to refer to the case. The same difficulty exists in the case at bar. The plaintiffs can maintain their action, whether in the form of contract or tort, only by proving the fraudulent acts of one of themselves.

But the plaintiffs urge that this case is distinguishable from *Homer v. Wood* in two particulars. The plaintiffs offered to prove that the defendant as well as Quinn acted in bad faith and with an intent to defraud the innocent partners. If this be true, it in no way affects, unless to aggravate, the fraud of Quinn; and the force of the objection, that the plaintiffs can recover only by showing the fraudulent conduct of one of themselves, remains unimpaired.

The right to recover does not depend upon the good or bad faith of the person with whom the fraudulent partner has dealt,

but is defeated by a disability of one of the coplaintiffs to allege and prove a fact necessary to maintain the action, arising from his own fraud. Thus, if the fraudulent contract, in such a case remains executory, or if one partner should give the note of the firm in settlement of his private debt, the innocent partners may defend a suit brought to enforce it, without regard to the question whether the other party to the contract acted in good or in bad faith. In such event, there is not presented the incongruity of allowing a party to rescind his own act by alleging his own fraud.

The other ground of distinction urged by the plaintiffs is, that their declaration contains a count in tort, while *Homer v. Wood* was an action of contract. But the difficulty is, that they have joined Quinn as one of the plaintiffs. The suit is in his name and for his benefit, and can only be maintained by permitting him to allege and prove his own misconduct. The reasons of the decision in *Homer v. Wood* apply as strongly to an action of tort in which the fraudulent partner is joined as a coplaintiff, as to an action of contract. In the leading case upon this subject in England, *Jones v. Yates*, 9 B. & C. 532, the principle was applied in an action of trover as well as in an action of assumpsit.

The question is not before us, whether the innocent partners can maintain any action at law in their own names without joining Quinn. Having joined him, the disability which the law attaches to him, to allege his own turpitude as a foundation of his right to recover, must defeat the right of the plaintiffs to recover in this action.

The objection that this defence is not open under the pleadings cannot be sustained. The facts relied upon by the defendant are not matters in discharge or avoidance of the action of tort, but they meet and rebut the allegations necessary to support the plaintiffs' case; and to the count in contract the defendant in his answer sets up payment under which he may avail himself of these facts.

Exceptions overruled.

JOHN A. C. GEDDES & wife vs. METROPOLITAN RAILROAD
COMPANY.

At the trial of an action by a woman against common carriers of passengers to recover for personal injuries resulting from her falling from their coach, there was evidence tending to show that the driver stopped the coach to receive her as a passenger; that the coach was crowded and all the seats in it were occupied; and that, immediately after she had got in, and when she was standing within the door, she was thrown out of the coach by its violent jerk at starting. *Held*, that there was some evidence in favor of the plaintiff, to go to the jury.

TORT to recover for personal injuries received by the female plaintiff in falling or being thrown from one of the defendants' coaches.

At the trial in the superior court, before *Morton*, J., it appeared that at the time of the accident there had been a snow storm which prevented the defendants, who were common carriers of passengers, from running horse cars, their usual mode of transporting passengers, and they were running coaches on runners, kept for such occasional use.

The female plaintiff testified as follows: "A man hailed the coach, opened the door and waited until I got in. I saw no conductor, no straps. There was no seat for me when I stepped in. I was in but a moment, and did not look round to recognize anybody. First I knew, I was out in the street; fell on my back and side; fell out backwards as quick as I got in. The coach started as soon as I got in, or nearly in; no time to be seated. I knew the conductor and think he was about, as he came to pick me up. I was with child." On cross-examination she further testified: "The seats were all full, and people were standing up inside; space all occupied; as much as ever I could do to get in. The door was open when I got to it and went in. The conductor was not there. Some one closed it from the window. I saw that there was no strap on the inside attached to the door; had not time to lean against the door; and could not step forward, as the coach was filled. It was a covered omnibus. Always have a strap to hold on to; this one had no strap to hold on to. It stooped on bare ground; it is harder starting on bare ground."

Mary Graves testified: "I saw the female plaintiff go in. Should think she had but just got in before she fell out backwards. She had not time to sit down, if there was a seat, before they started horses. I have an impression that the door was open when she went to go in. The conductor was on the box with the driver."

Ambrose R. Adams testified: "The coach stopped, and the female plaintiff got in; had not time to adjust her position when she was thrown out. There was no strap to the coach; there was a bar across inside to take hold of. She stepped forward to look for a seat, and, instead of taking hold of the bar, stepped back to lean against the jamb of the door, when the carriage started. The coach stopped as usual, and started as usual. She stepped back to lean; there was nothing on the door or steps to hold on to; the door closed behind her, or partially so at least, of itself. She stepped into the coach and then stepped back again; I should say about one step. The coach had a flat roof; could hardly stand up in it."

Jacob C. Wentworth testified: "The female plaintiff fell out immediately after getting in; she had not more than got in; the starting of the coach threw her out; I don't remember about the start."

The defendants, at the close of the plaintiffs' evidence, asked the judge to rule that "the female plaintiff had not shown due care on her own part, or such negligence on the part of the defendants as to entitle her to recover, and that no liability was shown on the part of the defendants by this evidence." But the judge refused so to rule.

The defendants called, among their witnesses, Albert Huse, a passenger in the coach at the time of the accident, who testified: "The female plaintiff got into the omnibus. I shut the door after her myself by reaching out my hand and swinging it together. She leaned deliberately back against the door; there was just room for one to stand when she got in. The conductor was engaged taking fares outside; the coach stopped on snow; when the plaintiff struck, she hit on bare ground. There was nothing unusual in the starting of the coach; I have no

seen a strap used for two years. The strap is used for the purpose of conveying intelligence to the driver, not to hold the door, or to hold on to."

At the close of the defendants' evidence the female plaintiff, being recalled as a witness in the plaintiffs' behalf, testified "that she did not lean nor attempt to lean against the coach."

The defendants requested the judge to instruct the jury as follows: First, "that the plaintiffs must show affirmatively that the female plaintiff was in the exercise of due care; and if not, and her want of due care contributed to the accident, she cannot recover; that the accident must have been occasioned solely by negligence on the part of the defendants, she being in no wise in fault herself; that if she saw, or had an opportunity to see, that the coach was full, and she could not ride without standing up in the coach next to the door, where she could not conveniently stand, or do so with reasonable safety, it was her duty to wait for the next coach, and it was a want of due care to enter and attempt to ride in that way; and that if there were bars across the coach for her to take hold of, and steady herself by, and she did not do it, but stood without support or leaned against the door, that would be a want of due care on her part, and she cannot recover." Second, "that the defendants were not bound to provide and keep a man at the end of the coach to prevent persons from falling out; that there was no evidence in the case tending to show what constitutes in law negligence on the part of the defendants, and upon the whole evidence no negligence on the part of the defendants was shown; also that, upon the evidence, due care was not shown on the part of the female plaintiff; that if she did as testified to by Adams, she could not recover, or if as stated by Huse, this would be negligence on her part; that the evidence of the female plaintiff herself, taken to be true as given, would not show due care on her part or entitle her to recover."

The judge instructed the jury "that the burden of proof was upon the plaintiffs to show that the injury was caused solely by the negligence of the defendants or their agents, and that the female plaintiff's own want of due care in no degree contributed

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to it;" adopted the first prayer of the defendants for instructions; further instructed the jury "that by due care was meant not extreme care, but ordinary care, such care as men of ordinary prudence or such care as the generality of men and women use under the same circumstances; and that it was for the jury to determine upon all the evidence and the instructions given them, whether the plaintiffs had shown that the female plaintiff was in the exercise of such care;" and refused to grant the second prayer of the defendants for instructions. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions. In the bill of exceptions the evidence of both parties, except as to the character and extent of the female plaintiff's injuries, was set forth in full, and those portions of it omitted from this report were substantially reiterations of the portions above reported.

W. Gaston & A. A. Ranney, for the defendants.

T. Willey, for the plaintiffs.

AMES, J. If the female plaintiff, when she stopped the defendants' omnibus, and undertook to take a place in it as a passenger, saw, or had an opportunity to see, that there was absolutely no room for her, and no place in which she could even stand with reasonable security, it might well be said to be "a want of due care to enter and attempt to ride in that way." This was the ruling requested by the defendants, and given by the court. A person who clings upon a crowded stage-coach, or street car, and voluntarily takes a position in which his hold is necessarily precarious and uncertain, has no right to complain of any accident that is the direct result of the danger to which he has seen fit to expose himself. But the defendants, on the other hand, by the act of stopping the carriage at her signal, and opening the door for her to enter, must be considered, not merely as giving her an opportunity to judge whether it would be safe and convenient for her to take passage, but as inviting her to do so, and assuring her that her passage should be a safe one, at least so far as depended upon the exercise of reasonable and ordinary care, diligence and skill on their part, in driving and managing their horses. The fact that the omnibus was already

crowded and overloaded can in no case be permitted to lower the standard of diligence and care required of them for the comfort and safety of the passengers. On the contrary, if, when the omnibus is already in that condition, they assume the responsibility of admitting an additional passenger, their contract with him, or rather their obligation to him, is, that they will furnish such increased and more watchful and solicitous care, skill and attention as the crowded condition of the vehicle requires. What constitutes ordinary and reasonable care of course varies with the circumstances of each case. It must be such as is required by the exigency of the case, and such as is necessary to guard against all dangers which can fairly be said to be probable, or such as reasonable men ought to anticipate. If a carriage heavily loaded requires more skill and care in its management than one in a different condition, the standard of the skill and care which they were bound to furnish would be higher in the same proportion.

She, on her part, if she saw and knew the condition of things when she got into the omnibus, must be understood to have voluntarily assumed the entire risk of all inconveniences and dangers resulting directly from its crowded and overloaded condition, and from the necessity of performing her journey in a standing posture. But she had a right to hold the defendants responsible for all injuries produced by, or resulting directly from, their own carelessness and unskilfulness. It is impossible to say, on examination of the report, that there is no evidence of any such carelessness and unskilfulness. On the contrary there is evidence upon which the jury may have found that, at the moment of her getting into the carriage, it was started with a sudden and violent jerk before she had time to balance herself or do anything whatever for her own security, and they may have thought this abrupt start, under the circumstances, was owing to carelessness or mismanagement.

The instructions given to the jury pointed out with entire distinctness the question which they were to consider, were carefully guarded and appropriate to the case, and there was no error on the part of the court that renders it necessary to disturb the verdict.

Exceptions overruled.

JAMES S. HANCOCK vs. VINCENT COLYER & wife, & trustees

A debtor, who has deposited the amount of his debt in a bank, subject to his own order, may be summoned and charged as trustee of his creditors, although he made the deposit at their request, and on their agreement that he should incur no responsibility therefor.

TRUSTEE PROCESS. Chandler, Shattuck & Thayer, attorneys at law, the parties summoned as trustees, filed an answer, denying that they had goods, effects or credits of the principal defendants intrusted or deposited in their hands or possession at the time of service of the writ upon them, otherwise than as follows: that they then had in their hands a certificate of deposit of the First National Bank of Boston, in the following form: "**\$12,727.43. First National Bank. Boston, Mass., February 4, 1867. Chandler, Shattuck & Thayer have this day deposited in this bank twelve thousand seven hundred and twenty-seven ¹¹/₁₀₀ dollars, to the credit and subject to the order of themselves, on return of this certificate. John Carr, Cashier;**" that said sum was an amount collected by them as attorneys for the principal defendants, upon a check received in satisfaction of an execution issued in favor of the said principal defendants against Charles L. Hancock, for the sum of **\$13,069.60, less the sum of \$342.17, in which sum the principal defendants were indebted to them; that, while the check was in their hands, they were summoned on January 25, 1867, as trustees of the principal defendants in a suit pending in this court, brought by the plaintiff in the present suit against the principal defendants, for the same cause of action named in the present suit; that on January 26 they deposited the check in said bank to their own account; that on February 5, 1867, under the instructions and at the special request and sole responsibility of the principal defendants, they paid over to the bank the said amount of \$12,727.43, and took from the bank the said certificate; that the bank, in giving the certificate, agreed to pay interest on the amount, from the time of the deposit of the check, on condition that the amount should remain in the bank for not less than three months; that in paying over the said amount and taking**

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the certificate and making with the bank the agreement aforesaid, they acted under the instructions of the principal defendants, and under an agreement with them that they should incur no risk or responsibility in the premises; and that at the time of service upon them of the writ in this action, the principal defendants owed them \$25. In the superior court, they were charged on this answer; and they appealed.

C. R. Train, for the plaintiff.

J. E. Hudson, for the trustees.

GRAY, J. In the former suit between these parties, the trustees were discharged, because at the time of the service upon them they had nothing in their hands or possession but a check payable to their order, for the amount of which they were not absolutely liable to the principal defendants. *Hancock v. Colyer*, 99 Mass. 187. But the amount of that check was afterwards collected by the trustees in money, and deposited, subject to their own order, in the bank, and there remained, liable to be immediately drawn out by them, at the time of the service of this process. They, then, and not the bank, were the debtors of the principal defendants. The money was as much in the possession of the trustees as if they had deposited it on their general bank account, or put it in a trunk in the custody of their own clerk, in either of which cases they admit that they would have been chargeable. The fact that the deposit was made by direction of the defendants, and under an agreement between them and the trustees that the latter should incur no responsibility, might have excused the trustees from liability to the defendants in case the money had been lost by insolvency of the bank. But money held by one person for another is not the less absolutely due, by reason of an agreement between them that the trustee shall not be held responsible for the solvency of parties with whom he may place it on deposit or loan. These trustees are therefore chargeable for the amount thereof, deducting their claim against the principal defendants. *Lewis v. Hancock*, 11 Mass. 72. *Dennie v. Hart*, 2 Pick. 204. *Hooper v. Hills*, 9 Pick. 435.

Trustees charged.

CHARLES P. HEUSTIS *vs.* JAMES H. RIVERS & another.

The liability of sureties on a bail bond under the Gen. Sts. c. 125, is limited by the penalty of the bond, with interest from the time return of *non est inventus* is made on execution.

SCIRE FACIAS on a bail bond under the Gen. Sts. c. 125, § 7, to the sheriff of Suffolk, signed by William H. Clay as principal, and the defendants as sureties, in the penalty of \$250, and conditioned that Clay should appear to answer the plaintiff in an action on a writ upon which he had been arrested, should abide the final judgment thereon, and should not avoid. Judgment was rendered in said action against Clay, who had previously been defaulted, for \$250 damages, which was the amount of the *ad damnum* in the writ, and for \$174 costs. Execution was issued, and the officer made return thereon that he could find neither property nor the body of Clay. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts, of which all that is material for the purposes of this report is stated above.

J. S. Abbott, for the plaintiff.

R. T. Paine, Jr., for the defendants.

COLT, J. The only discussion at the argument of this case related to the amount for which judgment should be rendered against the bail. All other questions raised on the agreed statement of facts were waived.

The penalty of the bail bond was fixed at the amount claimed as damages in the original suit against the principal. Judgment was rendered in that suit, for damages to the full amount of the *ad damnum* and costs, and exceeded, therefore, at the time it was rendered, the penalty of the bond, by just the amount of the costs included in the judgment.

The plaintiff claims that, by the Gen. Sts. c. 125, § 7, the obligation of the bail, who are not otherwise discharged, in case of the avoidance of the principal, is to satisfy the judgment, both damages and costs, with interest thereon from the time it is rendered, even if the amount exceeds the penalty.

The language of the section cited supports this claim, if taken alone. But the provisions relating to bail contained in this chapter are to be taken together, and, with reference to the subject matter, applied to the previously existing state of the law.

By § 2 it is provided that bail in civil actions shall be taken as heretofore practised, by a bond to the sheriff—a practice which was sanctioned by the province laws as early as 5 W. & M. (1693), and which requires, by implication at least, that the obligation be in the usual form of such an instrument, signed by principal and sureties, with a penalty and condition; and such is, and from early times has been, the form of our bail bond. Anc. Chart. 259. 1 Prov. Laws, (State ed.) 127. 5 Dane Ab. 276.

By § 6, the bail bond is required to be filed with the writ, and is declared to be so far a matter of record, and of the nature of a recognizance, that the creditor may take out a writ of *scire facias* thereon in his own name, alleging that the defendants became bail, but without setting forth the bond. There are other provisions which establish the peculiar character of the liability of sureties in the bond; and it is apparent that the bail bond, as recognized and regulated by our statutes, unites the characteristics both of bail below, or to the sheriff, and bail above, or to the action at common law. The security is by bond to the sheriff, but it is conditioned both that the defendant shall appear and answer the plaintiff in the action, and further, that he shall abide final judgment thereon, and shall not avoid. When filed, it is like the recognizance given in court in the common law bail to the action, and is treated, for the purpose of giving the creditor a more perfect remedy in his own name, as a part of the record. On the other hand, the execution of the bond by the defendants is regarded as matter *in pais*, and may be traversed before the jury. §§ 8, 11. *Bean v. Parker*, 17 Mass. 591, 600. *Champion v. Noyes*, 2 Mass. 481, 484. In either form of bail at common law, whether by bond to the sheriff in the first instance, or recognizance in the court above the liability of the sureties was limited by the penalty named. And the provision of the section relied on by the plaintiff must be construed with reference to the well known limitation upon

SUFFOLK.

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the liability of bail in either form. The responsibility for taking insufficient bail, which rests upon the sheriff, may have well been relied upon to secure in all cases a penalty, fixed by him, sufficiently large to cover the judgment which the plaintiff might recover; and we are of opinion that it was not the intention of the statute to enlarge the limit of the liability of sureties in a bond with penalty conditioned to secure the performance of specified acts, although the bond so given be a bail bond.

In *Crane v. Keating*, 13 Pick. 339, which was debt on a bail bond, brought in the name of the sheriff, the long mooted question whether such an action could be maintained was settled against the plaintiff. It is there said, in substance, by Shaw, C. J., that, when an obligation is once ascertained to be a bail bond, its force and effect are to be ascertained much more by the statute provisions on the subject than by particular words in the condition. And, he adds, considering that the whole subject of bail in civil actions is founded upon and regulated by statute, and that a bail bond partakes very little of the nature of a contract between the parties, but is rather a legal proceeding in the course of justice, it would be going too far to hold that an action of debt would lie in the name of the sheriff, merely on the ground of the formal words used in the instrument.

The result to which we arrive does not conflict with this decision, or with the reasoning by which it is supported. For if the liability is considered as wholly statutory, yet the meaning of the statute is to be ascertained by familiar rules of interpretation; and these do not permit us so to read it as to fasten upon the bail a liability beyond their express stipulation when the obligation was entered into. But the liability of the surety to the creditor does not rest wholly upon the statute. So far at least as the extent of it is fixed, it is wholly a matter of contract. And there is no reason why the sureties should suffer beyond the amount named, because the sheriff failed to fix the penalty sufficiently large. The contract of the defendants is not a covenant affirmatively stipulating to do a particular act, secured by a penalty. It is a bond which stipulates for the pay

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ment of a sum of money, and makes its payment depend upon a condition.

According to the agreement of the parties, judgment must be entered in this case in favor of the plaintiff for the penalty of the bond, with interest thereon, as damages for the detention, for such time as the defendants have been in fault for its non-payment. The avoidance of the principal is not complete until a return on the execution that he is not found, and interest should therefore be computed from the day on which such return was made in this case. *Leighton v. Brown*, 98 Mass. 517. *Bank of Brighton v. Smith*, 12 Allen, 243.

Judgment accordingly.

 WILLIAM THWING vs. GREAT WESTERN INSURANCE COMPANY.

In a policy of insurance on a ship, a warranty "not to load more than her registered tonnage" with either or all of certain articles, including coal, applies only to articles laden as cargo; and is not broken by taking on board, besides that amount of the prohibited articles as cargo, a quantity of coal for dunnage, when a suitable material, actually and in good faith used, and no more than is reasonably necessary, for that purpose, even if freight is received for its carriage.

CONTRACT upon a policy of insurance issued by the defendants to the plaintiff October 6, 1863, on his ship *Alhambra*, for a voyage from Liverpool to San Francisco. Trial, and verdict for the plaintiff, in this court, before *Morton, J.*, who allowed a bill of exceptions substantially as follows:

"It was agreed that the vessel received injury, and that, if the defendants were liable, the case was to go to an assessor to determine the amount. The only question at issue, material to this bill of exceptions, was, whether the vessel was overloaded with coal, iron and bricks, under the following clause in the policy of insurance: 'Warranted not to load more than her registered tonnage, with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage, and not to carry guano or lime.'

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"The defendants offered evidence tending to show that the vessel took on board at Liverpool, and carried to San Francisco, 1084 tons of iron, 6 tons of bricks, and 238 tons of cannel coal, making 1328 tons of prohibited articles, and that the registered tonnage of the vessel was 1270 tons.

"The plaintiff called as a witness the master of his ship, whose testimony tended to show that at Liverpool, on July 16, 1863, he made a written charter of this vessel to James Starkey, a copy of which was put into the case," and by which it was agreed "that (the cabin and stateroom, and sufficient room for the cables, ship's stores, coal not to exceed twelve tons, provisions, water, and crew, throughout this charter party being excepted, reserving, however, such room only for that purpose as the owners would, were the ship to be laden for their exclusive benefit, the charterers being allowed the full reach of the vessel's hold, including the half-deck) the said vessel shall immediately be made ready, and receive and take on board, from the said charterers, such goods as they may have to ship, or a full and complete cargo of lawful merchandise, specie, in dock and in the river, if required by the charterers, the owners employing sufficient hands for that purpose; and, on receiving orders from the charterers, shall proceed to San Francisco, California, and there or so near thereto as she may safely get, deliver the said cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. In consideration whereof, the said charterers shall deliver alongside the goods to be taken on board the said vessel, and shall and will pay for the use and hire of the said vessel, in respect of the said voyage, and in full of all freight, primage, pilotage, port charges, &c., at the rate of fifty-one shillings per ton (in full) of 2240 lbs. weight, cargo to be weighed on shipment."

"The master testified that, previously to making this charter party, he made another agreement (whether in writing or not he was uncertain) by which the charterer agreed to furnish dunnage for the ship, consisting of cannel coal to an amount not exceeding 250 tons, and pay freight therefor at the rate of fifty one shillings per ton; that he fixed the rate of fifty-one shillings

per ton in the charter party, on account of this additional agreement; and that he would not have chartered his vessel at so low a rate if he was not to receive freight for his dunnage; that an assorted cargo like that furnished by the charterer required to be dunnaged in order to be properly stowed; that cannel coal is an article commonly used for that purpose; and that he took on board the 238 tons of said coal for the purpose of dunnage. He also stated, in cross-examination, that if this coal had not been furnished he should have bought planks for dunnage on ship's account, and sold them in San Francisco, or some other articles that would have paid a profit; that he received this coal for dunnage, and placed it along the bottom of the vessel; that it filled up the ship six feet and a half; and that upon the top of the coal he placed a flooring of five inch joist, and then placed the other cargo upon the top of this flooring. The master also stated that this coal was upon the freight-list; that he collected freight for it the same as for his other cargo; and that he signed a bill of lading for it, and he thought the bill of lading stated that it was shipped as dunnage. It appeared by the freight-list that this coal was shipped by James Dickson & Co.

" The plaintiff called various experts, whose testimony tended to show that cannel coal is often used for the dunnage of Liverpool cargoes, and is suitable for that purpose; that planks and old pieces of wood are also used, and are suitable for dunnage; that the purpose of dunnage of this kind, among other things, is, to raise the cargo out of the salt water, and leave a water-way underneath; that it is usually placed along the bottom of the vessel, from ten to fourteen inches in thickness; that cannel coal, used as dunnage, is liable to be injured; and that, when taken as cargo, it is usually stowed in the ends of the vessel, or, if it is stowed in the bottom of the vessel, it requires to be dunnaged. The plaintiff also recalled his master, who stated that, taking into consideration the shape of his vessel and the character of his cargo, six and a half feet of coal was not too much for dunnage, and, upon cross-examination stated that, in a previous voyage in this vessel from New York to Liverpool, he had used wood for dunnage, and had put in about fourteen inches.

"The defendants offered no further evidence, but requested the judge to instruct the jury as follows: 1. If they should find from the testimony that this coal was taken on board at Liverpool, for the purpose of being carried to San Francisco, it came within the warranty, and the verdict should be for the defendants. 2. Because a portion of the cargo paying freight was used as dunnage to the rest of the cargo, it was not therefore excepted out of the warranty, when, as in this case, it was coal. 3. If they should find, from the evidence, that planks or pieces of old wood were frequently used for dunnage and were suitable for that purpose, then it was a breach of the warranty to take coal in excess of the registered tonnage of the vessel on freight, although it was taken under an agreement with the freighter that it might be used for dunnage. 4. That, in order to find for the plaintiff, they must find that this coal was taken on board and used as dunnage, and did not form a portion of the cargo. 5. That, the defendants having shown that this coal was on the freight-list, and paid freight the same as other goods on board, and that a bill of lading was given, the burden of proof is on the plaintiff to show that it was not cargo.

"But the judge declined so to instruct the jury, except so far as is contained in the following instructions: That the mere fact that the plaintiff took on board a greater quantity of the prohibited articles than the registered tonnage did not necessarily work a breach of the warranty; but if the plaintiff had shown that cannel coal was a suitable material for dunnage, he would have a right to use a proper and reasonable quantity for dunnage; and, although the coal thus used caused the dead weight of prohibited articles to exceed the registered tonnage, it would not be a breach of the warranty; that in this case it was incumbent upon the plaintiff to prove three facts: first, that cannel coal was a suitable and proper article to be used for dunnage; second, that he actually and in good faith used it for dunnage; and third, that as much as fifty-eight tons was reasonably necessary to dunnage his ship; and that, if he had proved these facts to their satisfaction, there was no breach of the warranty." To the refusal of their prayer for instructions, and to the instructions given, the defendants took exceptions.

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B. R. Curtis & M. E. Ingalls, for the defendants.

S. Bartlett & D. Thaxter, for the plaintiff.

GRAY, J. The single question in this case arises upon this clause on the face of a policy of insurance upon the plaintiff's ship: "Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage." This clause is doubtless a warranty, in the technical sense, any breach of which will defeat the policy; and being a warranty, the meaning of the words used is to be ascertained, and, when ascertained, strictly carried out.

The subject of the insurance is shown by the policy itself to be a ship, intended to carry cargo, and, consequently, to be duly equipped and prepared for that object. When a vessel is chartered, the charterer usually covenants to load the cargo only, and the duty of furnishing ballast to keep the vessel in proper trim, and dunnage to protect the cargo from leakage, like that of providing necessary stores and equipments, and otherwise taking care that the ship is in proper condition and the cargo duly stowed, remains upon the owner of the ship. *Moorsom v. Page*, 4 Camp. 103. *Irving v. Clegg*, 1 Bing. N. C. 53; *S. C.* 4 Moore & Scott, 572. *Abbott on Shipping*, (7th ed.) 346. *The Casco*, *Daveis*, 184, 192. In *Towse v. Henderson*, 4 Exch. 890, it was held that the owner of a vessel, who had agreed to load for the charterer a full and complete cargo of teas, might take merchandise as ballast and receive freight therefor, provided it occupied no more room than other ballast would have done.

The "tonnage" of a vessel is her capacity to carry cargo; and a charter of "the whole tonnage" of a ship transfers to the charterer only the space necessary for that purpose. *Hooe v. Groverman*, 1 Cranch, 214, 236, 237. *Ashburner v. Balchen*, 3 Selden, 262. *Cuthbert v. Cumming*, 10 Exch. 809, 814. The registered tonnage of a vessel, as regulated by act of congress, is intended as a safe standard of her capacity to carry cargo, and is usually less than her actual tonnage.

In the warranty in question, the words "not to load more than her registered tonnage" must have the same meaning and appli-

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ation as if they had stood alone, and extended to all kinds of merchandise, instead of being restricted by the succeeding words to particular articles. They cannot, according to their obvious, strict and natural meaning, include things put on board as necessary parts of the ship's stores or provisions or equipment. They would not, for instance, apply to guns and ammunition for the defence of the vessel, nor to spare chains and anchors, nor to coal carried to be consumed on board, nor to salt or grain for provisions, according to the duties resting upon the owner by law and the rights reserved to him in the charter party. Nor do they include articles shipped for the purpose of serving as ballast or dunnage. If the warranty "not to load more than her registered tonnage" had extended to goods of every description, and the dunnage used had been of the ordinary kind—planks or pieces of wood placed against the sides and bottom of the hold, to receive, support and protect the cargo—it could hardly have been contended that their bulk or weight should be ascertained and computed in estimating the burden or tonnage of the vessel. The true meaning and whole effect of the warranty, in our opinion, are to forbid the loading of an amount greater than the prohibited articles as cargo in a ship properly fitted to receive it.

It was argued by the learned counsel for the defendants that an insurance on "cargo" would have covered the coal in question. But we are by no means sure that such would be the construction of such a policy. According to the definition of Postlethwaite, approved by this court in *Wolcott v. Eagle Insurance Co.* 4 Pick. 429, 433, "cargo" signifies "all the merchandise and effects which are laden on board a ship, exclusive of the soldiers, crew, rigging, ammunition, provisions, guns, &c., though all these things load it sometimes more than the merchandise." In that case, it was held that by the word "cargo" provender for cattle on board was not insured, because, said the court, "this was not laden on board as merchandise, and the circumstance that some of it might remain to be sold at the end of the voyage does not make it cargo." So it is doubtful, to say the least, whether "cargo" would cover the outfits of a

whaling voyage. *Wolcott v. Eagle Insurance Co.* above cited. *Paddock v. Franklin Insurance Co.* 11 Pick. 227, 230. *Hill v. Patten*, 8 East, 373, 375.

But if the word "cargo," in the description of the subject matter insured, could be held to include merchandise shipped as ballast or for dunnage, it would only be upon the rule of liberal construction, by which the general terms of a policy are interpreted, but which is never applied to a clause of warranty. A warranty cannot be extended by inference beyond the strict meaning of the words in which it is expressed. As was said by Chief Justice Shaw in *Forbush v. Western Massachusetts Insurance Co.* 4 Gray, 337, 341, "nothing is to be added by way of intendment or construction, when the words are clear and intelligible, although it may reasonably be inferred that some object was intended to be accomplished by the warranty, which a mere literal compliance would not fully reach." The chief justice there cited with approval a case in the queen's bench, in the time of Lord Mansfield, of a ship warranted to have twenty guns, and proved to have had twenty guns, but only twenty-five men, when it required sixty men to man twenty guns; and in which the underwriters contended that the warranty implied that there should be a proportionable number of men, but the court held otherwise. *Hide v. Bruce*, 3 Doug. 213. See also *McLoon v. Commercial Insurance Co.* 100 Mass 472.

In the present case, there was evidence tending to show, and the jury have found by their verdict, that coal was a suitable and proper article to be used for dunnage, that it was actually and in good faith used by the plaintiff for dunnage, and that at least as much as the excess above the registered tonnage was reasonably necessary for the dunnage of this ship for her voyage. The mere fact that a freight was paid upon the coal found to have been so used for dunnage is not necessarily inconsistent with and cannot control the finding of the jury. Upon that finding, we concur with the justice who presided at the trial that there was no breach of the warranty. We are fortified in this conclusion by a judgment rendered in the circuit court of the United

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States for this district, in a similar case between the same parties. while this case has been under advisement.

Exceptions overruled.

MARY GOULD vs. EDWARD MANSFIELD & others.

An oral promise to make a will of all the testator's property, real and personal, in favor of a person who in consideration thereof agrees to make a similar will in favor of the first testator and makes one accordingly, is a contract for the sale of lands, within the statute of frauds, Gen. Sts. c. 105, § 1.

BILL IN EQUITY filed December 27, 1866, by Nancy Gould's sister, praying for a decree to compel the executors of said Nancy's last will and testament, and the various legatees and devisees under the same, to deliver to the plaintiff the estate which the testatrix, who died June 8, 1865, disposed of by said will otherwise than to the plaintiff. The ground for seeking relief was, that the provisions of the will were in violation of an oral agreement for mutual wills between the plaintiff and said Nancy. The defendants demurred, alleging, among other grounds of demurrer, that the agreement was within the statute of frauds, Gen. Sts. c. 105, § 1; and the case was reserved by Hoar, J., for the determination of the full court, and was argued orally in November 1867, and again at this session in writing. The material facts are stated in the opinion.

E. Bangs, for the defendants.

B. Dean & T. Dean, for the plaintiff.

CHAPMAN, C. J. The bill states, in substance, an oral agreement between the plaintiff and Nancy Gould, deceased, the testatrix of the defendant executors, the purport of which was, that each of them should make a will in the other's favor, and give and devise thereby all her property, both real and personal, to the other, and that neither of them was to make any different will at any time, or to dispose of her property in any different manner therefrom. The plaintiff alleges that the said Nancy did make her will accordingly, and informed the plaintiff thereof and thereupon the plaintiff made her will in accordance with

the agreement, and did not revoke it during Nancy's lifetime, or make any different will; that Nancy stated the agreement to divers persons during her lifetime; that the plaintiff performed services for Nancy, and expended money for her, under the belief that such a will existed; but that Nancy made another will, which has been proved and allowed, giving her property to others. The wills were to be of all the real and personal property which they had, but no property is mentioned as being included in them except a house, which they owned in common, and in which they lived together. The personal estate, if any, seems to have been of minor importance, and the agreement in respect to it is not divisible from that relating to the real estate.

Among other defences set up, the statute of frauds is pleaded, and it is contended by the defendants that this was a contract for the sale of lands within that statute. On the contrary, the plaintiff denies that it is a contract for a sale within the statute.

If we look at the character of the act to be done, we find that a will is considered in the nature of a conveyance by way of appointment. *Harwood v. Goodright*, Cowp. 87, 90. "It doth as effectually give and transfer estates, and alter the property of lands and goods, as acts executed by deeds in the lifetime of the parties." 1 Shep. Touch. 402. A devisee comes within the legal definition of one who takes by purchase. Watkins on Descents, 155. And the contract set forth in the bill is a contract to convey, by the act alleged, a title in fee simple to lands for a consideration. In *Harder v. Harder*, 2 Sandf. Ch. 17, such a contract was held to be within the statute of frauds; and in *Walpole v. Orford*, 3 Ves. 402, Lord Chancellor Loughborough so regarded it. See also Browne on St. of Frauds, (3d ed.) § 263. In the recent case of *Caton v. Caton*, Law Rep. 1 Ch. 137, and 2 H. L. 127, the same doctrine was held. We see no ground to differ from these authorities, and must regard it as a contract for the sale of lands, within the statute of frauds.

There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law

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from subsequent changes in the condition or circumstances of the testator. Gen. Sts. c. 92, § 11. The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control. The services rendered and money paid by the plaintiff are not alleged to have been in part performance of the contract.

It is unnecessary to consider the provision of the statute of frauds as to the personal property, it being indivisible from the real estate in respect to the alleged contract, if indeed there be such property of any considerable value.

These views being fatal to the plaintiff's case, it is not necessary to decide the other questions discussed.

Demurrer sustained.

WILLIAM M. VERMILYEA & others vs. S. M. ROBERTS & trustee.

A person having funds of L. R. in his hands may be charged as trustee in an action brought originally against S. R., but, after the trustee's answer, changed by amendment into an action against "S. R., otherwise called L. R.;" and the liability of the trustee is not affected by an assignment made by the defendant since the service of the writ and before such amendment.

CONTRACT against S. M. Roberts. Thomas F. Currier was summoned as trustee. At October term 1868 of the superior court, at which the writ was returnable, the trustee answered that, at the time of the service of the writ upon him, he had no funds of S. M. Roberts in his hands; but, in answer to interrogatories filed by the plaintiffs, he admitted that he had funds of Lydia J. Roberts. At January term following, the writ was amended, on the plaintiff's motion, so that the action was brought against S. M. Roberts, otherwise called Lydia J. Roberts; due notice was given to Lydia J. Roberts, and she was defaulted. The trustee filed an additional answer, setting forth that on October 31, 1868, he received a copy of an assignment dated October 30, 1868, of the funds in his hands by Lydia J. Roberts to Valentine Gleason. The trustee was charged in the superior court, and appealed.

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C. R. Train, for the plaintiffs.

T. F. Currier, for the trustee.

CHAPMAN, C. J. By the amendment, the action became one against S. M. Roberts, otherwise called Lydia J. Roberts, and the defendant has submitted to judgment. The trustee admits that he has assets belonging to Lydia J. Roberts, and would be chargeable as trustee of that person. As the judgment is against that person, he must be charged. The judgment will protect him against any claim which she may make against him.

The notice to the trustee of an assignment made since the service upon him is immaterial. *Trustee charged.*

CRIMINAL CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
AT THE
NOVEMBER SESSION 1869, IN BOSTON.

PRESENT :

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.		
HON. HORACE GRAY, JR.,	}	JUSTICES.
HON. JOHN WELLS,		
HON. SETH AMES,		
HON. MARCUS MORTON,		

COMMONWEALTH vs. JOHN DORSEY.

The St. of 1869, c. 151, giving the Commonwealth a right of peremptorily challenging jurors in criminal cases, is constitutional.

On the trial of an indictment for murder, testimony of persons, not experts, is admissible, that hairs on a club appeared to the naked eye to be human hairs and resembled the hair of the deceased; and evidence offered by the defendant that five months after the alleged homicide there was hair on wood-piles in the yard where it occurred, and that the yard had remained substantially in the same condition during the interval, is inadmissible.

INDICTMENT for the murder of Mary Dorsey, the defendant's wife, by striking her upon her head with a club, on May 1, 1869. Trial before *Chapman, C. J., Gray, Colt and Ames, JJ.*, at a special term in October 1869 for Hampshire.

Upon the empanelling of the jury, the attorney general peremptorily challenged a juror. The defendant objected that the Commonwealth had no right of peremptory challenge; and that

the St. of 1869, c. 151, allowing it, was unconstitutional; but the objection was overruled, and the challenge allowed.

"The Commonwealth introduced circumstantial evidence tending to show that the murder was committed by the defendant with a club, in the yard of his own house, late in the evening of May 1, and, among other things, that the next day there were several hairs adhering to the club with which it was contended that the murder was committed. A witness, not an expert, was allowed, against the defendant's objection, to testify that these hairs appeared to his naked eye to be human hairs.

"Another witness, called by the defendant, was asked, on cross-examination, whether he did not think that the hairs, which he saw on the club on the day after the homicide, came from the head of the deceased. The defendant objected, but the objection was overruled, and the witness answered, 'My impression was that they resembled hers.' The witness had previously testified that he was one of the jury at the coroner's inquest, and saw and compared the hairs of the deceased with those on the club.

"The defendant introduced evidence that there was a horse-post in the yard, to which horses were frequently tied, at and before the time of the homicide. He then offered to show that the wood-piles in the yard had remained in substantially the same condition as at that time, and that there were hairs on some of the wood on the 9th of the subsequent October. But the evidence was objected to by the attorney general, and excluded by the court as immaterial."

The jury found the defendant guilty, and he alleged exceptions, which were argued at Boston before all the judges but *Ames, J.*

C. Delano, for the defendant. 1. The St. of 1869, c. 151, providing that in capital cases the Commonwealth shall be entitled to challenge peremptorily five of the jurors from the panel called to try the cause, is unconstitutional. Trial by jury according to its meaning in Magna Charta, and as it was understood in England generally till the emigration of our ancestors, with all its common law incidents, was introduced into the

colony, perpetuated in the province, reaffirmed in the Constitution, and thus by a permanent, uniform and universal usage and authority has become in every essential feature irrepealable, except by a change in the Constitution itself. The giving of the right of peremptory challenge to the defendant only is an essential feature. There is no just analogy between the action of the court with reference to the body of jurors present in court, and the municipal or executive machinery in the county by which the array is furnished to the court.

2. Testimony of the witnesses, not experts, that the hairs on the club appeared to be human hairs, and that they resembled the hair of the deceased, was inadmissible. *State v. Knight*, 43 Maine, 11. 1 Whart. Crim. Law, §§ 848 *et seq.* Taylor Med. Jurisp. (6th Am. ed.) 234.

3. The evidence of the hairs found on the wood in October was admissible.

C. Allen, Attorney General, for the Commonwealth. 1. The right of trial by jury is not impaired by allowing the Commonwealth to challenge jurors peremptorily. The right is, to be tried by an impartial jury. It is no part of the design of the Constitution that persons charged with crime shall have a right to select the jurors by whom they will be tried. And it is quite immaterial, so far as the Constitution is concerned, in what manner jurors are selected, or for what reasons jurors are rejected, if those who actually sit are impartial. There is, in the different states, a great diversity in the details of the mode of drawing jurors in the first instance. It cannot be supposed that any change of legislation in respect to these details would be unconstitutional. Nor can it be a matter of doubt that it is within the constitutional power of the legislature to change the qualifications of jurors; to create special exemptions from jury duty, by reason of age, occupation, residence, or to remove existing exemptions; to vary the places from which jurors shall be taken; to determine whether aliens may serve or not; to define how often men may be called upon or allowed to serve; and in other similar respects to regulate the selection of jurors. *Mountfort v. Hall*, 1 Mass. 443, 451. *Colt v. Eves*, 12 Conn. 243 252

There is no legal presumption that all those who are drawn as jurors are fit for jury duty. Men legally exempt, and even legally disqualified, are often thus drawn. Even of those who have the legal qualifications, and are not legally exempt, some are occasionally found unfit by reason of physical infirmity; from obvious mental or notorious moral defects; from mental disquietude in consequence of existing or impending misfortune; from intoxication; or from having a contagious disorder. In all these and many other supposable cases, it cannot be that the accused has a right to demand that these unfit persons shall sit upon the jury to try him. Especially is this so where jurors are drawn, as here, by lot.

There may be instances where the prosecuting officer has information showing the unfitness of a juror; and yet is unable to prove the fact, without a violation of private confidence, or by reason of the death of the person who told him. There may be cases of corruption fully believed or strongly suspected, and yet from the nature of the case incapable of proof. There may be other cases of manifest unfitness to sit in judgment upon a particular case. There can be no constitutional right, on the part of a criminal, to insist upon being tried by jurors like these. The fact that, when two or more prisoners are tried jointly, one may challenge a juror whom another may wish to retain upon the panel, is held to furnish no ground for separate trials. *Commonwealth v. James*, 99 Mass. 438. *United States v. Marchant*, 12 Wheat. 480, 482. *United States v. Wilson*, Baldw. 78, 82. So in this Commonwealth, in England and elsewhere, the existing right of persons accused of crime to make peremptory challenges has been abridged. St. 1795, c. 45, § 3. St. 22 Hen. VIII. c. 14. 4 Bl. Com. 354. 1 Chit. Crim. Law, 534, 535. Joy on Confessions and Challenges, 148-162. U. S. St. 1790, c. 9, § 30. *Dowling v. State*, 5 Sm. & Marsh. 664, 685. *Perry v. Commonwealth*, 3 Grat. 632.

By the ancient common law, the king might challenge peremptorily as many jurors as he pleased. Co. Lit. 156^b. By judicial construction and the practice of centuries, under the St. 33 Edw. I. St. 4, the prosecuting officer, when he challenges a juror, does not assign his cause until the whole list has been

gone through with ; and if a full jury can be obtained without recalling those who have been set aside, the cause of challenge is not assigned at all. He thus exercises a right of peremptory challenge which is practically unlimited. Staundf. P. C. lib. 3, c. 7, *ad fin.* Co. Lit. 156 b. 2 Hawk. bk. 2, c. 43, §§ 2, 3. 2 Hale P. C. 271. Bac. Ab. Juries, E. 10. 4 Bl. Com. 353. Kennedy on Juries, 100. Forsyth on Trial by Jury, 232. *Rex v. O'Coigly*, 26 How. St. Tr. 1231-1241. *Regina v. Frost*, 9 C. & P. 129, 136. *Mansell v. The Queen*, 8 El. & Bl. 54, 103 ; S. C. Dearsly & Bell, 375. By U. S. St. 1365, c. 86, § 2, when the offence charged is treason, or a capital offence, the United States are entitled to five peremptory challenges ; and in certain other cases to two. In various states and territories the government has the right of peremptory challenge in criminal cases, by statute. Maine, St. 1867, c. 108. New Hampshire, St. 1860, c. 2350. Massachusetts, St. 1869, c. 151. Rhode Island, Rev. Sts. of 1857, c. 172, § 33. Connecticut, Gen. Sts. of 1866, tit. 12, c. 12, § 239. New York, St. 1858, c. 332, § 1. Pennsylvania, Crim. Proc. Act, 1860, § 37. Delaware, Rev. Code of 1852, c. 133, § 16. Maryland, 1 Code of 1860, art. 50, § 15 ; 2 Code of 1860, art. 4, § 618. North Carolina, Rev. Code of 1854, c. 35, § 33. Georgia, Code, (Irwin's Rev. of 1868) §§ 4549, 4550. Alabama, Rev. Code of 1867, § 4179. Mississippi, Rev. Code of 1857, c. 64, art. 297. Louisiana, Rev. Sts. of 1856, p. 163, § 24. Texas, Paschal's Dig. (1866) §§ 3037-3039. Arkansas, Dig. of Sts. (1858) c. 52, § 154. Tennessee, Code of 1858, §§ 4013, 4014. Kentucky, Crim. Code, 191. Ohio, 1 Rev. Sts. of 1860, c. 62, § 15. Michigan, St. 1861, No. 72 ; Comp. Laws of 1857, c. 128, § 58. Indiana, 2 Rev. Sts. of 1852, part 3, c. 1, § 82. Illinois, 1 Sts. of Ill. (1856) c. 30, § 230. Missouri, Gen. Sts. of 1865, c. 213, § 6. Wisconsin, Rev. Sts. of 1858, c. 179, §§ 3, 4. Iowa, Rev. Sts. of 1860, c. 211, § 4779. Minnesota, St. 1868, c. 86. Kansas, Gen. Sts. (1868) c. 82, § 199. California, Wood's Dig. art. 1610. Nevada, St. 1861 c. 104, § 336. Oregon, St. 1864, c. 15, § 155. Washington Territory, St. 1859, p. 142, § 188. Idaho Territory, Laws of 1864, p. 277. Colorado Territory, Rev. Sts. of 1868, c. 22, § 212. Nebraska Territory, Rev. Sts. of 1866, part 3, § 191. The Eng-

lish practice, above referred to, has been said by some to be a part of the common law of this country; and it is adopted in South Carolina, and perhaps in others of the few states where the right of peremptory challenge is not conferred expressly by statute. 1 Bishop Crim. Proc. § 800. 3 Whart. Crim. Law, § 2956. *Mansell v. The Queen*, 8 El. & Bl. (Am. ed.) 116, note. *State v. Stalmaker*, 2 Brev. 1. *State v. Barrontine*, 2 Nott & McCord, 553. *State v. Bone*, 7 Jones, (No. Ca.) 121. *Commonwealth v. Jolliffe*, 7 Watts, 585, 586. *Jewell v. Commonwealth*, 22 Penn. State, 94. *United States v. Douglass*, 2 Blatchf. 207, 210. *United States v. Marchant*, 12 Wheat. 480, 483. The constitutionality of these statutes, when questioned, has been uniformly upheld. *Warren v. Commonwealth*, 37 Penn. State, 45. *Hartzell v. Commonwealth*, 40 Penn. State, 462. *Walston v. Commonwealth*, 16 B. Monr. 15. *Jones v. State*, 1 Kelly, 610. *Boon v. State*, Ib. 618. *Hudgins v. State*, 2 Kelly, 173. In other states, the validity of these statutes has been recognized or assumed by the courts. *Schoeffler v. State*, 3 Wisc. 823, 837-839. *Wiley v. State*, 4 Blackf. 458. *Beauchamp v. State*, 6 Blackf. 299. *Fouts v. State*, 8 Ohio State, 98, 104. *Mallison v. State*, 6 Missouri, 399. *State v. Craton*, 6 Ired. 164. *State v. Arthur*, 2 Dev. 217. *State v. Benton*, 2 Dev. & Bat. 196, 203-206.

So likewise, a judge, of his own motion, may set aside a juror deemed by him to be evidently unsuitable. *Mansell v. The Queen*, 8 El. & Bl. 54, 80, 106, 107, 109, 110, 112-115; *S. C. Dearsly & Bell*, 375, 405, 406, 419, 421, 425. *United States v. Morris*, 1 Curt. C. C. 23, 35-37. *United States v. Cornell*, 2 Mason, 91, 104-106. *Lewis v. State*, 9 Sm. & Marsh. 115. *Montague's case*, 10 Grat. 767, 772. Junius, letters xli, lxi. See also *Commonwealth v. Hayden*, 4 Gray, 18, 21.

2. The evidence of the witnesses, though not experts, as to the hairs on the club, was admissible.

3. The evidence as to the condition of the wood-piles was properly excluded.

CHAPMAN, C. J. The attorney general having challenged a juror under the provisions of the St. of 1869, c. 151, which gives him the right, on the trial of a capital offence, to challenge per-

emphorily five of the jurors from the panel called to try the cause, the prisoner objected that the Commonwealth had no right of peremptory challenge, because the statute is unconstitutional. The particular provision of the Constitution applicable to the case is the last clause of art. 12 of the Declaration of Rights, "And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury." The jury referred to in this provision is what has been known as a petit jury, which consisted, by the common law, of "twelve good and impartial men of the neighborhood." Bac. Ab. Juries. Undoubtedly the Constitution contemplated a jury of twelve men, who should be good and impartial. The neighborhood, in this Commonwealth, has always included the county. But it is not contemplated that they shall know the parties and the case beforehand, so as to try cases on their personal knowledge, as they formerly did. *Schmidt v. New York Union Insurance Co.* 1 Gray, 529, 535. On the contrary, they are to try causes on evidence produced before them, and should know so little of the case as not to have formed or expressed any opinion in regard to its merits, and should be free from bias or prejudice. But the method of selecting jurors is left by the Constitution to be regulated by legislative enactments; and these may be modified from time to time as the legislature shall think proper.

By the English law, from which the right of trial by jury is derived, a juror must have a certain property qualification; but this is not an essential feature of the institution, and may be modified. Jurors were selected to a certain extent by the sheriff, and this made his impartiality in respect to the causes to be tried very important. 3 Bl. Com. c. 23. But our Constitution has never been held to restrain the legislature from adopting better modes of selection. And in respect to the point before us, by the common law the king might challenge peremptorily without being limited to any number. This right has been restrained by several acts of parliament, and the later practice has been that the officer of the crown directs a person to whom he

objects to "stand by," and he continues to do this without assigning any cause, till the panel is gone through. If a full jury cannot be obtained, they are then called again in turn, and he must then show cause. But in practice it gives the crown an extensive right of peremptory challenge. *Mansell v. The Queen*, 8 El. & Bl. 54. Bac. Ab. Juries. If the framers of the Constitution had intended to prohibit the legislature from conferring a right of peremptory challenge on the government, their knowledge of the institution of trial by jury would have induced them to express that intent. Many changes have been made by legislative acts in respect to the qualifications of jurors, the methods of selecting and summoning them, and of forming a panel, which differ materially from the ancient practice, and it has not been supposed that the Constitution was violated by such provisions. It has been thought expedient to increase the number of challenges on the part of the prisoner to twenty-two. The experience and observation of the court have made it apparent that a limited power of peremptory challenge is important to the government in many instances, in order to obtain an impartial jury, and we see no ground to regard such a power as unconstitutional. The statutes and authorities cited by the attorney general show that the power of peremptory challenge on the part of the prosecuting officer exists in a large number of the states of the Union, and is upheld by the courts.

A witness, who was not an expert, was permitted, against the objection of the prisoner, to testify that certain hairs which were found adhering to the club mentioned in the bill of exceptions appeared to his naked eye to be human hairs, and another testified to his impression that they resembled the hairs of the deceased. The objection to this evidence rests upon the general principle that witnesses who are not experts cannot testify to their opinions, but are limited to statements of fact, and it is contended that this testimony is merely an expression of opinion. But there is a large class of facts in regard to which judgment or opinion is all that can be expressed. Such testimony is admissible in respect to the value of property and damage done to it. *Vandine v. Burpee*, 13 Met. 288. *Walker v. Boston*,

8 Cush. 279. *Dwight v. County Commissioners*, 11 Cush. 201. *Swan v. County of Middlesex*, 101 Mass. 173. Also whether a horse eats well, travels well, and appears to be free from disease. *Spear v. Richardson*, 34 N. H. 428. And in *Hackett v. Boston, Concord & Montreal Railroad Co.* 35 N. H. 390, the court say that in most cases when a witness is examined as to distances, dimensions, weight or any quality of the matter in question, he cannot testify except by the use of language which necessarily implies his opinion. Many facts that we know through our senses are of this character. In testifying to the identity of a person, the statement often can be nothing more than belief or opinion. This is especially so when the person was seen in the night, or at a distance, or for a very short time. So as to the identity of one of his garments, or a fragment of a garment. So of footprints, animals and many other objects, and of the size or color of objects, the character and quality of objects or the value of property, or of sounds or noises. Handwriting is of the same character. See 1 Greenl. Ev. § 440, and cases cited. The question whether an object appears to be a human hair, or to resemble the hair of a certain person, is of the same character. There may be less certainty about it than if the testimony related to the face or some other part of the body, but the principle is the same. When other tests than the senses are to be applied to these subjects in order to gain knowledge that cannot be gained by common observation, but must be acquired by the application of special skill or learning, the testimony of experts must be resorted to, yet that evidence does not render the testimony of common observers inadmissible, so far as such observation can go. For example, in the present case, any witness could state that the deceased appeared to be dead; that there appeared to be blood upon or about her; that there was a wound upon her head from which brains appeared to be escaping; and that her hair appeared to be matted or dishevelled and a portion of it appeared to have turned gray. But the effect of such wounds in destroying life the question whether the blood was found by analysis to be human blood, or whether what appeared to be brains was not in

fact some other matter, might require scientific examination, the results of which could only be stated by an expert. We think tha' the testimony as to the hairs was properly admitted.

The testimony offered in behalf of the prisoner, in respect to hairs seen on the wood-piles on the 9th of October, related to a period more than five months subsequent to the murder. This period is so remote as to make the evidence unreliable and immaterial; and it was properly rejected.

Exceptions overruled.

COMMONWEALTH vs. DANIEL STONE.

In a criminal trial, it is sufficient to sustain an averment of a name charged, if the jury find that the name proved, though differently spelled, is "substantially identical" in pronunciation.

COMPLAINT for assault and battery on "Catherine Marres." Trial in the superior court, on appeal, and verdict of guilty, before Ames, C. J., who allowed the following bill of exceptions:

"At the trial but one witness was produced on the part of the Commonwealth, and she said that her name was 'Catherine Mars,' pronouncing it as one syllable; but she did not say how her name was spelled. She also testified that she was assaulted and beaten by the defendant. The defendant contended, on her testimony, that the proof offered was a variance from the charge, and that evidence of an assault on 'Catherine Mars' would not sustain a charge of an assault on 'Catherine Marres;' and contended as matter of law that Marres is not *idem sonans* with Mars. The attorney for the Commonwealth contended that, as there was no question as to the identity of the transaction, or the persons concerned in it, the mistake in the spelling of the name was immaterial, unless there was also a difference in the pronunciation; and that the word Marres, if accented on the first syllable, did not differ substantially or perceptibly from the word Mars. The court refused to rule on the question of *idem sonans*; but instructed the jury that, if the charge was in other respects proved, and if they found that in pronunciation the word Marres was substantially identical with the word Mars, they could find the defendant guilty."

Commonwealth v. Brown.

F. F. Heard, for the defendant. The defendant does not dispute that the question of *idem sonans* is for the jury. *Regina v. Davis*, 2 Denison, 231. *Commonwealth v. Mehan*, 11 Gray, 321, 323. *Commonwealth v. Donovan*, 13 Allen, 571. But the judge was in error in instructing the jury that it would be sufficient if they should find that in pronunciation Marres was "substantially identical" with Mars. They should have been instructed that the name must be strictly and accurately proved as charged. *Commonwealth v. Morse*, 14 Mass. 217. *Commonwealth v. Manley*, 12 Pick. 173. *Commonwealth v. Blood*, 4 Gray, 31, 33. The language of the whole instruction, addressed to laymen, unused to the niceties of criminal law, was adapted to induce them to jump over any technicality as immaterial, especially when following such language as was used in argument by the attorney for the Commonwealth.

C. Allen, Attorney General, for the Commonwealth. The jury might well find that the same rule applied in usage to the pronunciation of Marres as does to Hobbes, Welles and Willes.

BY THE COURT. The ruling was in conformity with *Commonwealth v. Donovan*, 13 Allen, 571.

Exceptions overruled.

COMMONWEALTH vs. HENRY B. BROWN & another.

The Commonwealth is not barred from prosecuting a person for a crime, by the fact that he has confessed his guilt while testifying as a witness, without express promise of protection by any one, on the prosecution of another person for participation in the same crime or some other growing out of or connected with it, before some magistrate whose court was not attended by a public prosecutor, or before the grand jury without request of the district attorney.

INDICTMENT returned into the superior court for Suffolk at August term 1869, charging Brown and Andrew Drake with assault and battery each upon the other. Drake pleaded guilty. Brown was tried and found guilty, before *Scudder, J.*, who allowed exceptions in substance as follows:

"It appeared at the trial, that the defendants were engaged by previous agreement, in a fight with their fists, when Drake suddenly stabbed Brown with a knife; and that Brown imme-

diately reported the facts to a police officer, on whose complaint Drake was brought before the municipal court of the city of Boston for an assault on Brown with a knife. At the examination before the municipal court, Brown appeared as a witness for the Commonwealth, and Drake was held to bail for said assault with a knife. Brown also appeared as a witness for the Commonwealth before the grand jury. The matter of good faith or bad faith on the part of Brown was not discussed or alluded to by the Commonwealth.

"Upon this evidence, the defendant's counsel contended that the Commonwealth had accepted and used Brown as its witness; and that the faith of the Commonwealth was thereby pledged to him to protect him from harm by reason of his complicity in the offence set forth in the indictment. But the court allowed the defendant to be put on trial, and he was convicted of a simple assault, and excepted to these rulings."

C. Cowley, for Brown, cited *Rex v. Rudd*, Cowp. 331; *S. C. Leach*, 135; *Rex v. Brunton*, Russ. & Ry. 454; 1 Phil. Ev. (2d ed.) 597.

C. Allen, Attorney General, for the Commonwealth. The question which the defendant seeks to raise, as to the duty of the Commonwealth towards one whom it has used as a witness against another, in a criminal case, does not here arise. The Commonwealth has never used or accepted him as a witness. Appearing and testifying before the municipal court, where no prosecuting officer attends officially on the part of the Commonwealth, and before the grand jury without the request of the district attorney, does not impose any duty or obligation whatever upon the Commonwealth or its prosecuting officers. Nobody asked him to appear or testify. He volunteered as the prosecutor in the case, he having been the person who received the chief injury. Nor is it probable that the district attorney ever knew of the nature of his testimony, till it was given in the presence of the grand jury. In prosecuting the defendant there can be no breach of public faith; since there was no promise whatever, express or implied, by any person authorized or unauthorized, that he should be exempt from prosecution.

Commonwealth v. Brown.

CHAPMAN, C. J. It does not appear that any express pledge was made to the defendant; nor that any implied pledge was made to him by any one having authority to make it.

*Exceptions overruled.**

* A similar decision was made in the following case, argued at September term 1870 for Hampden.

COMMONWEALTH vs. THOMAS DENEHY.

INDICTMENT returned into the superior court for Hampden at December term 1869, charging the defendant with breaking and entering Loring Sackett's shop in Holyoke with intent to commit larceny therein, and then and there stealing ten pairs of boots. Trial and verdict of guilty, in the superior court, before Rockwell, J., who allowed exceptions in substance as follows:

The defendant filed a plea "that the Commonwealth ought to be barred from having and maintaining this indictment; because, he says, that in a trial, before a trial justice in said county, of Patrick Bowler, for the same offence charged against him therein, the government called him as a witness, and caused him to be duly sworn as a witness in said cause, and at the request of the Commonwealth, then and there as such witness, before said trial justice, he did testify that he did commit the offence charged against him, and testified fully and entirely his whole knowledge of the circumstances of the commission of said offence and his participation therein, and made full and complete disclosures and proof of the commission of said offence and his crime; all of which he is ready to verify." This plea was overruled.

"The defendant then pleaded not guilty, and was tried. He proved, in his defence, that, upon a trial of Patrick Bowler, before a trial justice for said county, at Holyoke, for the same burglary and offence charged in this indictment, he was called by the Commonwealth and sworn as a witness; that he then did testify that he, the said Denehy, broke and entered the shop of Sackett, as charged in this indictment, and stole the property therein charged, and took it to where Bowler was, and Bowler refused to take the stolen property; that he, the defendant, testified then and there to the circumstances of said burglary, and disclosed the parties engaged in it with him; and that Bowler was held to answer the said charge, but was not indicted by the grand jury. And thereupon the defendant asked the court to rule that, if he did so testify, at the request of the Commonwealth, as the witness of the Commonwealth, and made a full and complete disclosure of all the facts in his knowledge concerning the burglary, the jury could not convict; but the court ruled otherwise, and he excepted."

G. M. Stearns, (M. P. Knowlton with him,) for the defendant. 1. In this case the Commonwealth called the defendant as a witness, and thereby impliedly promised him the protection of the government. *Commonwealth v. Knapp* 10 Pick. 477, 493. It cannot be objected that he was called by the trial justice

COMMONWEALTH vs. WILLIAM LAWLESS.

A check payable to A.'s order, stolen from B.'s custody, may, under the Gen. Sta. c. 172, § 12, be properly described as A.'s property, in an indictment for the larceny, if B. held it only for transmission to A., without having, himself, any interest in it or right to retain it.

An instruction to the jury, in a criminal trial, "that the evidence is sufficient on which to convict of the charge," is not a charge with respect to matters of fact, within the Gen. Sta. c. 115, § 5; if it is given in response to a request of the defendant for a ruling "that the evidence does not sustain the charge," and may fairly be understood to apply only to the sufficiency in law of the evidence to sustain the indictment provided that the jury shall be satisfied with its weight.

On the trial of an indictment for larceny of "a certain paper writing, called and being a 'discharge' from the military service of the United States, of the value of one hundred dollars" of the property of J. S., evidence that J. S. had been a soldier in a regiment of Massachusetts volunteers, that the defendant stole the "discharge paper" of J. S., and that this "discharge paper" was "a discharge from the military service of the United States," is sufficient to warrant a finding that what the defendant stole was of some value, without the production of the paper or further evidence of its contents.

Evidence that a man, by falsely personating a discharged soldier with intent to steal his bounty money, received from an officer, by whom the bounty was payable, a discharge paper which was incident to and inseparable from the bounty, and converted it to his own use or deprived the owner of it, will warrant his conviction of larceny of that paper.

On the trial of an indictment for larceny, evidence is competent that the signature of a

only, and not by a mere prosecuting officer. The trial justice acts for the Commonwealth, and no other person is invested with authority to call witnesses in his court for the government. In *Rex v. Rudd*, Cowp. 331, 334, the party was called as a witness by a police magistrate of London. In England, the defendant could not plead this matter in bar, nor set it up in defence, because under ordinary circumstances he would have there only an equitable right to a recommendation for pardon. 3 Russell on Crimes, (4th ed.) 597. But if pardon was promised in the Gazette, he would have a right to pardon, although subject to sentence. *Rex v. Rudd*, Cowp. 331, 334. In this country, if convicted before he is called as a witness, he is entitled as of right to a pardon. *People v. Whipple*, 9 Cowen, 707, 715. If not tried, he is entitled to a discharge. *United States v. Lee*, 4 McLean, 103. *Commonwealth v. Knapp*, 10 Pick. 477, 493. In England, he is entitled to nothing until after sentence. In Massachusetts, he is entitled not to be prosecuted. *Commonwealth v. Knapp*, 10 Pick. 493. Inasmuch, therefore, as he is entitled to protection from prosecution, it follows he may plead the matter in bar or set it up in defence. Such is the law in Scotland. Alison Fract. Crim. Law of Scotland, 453.

C. Allen, Attorney General, for the Commonwealth.

- BY THE COURT. The case cannot be distinguished from *Commonwealth v. Brown*, ante, 422.

Exceptions overruled

Commonwealth v. Lawless.

receipt for the stolen goods, made by a person who, by falsely personating their owner and giving the receipt, obtained possession of them, is the handwriting of the defendant. If, on the trial of an indictment on the Gen. Sta. c. 161, § 18, for larceny of several articles worth together more than one hundred dollars, but each worth less than that sum, the jury return a general verdict of guilty under instructions which render it possible that they may have found the defendant guilty of larceny of one article only, this court, in disposing of the case under the Gen. Sta. c. 112, § 35, and c. 114, § 12, "as law and justice require," may affirm the verdict if the attorney for the Commonwealth shall move for judgment and sentence as upon conviction of larceny of property not exceeding one hundred dollars in value.

INDICTMENT for larceny of "a certain paper writing, called and being a 'discharge' from the military service of the United States, of the value of one hundred dollars; one 'discharge' paper of the value of one hundred dollars; one check of the denomination and value of one hundred dollars; one bank check of the denomination and value of one hundred dollars; one order for money of the denomination and value of one hundred dollars; one promissory note of the denomination and value of one hundred dollars; one draft of the denomination and value of one hundred dollars; of the property, goods and chattels of one George P. Gill." At the trial in the superior court, before *Lord, J.*, the following evidence was introduced in behalf of the Commonwealth:

Frederick L. Cutting, a clerk in the office of the surgeon general of Massachusetts, testified that, on August 15, 1868, between eleven o'clock and noon, the defendant came to the office and asked for his bounty, and, being asked "Whose bounty?" said "Gill's," and, being further asked if he had no other name, said "George P.;" that he was then asked several questions, such as are usually put to such applicants, as to his age, place of birth, regiment, company and commander, all of which he answered; that he again asked for his bounty, and a check for the amount of George P. Gill's bounty and Gill's discharge paper were given to him in one package; that this check was drawn by the paymaster general of the United States army, at Washington, upon the assistant treasurer of the United States, at New York City, payable to the order of George P. Gill, and had never come into Gill's actual possession, but had been sent through the state agent of Massachusetts at Washington to the

surgeon general's office in Boston, and had remained there until this occasion; and that the discharge paper was Gill's property, and had been left by him in the office when he applied for his bounty. On cross-examination, this witness testified that the defendant did not ask for the discharge paper, but that the witness gave him the check and discharge paper together, and that he took them both.

George P. Hawes testified that, on August 15, 1868, he saw the defendant at the station of the Old Colony Railroad in Boston, shortly before noon, and asked him where he had been, and the defendant replied that he had gone from Stoughton to Braintree that morning to hire a team, and then had come from Braintree to Boston.

George P. Gill testified that he lived in Stoughton, had served in the thirty-fifth regiment of Massachusetts Volunteers, and had a claim in the office of the surgeon general of Massachusetts for a bounty from the United States; that on August 14, 1868, the defendant was in the shop of the witness, and asked if the witness had got his bounty, and he answered that he had not got it, but had received notice that it was ready for him; that on August 15, about six o'clock in the morning, the defendant was in the shop again, and asked how much of a job the witness had that day, and he answered that he was going to make four pairs of boots; that he gave the defendant no authority to draw his bounty; and that the signature in a book produced from the surgeon general's office, to a receipt in his name for the check and discharge paper, was not written by him or by his authority.

The Commonwealth, against the defendant's objection, was then permitted to put in evidence the book containing the receipt, and introduce testimony tending to show that it was signed by the defendant with the name of George P. Gill, and to prove the defendant's handwriting by signatures made by him at the time of his arrest in the proceedings preliminary to this indictment. The Commonwealth also proved that "Gill had been reimbursed by the surgeon general."

The discharge paper was not produced at the trial, nor did it

appear what were its contents or what was its value, except that Gill and Cutting spoke of it as a discharge from the military service of the United States.

This was all the evidence introduced by the Commonwealth. The defendant offered no evidence, but requested the judge to rule as follows :

"1. There is no evidence in this case from which the jury can infer that the check was the property of George P. Gill ; and accordingly the defendant cannot be found guilty of larceny of the check.

"2. There is no evidence that this check ever came to the possession of Gill ; and accordingly, upon this indictment and evidence, the defendant cannot be found guilty of larceny of the check.

"3. The evidence of the Commonwealth does not sustain the charge of the indictment.

"4. There is no evidence upon which the defendant can be convicted of anything more than the larceny of the discharge paper ; and there is no evidence of any value of that discharge paper.

"5. The defendant cannot be convicted of larceny of the discharge paper ; because it appears that this was given to him without any request or effort by him therefor."

"The judge declined to give any of these instructions, and instead thereof ruled, as to the first and second prayers, that, if it appeared that the check was in the custody of the surgeon general on a naked trust for the benefit of Gill, the property was rightly alleged to be in Gill, and that the mere fact of the possession not having come to Gill was immaterial ; as to the third prayer, that the evidence was sufficient on which to convict of the charge in the indictment ; as to the fourth prayer, that the Commonwealth need not offer direct evidence of the value of the discharge paper, but that the jury might, on the evidence, infer such value as they should find it to have ; and he further instructed the jury that, if they should find the discharge paper to be of any value, they might return a general verdict of guilty, in case they found a larceny of that paper

although they should find the defendant not guilty of larceny of the check; but that, if they found the discharge paper to have no value, then they should state that fact.

"The jury did not find the discharge paper of no value. Upon this point, they were instructed that the paper was of no value unless the Commonwealth proved it to be of some value.

"As to the fifth prayer, the judge instructed the jury that, if the discharge was given to the defendant as an incident to the bounty for which he asked, and as a thing inseparable from it, they might convict of larceny of the discharge paper, even though the defendant had made no effort to obtain the discharge paper by itself."

The jury returned a general verdict of guilty; and the defendant alleged exceptions.

G. C. Starkweather & H. N. Sheldon, for the defendant.
1. Gill had no property in the check. There was no evidence on which it was competent for the jury to find that the surgeon general held it on a naked trust for Gill's benefit. *Rex v. Adams*, Russ. & Ry. 225. The loss incurred in respect to it fell not on Gill, but on the surgeon general.

2. The ruling "that the evidence was sufficient on which to convict of the charge in the indictment" was a charge with respect to a matter of fact, within the provision of the Gen. Sts. c. 115, § 5, that "the courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."

3. The instruction as to the proof of value of the discharge paper, though abstractly correct, was not applicable to the testimony. There was nothing in evidence from which the jury could infer any value. The strongest case on the subject goes only to the length that a jury may infer from inspection that stolen property is of some value; but this paper was not produced, and there was no evidence of its contents. In *Commonwealth v. Burke*, 12 Allen, 182, the articles the value of which was in question were submitted to the inspection of the jury.

4. If the discharge paper was given to the defendant without his will, and taken by him without intention on his part feloni-

ously to convert it to his use, he did not commit larceny of it. The retention of it might have been embezzlement. The mere reception could not have been larceny. And there was no evidence that it "was given to him as an incident of the bounty for which he asked, and as a thing inseparable from it." Were this otherwise, still it may have been so given to him and yet he never have had any felonious intention of converting it. For this the verdict should be set aside. *State v. Somerville*, 21 Maine, 20.

5. Evidence of a forgery of Gill's signature should not have been admitted on an indictment merely for larceny of Gill's property. *State v. Williams*, 27 Verm. 724.

6. The instructions of the court, considered above under point 3, were especially material in their relation to the proof of value of the discharge paper, as they affected the punishment of the defendant on his conviction. Gen. Sts. c. 161, § 18. Under the whole instructions, the jury may have found him not guilty of larceny of the check, but guilty of larceny of the discharge paper, and that this was of a trifling value, say of the value of one cent only; but upon the general verdict of guilty which was rendered, he stands convicted of larceny of property valued at \$700; and the Commonwealth, if these exceptions shall be overruled, must insist that he shall be sentenced for larceny of property of greater value than \$100; so that upon this record he may be sentenced for a crime of which the jury never intended to convict him. Nor can it be said that there was no evidence on which such a verdict could be found; for the exceptions do not purport to give the testimony for the defence, and it must be presumed that the instruction by the judge concerning such a verdict rested upon some testimony. *Commonwealth v. Griffin*, 21 Pick. 523, 526.

C. Allen, Attorney General, for the Commonwealth.

WELLS, J. 1. If the jury found "that the check was in the custody of the surgeon general on a naked trust for the benefit of Gill," it was properly described as Gill's property. It was payable to his order. The surgeon general had no interest in it, and no right to retain it from Gill. It was in his hands only

for transmission. The beneficial interest; the right of possession, and constructive possession also, were in Gill. That is sufficient. Gen. Sts. c. 172, § 12.

2. The ruling of the court, "that the evidence was sufficient on which to convict of the charge in the indictment," must be taken in connection with the third prayer for instructions, to which it was in response. That prayer was for an instruction that the evidence "does not sustain the charge of the indictment." We understand the ruling of the court below to apply to its sufficiency in law to sustain the indictment, if the jury should be satisfied with its weight; and not as an instruction to them upon the force which they should give to the testimony. We must presume that the jury were rightly instructed as to their province and their duty in regard to the finding of their verdict upon the evidence.

3. The jury were rightly instructed as to the proof of value of the discharge paper. It was an instrument of well known character. Its name, and its description in the indictment and by the evidence, sufficiently informed the jury what it was, and enabled them to judge whether it was or might be of value to the owner. *Commonwealth v. McKenney*, 9 Gray, 114. *Commonwealth v. Williams*, 9 Met. 273. *Commonwealth v. Riggs*, 14 Gray, 376. Its inspection would not have aided them.

4. The defendant, having obtained possession of the discharge paper by falsely personating the owner, and having converted the same to his own use, or deprived the owner thereof, by means of such fraudulent conduct, was properly held guilty of larceny of that paper. The intent to convert to his own use the bounty money of Gill, which was the inducement to his crime, may well be held to extend to all the articles which he obtained by the same means, although they were not themselves the object for which he engaged in the undertaking. One who steals a coat is guilty of stealing whatever may be in the pockets of the coat, although he neither coveted the articles nor knew them to be in the pockets. Under the instructions given in this case, the jury must have found that the discharge paper was an incident to the bounty and inseparable from it.

5. Evidence that the signature to the receipt for the articles was in the handwriting of the defendant was competent to identify him as the person who had falsely personated Gill and obtained the articles. It is no objection to its admissibility for this purpose, that it also proved him to be guilty of another punishable offence. *Commonwealth v. Riggs*, 14 Gray, 376.

6. The principal difficulty in this case arises upon the instruction to the jury that "if they should find the discharge paper to be of any value they might return a general verdict of guilty, in case they found a larceny of that paper, although they should find the defendant not guilty of larceny of the check." A verdict rendered upon this instruction, to wit, for larceny of the discharge paper alone, it not being alleged to exceed the value of one hundred dollars, would be for the lesser offence set forth in Gen. Sts. c. 161, § 18, and punishable by the lesser penalty; whereas a general verdict would subject the party to the higher penalty therein prescribed. We are unable to see how the jury could find the defendant guilty of larceny of the discharge paper and at the same time find him not guilty of larceny of the check; and if found guilty of both, as there could be no doubt that the check was, by itself, of the value of one hundred dollars, the verdict would be right as a verdict of guilty of larceny of property exceeding the value of one hundred dollars. But, upon the instruction last referred to, the general verdict might have been rendered upon proof which satisfied the jury only of the larceny of the discharge paper; and therefore we cannot know, and cannot assume, that the jury did in fact find the defendant guilty of larceny of the check. Upon a verdict so rendered, the court could not properly impose the punishment attached to the greater offence. To justify that, the jury should have found by their verdict that the greater offence had been committed; that is, it should be made to appear that they found the defendant guilty of stealing property to an amount exceeding the value of one hundred dollars. *Commonwealth v. McKenney*, 9 Gray, 114.

So far as this verdict indicates that the jury found the defendant guilty of the greater offence, it was rendered upon instructions which were erroneous; and therefore it cannot be allowed.

to operate as a finding that the property proved to have been stolen exceeded one hundred dollars in value. Can it be allowed to stand as a verdict of guilty of larceny to be punished by the lesser penalty prescribed by the statute for larceny of property not exceeding the value of one hundred dollars? If it can, consistently with the rules of practice in criminal cases, the ends of justice will be better subserved, as it appears to us, than by sending the case back for another trial. The jury have found the defendant guilty of larceny, upon proper evidence, and under instructions which we hold to be unexceptionable. The offence is the same in character, whether punishable by the greater or the lesser penalty. It is wholly set out in one section of the statute, and by the same words; the distinction consisting only in the degree of punishment inflicted, and that distinction depending solely upon the value of the property stolen. If the allegations of the indictment make the value of the property exceed one hundred dollars, the conviction and sentence can be only of the smaller offence, without proof and the finding of the jury that the value of the property stolen did in fact exceed that sum. But in such case the party may properly be sentenced to the lesser punishment provided by that statute. When there are several counts in the same indictment, or several articles alleged to be stolen in one count, all of which together exceed, but each of which separately does not exceed, the value of one hundred dollars, and a general verdict of guilty is returned, the court may render such judgment and sentence as is appropriate to the case actually developed at the trial. If, in fact, the proof was of but one offence, but one punishment will be imposed; if larceny is proved of only one of the several articles charged, the conviction and sentence will be only for the lighter penalty. This is the usual and proper course, especially where the several allegations are only different forms of charging the same fact. *Crowley v. Commonwealth*, 11 Met. 575.

Upon writ of error, it is always presumed that the sentence has been thus adjusted to the offence or offences of which the party has been properly and legally convicted. *Josslyn v. Commonwealth*, 6 Met. 236. This involves the right and the duty

of the court so to adjust it. In the case of *Commonwealth v. Eastman*, 2 Gray, 76, in which a general verdict of guilty was rendered upon an indictment charging larceny of several articles exceeding in all the value of one hundred dollars, there was a motion in arrest of judgment on the ground that the description of the principal article was bad; the remaining articles amounting to less than one hundred dollars in value. The court held that, whether the larceny of the article in question was well charged or not, "it is obvious that in either case a judgment must be rendered upon the verdict. The conviction is certainly right; and the only remaining question is, what is the sentence which is thereupon to be awarded." The case was accordingly sent back for sentence without determining the sufficiency of the allegation. This decision settles that there is no error in such case, if the sentence does not exceed the proper punishment for so much of the offence charged in the indictment as is legally established by the verdict; and that, so far as the verdict rendered is legally and properly rendered, it may avail for the purposes of judgment and sentence. See *Commonwealth v. Remby*, 2 Gray, 508; *Commonwealth v. Stebbins*, 8 Gray, 492.

We think the same principle may be applied to the present case. The defendant is properly convicted of larceny. The only error disclosed by the exceptions is, that, under the instructions given to the jury, they may not have found him guilty of stealing more than one of the several articles described, and therefore may not have found that the larceny was of such an amount of property in value as to warrant the severer penalty imposed by the statute. But this affords no good reason against making the verdict suffice for the lighter penalty. The judge who tried the case might have accepted the verdict and entered judgment as of a conviction for larceny of property not exceeding one hundred dollars in value. The attorney for the government might have avoided this exception by remitting the excess. The statutes give this court authority to make such order in regard to the disposition of the case in the superior court "as law and justice require." Gen. Sts. c. 112, § 35; c. 114, § 12. The circumstances of the case may sometimes be such as to

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make it proper that the prosecution should be pressed for the heavier punishment. The order which we consider most suitable, therefore, is that the exceptions be sustained and the verdict set aside, unless the attorney for the Commonwealth shall move for judgment and sentence as upon conviction of larceny of property not exceeding the value of one hundred dollars; and the case is to be disposed of in the superior court according to this direction.

Ordered accordingly.

COMMONWEALTH vs. JAMES McLAUGHLIN.

An indictment charging larceny of property of a wife may be sustained under the Gen. Sts. c. 172, § 12, by proof of larceny of property of her husband in her possession.

INDICTMENT for larceny of bank bills and a pocket-book, "of the property, goods and chattels and moneys of one Bridget Dolan," from her person.

At the trial in the superior court, before *Devens, J.*, Bridget Dolan testified that, on the day when the money was stolen, she was a married woman, living with her husband; that the money was his earnings; and that it was stolen from her at an auction of some furniture, to which she had gone, taking it with her with the intention of making purchases, and at which her husband was not present. The defendant contended "that the property should have been laid as the husband's property, and asked the discharge of the defendant on the ground of a variance;" but the judge ruled to the contrary. The defendant was found guilty, and alleged exceptions.

C. H. Hudson, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

MORRIS, J. This case is within the provisions of the Gen. Sts. c. 172, § 12.* It was proved at the trial, that, at the time

* "In the prosecution of offences in relation to or affecting real or personal estate, it shall be sufficient, and shall not be deemed a variance, if it is proved

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when the offence was committed, the property stolen was in the actual possession of the person alleged to be the owner.

The case of *Commonwealth v. Williams*, 7 Gray, 337, merely decides that an indictment is good, which, in a case like this one, alleges the property to be in the husband. But under the statute above cited it is also sufficient to allege the property to be in the wife from whose actual possession it was stolen.

In *Commonwealth v. Davis*, 9 Cush. 283, cited by the defendant, the indictment was for cheating by false pretences. This not being one of the offences enumerated in Rev. Sts. c. 133, § 11, the common law rule applied to it, and it was necessary to allege the property to be in the husband. It is not therefore inconsistent with this case.

It may be observed, though not affecting the decision, that the provisions of the Gen. Sts. c. 172, § 12, are broader than the corresponding provisions of the Revised Statutes above referred to, extending the rule as to a variance to all offences in relation to or affecting personal estate.

Exceptions overruled.

COMMONWEALTH vs. HUGR CAMPBELL.

An indictment for receiving as stolen goods "thirty yards of cloth," and "one coat," sufficiently describes the nature of the goods; and is sustained by proof that they consisted of "one piece of cassimere" and "one blue pilot cloth coat."

An indictment, which avers that the defendant received on a specified day goods "before then" stolen, may be sustained by proof of his receiving after the theft goods stolen on a later day.

On the trial of a shopkeeper for receiving stolen goods, evidence of what kind of business he carried on at his shop is admissible, although it does not appear that the goods were ever in the shop.

On a trial for receiving stolen goods, a witness for the Commonwealth testified, irresponsively to a question by the district attorney, that the defendant "had fighting dogs;" the defendant asked for no ruling upon this testimony; and the judge gave no special instructions upon it. *Held*, that the defendant had no ground of exception.

on the trial, that, at the time when the offence was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged to be the owner thereof."

INDICTMENT for receiving on January 1, 1869, goods "before then" stolen, and described in the indictment as "thirty yards of cloth, of the value of one dollar and twenty cents each yard; thirty yards of cloth, of the value of one dollar and forty cents each yard; fifteen yards of cloth, of the value of one dollar and thirty cents each yard; one hundred yards of cloth, of the value of one dollar each yard; and one coat, of the value of sixteen dollars; of the goods and chattels" of persons named. Trial and verdict of guilty, in the superior court, before *Pitman, J.*, who allowed exceptions in substance as follows:

"The evidence at the trial showed that the goods consisted of one piece of fancy cassimere; one or two pieces of tricot, black and brown; one piece of picque; one piece of King's Mill goods; one piece of blue pilot; one blue pilot cloth coat; and several pieces of doeskins and other kinds of goods which the witnesses had no account of and could not remember. The defendant requested the judge to rule that the property was not described with sufficient certainty in the indictment, and that the evidence did not support the description of the goods given in the indictment and was a variance therefrom. But the judge ruled that the goods were described with sufficient certainty in the indictment, and that the evidence supported the description.

"During the trial, one of the witnesses for the Commonwealth was asked by the district attorney what business the defendant was engaged in, and answered that he kept a shop. The district attorney then asked the witness what kind of business the defendant carried on at his shop. The defendant objected to the question as incompetent, but the objection was overruled, and the officer testified that the defendant kept a bar room and grocery. Two other witnesses for the Commonwealth afterwards testified that the defendant kept a grocery and bar room, one of them also testifying that the defendant had fighting dogs. But the only question permitted by the judge was as to the business carried on by the defendant at his shop; and no instructions were asked as to the evidence.

"The evidence showed the goods to have been stolen upon the night of February 4, 1869; and the defendant requested the

judge to rule, that, as the indictment alleged the goods, which the defendant was alleged to have received, to have been stolen before January 1, 1869, the defendant could not be convicted for receiving goods which were not stolen until February 4, 1869. But the judge declined so to rule, and ruled that the allegation of time was immaterial if the jury were satisfied that the goods were stolen before they were received by the defendant. To all which rulings the defendant excepted."

A. O. Brewster, for the defendant. 1. The description of the goods in the indictment was not certain enough, for the coat was of a particular cloth, color and cut, and each of the cloths, as also the coat, had obtained in common parlance a specific name, Declaration of Rights, art. 12. *Commonwealth v. Clair*, 7 Allen, 525. *Hooker v. State*, 4 Ohio, 348. *Pryor v. Commonwealth*, 2 Dana, 298. *Rex v. Halloway*, 1 C. & P. 127. 2 Russell on Crimes, (4th ed.) 313. *People v. Wiley*, 3 Hill, 194. *Commonwealth v. Brown*, 13 Met. 365, 368. *Commonwealth v. Merrifield*, 4 Met. 468. *Commonwealth v. Blood*, 4 Gray, 31, 33.

There was a fatal variance between the description in the indictment and the proof. The evidence should correspond strictly with the indictment as to the species of goods. *Commonwealth v. Clair*, *Hooker v. State*, *Pryor v. Commonwealth* and *People v. Wiley*, above cited.

2. The words "before then" referred to January 1, 1869, and although that particular date, as an averment of the time when the goods were received was immaterial, yet the Commonwealth, by reason of its unnecessary particularity, was limited by the indictment to proof that the goods were stolen before January 1, 1869. *State v. Newland*, 7 Iowa, 242. *Rosc. Crim. Ev.* 60. *Rex v. Hucks*, 1 Stark. 521. *State v. Dandy*, 1 Brev. 395.

3. There being no evidence showing that the goods were ever in the defendant's shop, it was immaterial to the issue what kind of business he carried on there. The district attorney, by his distinct and repeated offer of evidence that the defendant kept a bar room and fighting dogs, showed that he relied upon it in part as proof of the charge in the indictment, and intended to prejudice the defendant's cause; and the judge, although no in-

structions were asked, should have instructed the jury that this evidence was irrelevant and immaterial, and that they should not allow themselves to be prejudiced by its introduction. *Commonwealth v. Madden*, 1 Gray, 486. *Brown v. Gordon*, Ib. 182, 185. *Hall v. Power*, 12 Met. 482, 487. *Commonwealth v. Smith*, 2 Allen, 517.

C. Allen, Attorney General, for the Commonwealth.

GRAY, J. 1. The description of the stolen goods, alleged to have been received by the defendant, as so many yards of cloth of a certain value was sufficiently definite, and was supported by proof that they were like pieces of any kind of cloth not manufactured into a different shape. *Regina v. Mansfield*, Car. & M. 140. *Commonwealth v. Brettun*, 100 Mass. 206. There was therefore no material variance in point of description.

2. By one of the most familiar rules of criminal pleading, the time which is required to be alleged need not be proved as laid. The indictment alleged, and the jury under the instructions of the court have found, that the goods had been stolen before they were received by the defendant. There was therefore no material variance in point of time.

3. Evidence of the kind of shop which the defendant kept, and the business which he there carried on, was admissible to inform the jury of his habitual occupation, and consequent opportunity to commit the offence charged against him, and thus assist them in determining whether he was guilty of that offence. In *Commonwealth v. Madden*, 1 Gray, 486, relied on by the defendant, the only point adjudged was that keeping a public house was not of itself proof of unlawfully selling intoxicating liquors; and the decision was not put, and could not be sustained, on any other ground. *Commonwealth v. Norton*, 16 Gray 30. *State v. Wilson*, 5 R. I. 291.

The additional statement of one witness, that the defendant had fighting dogs, was not responsive to the question put by the district attorney, nor ruled by the court to be competent, and the defendant asked for no ruling upon it.

Exceptions overruled.

Commonwealth v. Pope.

COMMONWEALTH vs. WARREN POPE.

Whenever evidence of the condition of clothes is competent and material, their condition may be described by witnesses, without producing the articles themselves.

The correspondence between boots and footprints is a subject to which any one who has seen both may testify.

INDICTMENT for the crime against nature. At the trial in the superior court, *Putnam, J.*, permitted a witness, who saw the clothes of the defendant at the time in question, to testify to spots and stains on them, without producing the clothes or showing any reason for not producing them; and also to testify that he examined the boots of the defendant and footprints near the place where the crime was committed, and thought that the boots would fit the footprints and were of the same size. The defendant was convicted, and alleged exceptions.

C. Cowley, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

BY THE COURT. These exceptions are groundless and frivolous. Whenever evidence of the condition of clothes or other articles of personal property is competent and material, their condition may be described by witnesses, without producing the articles themselves. The correspondence between boots and footprints is a matter requiring no peculiar knowledge to judge of, and as to which any person who has seen both may testify.

Exceptions overruled.

COMMONWEALTH vs. ELIZA F. HOLMES.

On the trial of an indictment for procuring a miscarriage of A., it is competent for the Commonwealth to prove that, before leaving her home and submitting to the operation which caused the miscarriage, A. knew that her mother had had an interview with the defendant in which the mother had said that A. was pregnant and was going somewhere to get rid of her child, and the defendant had replied "Send her to me," and added that he had operated successfully five times on one person.

The omission in an indictment containing two counts of an averment that they are different descriptions of the same offence is cured by a verdict of not guilty on one of the counts and the entry of a *nolle prosequi* on that count.

INDICTMENT with two counts; the first charging that the defendant thrust an instrument into the pregnant womb of Elizabeth B. Blanchard with intent to procure a miscarriage, and in consequence thereof said Elizabeth died; and the second containing substantially the same averments as to the use and purpose of the use of an instrument on the body of said Elizabeth, but omitting to aver her death. There was no averment that both counts were different descriptions of the same offence. In the superior court, before the jury were empanelled, the defendant moved to quash the indictment, for the want of such an averment; but the motion was overruled. The defendant was then tried, and found guilty on the second count, and not guilty on the first count, before *Reed, J.*, who allowed exceptions to the ruling on her motion to quash, and to a ruling on the admission of evidence which was stated in the bill of exceptions as follows:

"At the trial, Mary J. Blanchard testified that she had an interview with the defendant, in which she stated to the defendant that Elizabeth B. Blanchard, who was her daughter in law, was in a family way; that Elizabeth said she was going to Boston or somewhere, to get rid of her child; that the defendant said, 'Send her to me,' that she had operated successfully five times upon one person, &c.; but that no message was sent by the defendant to said Elizabeth, and no appointment was made. It appeared that this conversation must have occurred some weeks before Elizabeth saw the defendant, if she saw her at all. The district attorney was allowed, against the objection of the defendant, to ask the witness, 'Did or not your daughter, before she left home, have knowledge of what had occurred between you and Mrs. Holmes?' and the witness answered, 'She did.'"

A copy of the indictment annexed to the bill of exceptions showed that the district attorney, on the day of the trial and verdict, filed a *nolle prosequi* of the first count.

E. Avery & W. Colburn, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

AMES, J. It appears to us that the evidence which was objected to by the defendant was material and competent, and for

that reason admissible. The witness had been permitted, without objection, to testify to a conversation, the substance and effect of which was that the defendant represented herself as having experience and skill in operations of the kind referred to in the indictment; that she had repeatedly performed them with success; and that she was ready and willing to undertake the performance of such an operation upon Elizabeth B. Blanchard. It was not in form a message directly from the defendant to her, but it was in substance an invitation to her, if she wished to "get rid" of the child with which she was then pregnant, to come to the defendant. The only thing which would give to this conversation any significance or importance would be proof of the fact that it was substantially made known to the person to whose case it applied; and the evidence to which the defendant objects, if believed, supplies exactly that proof. If followed up, as we are bound to suppose it was, by other evidence tending to show that she left her home afterwards and had communication with the defendant, and that she underwent such an operation, with a fatal result, it would certainly be proper for consideration as one link in a chain of circumstantial evidence that the defendant's readiness to undertake the operation had been communicated to the patient.

With regard to the objection that the indictment contains two counts without any averment that they are different descriptions of the same act, the difficulty (if any) is entirely relieved by the verdict of not guilty upon the first count, and the *nolle prosequi* by the district attorney of the same count. See *Commonwealth v. Cain*, 102 Mass. 487.

Exceptions overruled.

COMMONWEALTH vs. FREDERICK DOHERTY.

An indictment on the Gen. Sts. c. 164, § 10, for being armed with a dangerous weapon when arrested by a police officer on a warrant from a magistrate for a criminal offence, which does not aver that the arrest was lawful, or that the officer was authorized to make it, is bad.

INDICTMENT on the Gen. Sts. c. 164, § 10, averring that the defendant, on September 1, 1869, at Boston, "was arrested by Thomas B. Ford, a police officer of said city of Boston, under and by virtue of a warrant issued by a magistrate, to wit, by the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business, against said Doherty for an alleged offence against the laws of said Commonwealth, to wit, the offence of larceny, by the embezzlement and fraudulent conversion to his own use of the property of another, delivered to him, which property was the subject of larceny; and, when so arrested by said officer, said Doherty was then and there armed with, and then and there had on his person a certain dangerous weapon, to-wit, a pistol loaded with gunpowder and a leaden bullet, and capped."

In the superior court, the defendant, before the jury were empanelled, moved to quash the indictment "because it does not set forth in substance or legal effect that the alleged arrest was lawful." This motion was overruled by *Scudder, J.* The defendant was tried and found guilty, and alleged exceptions.

C. H. Hudson, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

GRAY, J. An indictment on the Gen. Sts. c. 164, § 10, for being armed with a dangerous weapon when arrested for a criminal offence, must allege, in substance or effect, that the arrest was lawful. *Commonwealth v. O'Connor*, 7 Allen, 583. This indictment alleges that the defendant was arrested by a police officer of the city of Boston under and by virtue of a warrant from a magistrate, particularly described; but it does not allege that the arrest was lawful, or that the officer was authorized to make it. By the laws of the Commonwealth, police officers may be appointed in towns and cities, with all or any of the

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powers of constables, except that of serving and executing civil process. Gen. Sts. c. 18, § 38; c. 19, § 2. Police officers might therefore be appointed in Boston with or without the power of serving such a criminal process as is described in the indictment; and, for aught that appears in the indictment, the officer who served the warrant upon the defendant may have had no lawful power to do so. The indictment is therefore bad, and should have been quashed. *The King v. Everett*, 8 B. & C. 114. S. C. 2 Man. & Ryl. 35. *United States v. Stowell*, 2 Curt. C. C. 153. *Indictment quashed.*

COMMONWEALTH vs. JOHN D. SMITH.

The provisions of the St. of 1864, c. 122, § 4, prescribing penalties for the selling of adulterated milk, were not repealed by the enactment of the St. of 1868, c. 263, prescribing in § 1 penalties for the selling of such milk with knowledge of the adulteration.

INDICTMENT charging that the defendant on March 6, 1869, at Boston, "with force and arms did unlawfully offer for sale and sell to one Gilman Currier, for the sum of eighteen cents, a large quantity, that is to say, two quarts, of adulterated milk, that is to say, a certain quantity, to wit, two quarts of milk, to which a certain quantity, to wit, one pint, of water had been added."

In the superior court, before the jury were empanelled, *Devens, J.*, overruled a motion of the defendant to quash the indictment for want of an allegation that the defendant sold the milk knowing it to be adulterated; and ruled "that the indictment was good under the St. of 1864, c. 122, § 4, and that it should be tried without regard to the provisions of the St. of 1868, c. 263;" and at the trial he refused a request of the defendant for an instruction to the jury "that the Commonwealth must aver and prove that the defendant sold the milk knowing it to be adulterated;" and instructed them that, if the sale was proved, "the only question in the case to be determined by them was, whether the milk was adulterated when sold." The defendant was found guilty, and alleged exceptions.

J. F. Pickering, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The St. of 1864, c. 122, § 4, prescribed as the penalty for selling or offering for sale adulterated milk, or milk to which water or any foreign substance has been added, a fine of twenty dollars. In prosecutions under this act, it was not necessary to prove the knowledge of the seller that the milk had been adulterated. *Commonwealth v. Farren*, 9 Allen, 489. The act of selling without knowledge was regarded as an act of criminal carelessness.

The St. of 1868, c. 263, § 1, prescribing for a like offence, with the additional fact that the seller knows the milk to be adulterated, a fine of one hundred dollars, treats the knowledge as an aggravation of the offence. This section does not repeal the former act by implication; for both may stand together. Nor is the former statute expressly repealed; but the second section of the last named act recognizes it as still in force, by declaring that the penalty mentioned in the preceding section "and that prescribed in the act to which this is in addition" may be recovered in the manner which it states. This section declares that the act is in addition to the former act; and the fact that the statute is entitled "an act to amend" the former act is immaterial.

Exceptions overruled.

COMMONWEALTH vs. ELLEN DESMOND.

A complaint "in behalf of the Commonwealth of Massachusetts" "to the justices of the municipal court of the city of Boston, holden at said Boston, for the transaction of criminal business, within and for the county of Suffolk," that J. S., on July 17, 1869, "at Boston aforesaid, did keep intoxicating liquor with intent to sell the same in this Commonwealth, not being authorized to sell the same in said Commonwealth for any purpose under the provisions of chapter 415 of the acts of the year 1869 of this Commonwealth, or by any legal authority whatever, against the peace of said Commonwealth and the form of the statute in such case made and provided," and certified by the signature of "A. B., Clerk," under the caption of "Suffolk, to wit," as having been sworn to "before said court," is not void, on appeal to the superior court, for want of sufficient averments of venue or jurisdiction, or for defect in the certificate of the complainant's oath.

Commonwealth v. Desmond.

COMPLAINT of "Chauncey C. Dean, of the city of Boston in the county of Suffolk, deputy state constable, in behalf of the Commonwealth of Massachusetts," addressed "to the justices of the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business within and for the county of Suffolk," and alleging "that Ellen Desmond, of said Boston," on July 17, 1869, "at Boston aforesaid, did keep intoxicating liquor with intent to sell the same in this Commonwealth, she, the said Ellen, not being authorized to sell the same in said Commonwealth for any purpose under the provisions of chapter 415 of the acts of the year 1869 of this Commonwealth, or by any legal authority whatever; against the peace of said Commonwealth and the form of the statute in such case made and provided." The *jurat* was as follows: "Suffolk, to wit. Taken and sworn to this 19th day of July in the year of our Lord 1869. Before said court. John C. Leighton, Clerk." In the municipal court the defendant was found guilty, and appealed.

At the trial in the superior court, before *Scudder, J.*, the defendant, before the jury were empanelled, moved to quash the complaint, "because it does not appear that this court has any jurisdiction of the cause; because it does not appear that the alleged offence was committed in the Commonwealth of Massachusetts, or where committed, with certainty; because it does not appear that the defendant was an unmarried woman and therefore not under the control of her husband; because of the want of a proper or perfect venue; and because it does not appear to have been sworn to in this Commonwealth, or before any officer qualified to administer an oath." This motion was overruled. The jury returned a verdict of guilty, and the defendant alleged exceptions.

L. W. Osgood, for the defendant.

J. C. Davis, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

AMES, J. The various objections made by the defendant in the superior court were none of them taken in the municipal court, from which she appealed; and therefore, so far as they depend upon formal defects apparent on the face of the com-

plaint, are too late to be of any avail. St. 1864, c. 250, § 2. *Commonwealth v. McGovern*, 10 Allen, 193. *Commonwealth v. Walton*, 11 Allen, 238.

Even if they had been seasonably taken, it is difficult to see how they could be of any effect. It is not denied that the superior court has a general appellate jurisdiction in cases of this kind; but the defendant insists that it does not appear on the face of the complaint that this offence was committed within this Commonwealth, and that, for that reason, it does not appear to be within the jurisdiction of that court. But the complaint, although it does not in terms say that the county of Suffolk is in this Commonwealth, is nevertheless brought in the name of the Commonwealth, for the violation of a specific statute of the Commonwealth, in Boston in the county of Suffolk, and the court is bound judicially to take notice of the fact that Suffolk is one of the counties of the Commonwealth. The want of a formal caption, or marginal entry of venue, is a matter of no importance in such a state of the case. *Commonwealth v. Quin*, 5 Gray, 478. The venue is sufficiently given in the body of the complaint to deprive this objection of all force. The point that it does not appear on the face of the complaint that the defendant was not a married woman was not insisted on in the argument, and is plainly untenable as an objection. As to the point that the complaint does not appear to have been sworn to in this Commonwealth, it is enough to say that it is certified by the clerk of the municipal court of the city of Boston, in the county of Suffolk, and that we are bound judicially to take notice, not only of the existence of such a court, but also of its local situation and jurisdiction in a city and county within the limits of the Commonwealth. *Commonwealth v. Wingate*, 6 Gray, 485.

Exceptions overruled.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, John Harvey, claimant.

In the provisions of the St. of 1869, c. 415, § 44, for the making to "a justice of the peace or police court" of a complaint of the keeping of intoxicating liquors for unlawful sale and for the issue of a search warrant by "such justice or court" upon proof of probable truth of the complaint; the phrase "police court" designates the tribunal by its character and jurisdiction, without regard to its style.

The municipal court of the city of Boston is a police court within the meaning of the St. of 1869, c. 415, § 44.

By the St. of 1869, c. 17, § 2, the municipal court of the city of Boston has concurrent jurisdiction with the municipal court for the southern district of the city of Boston of complaints on the St. of 1869, c. 415, § 44, for causes arising in said southern district.

A record of proceedings in a police court upon a complaint on the St. of 1869, c. 415, § 44, which sets forth the complaint as subscribed by the two complainants and indorsed with a certificate of the clerk of the court as "received and sworn to;" and which, in the preamble of the search warrant, sets forth that the complaint was made "on oath" by said two complainants, and that they were both of full age and competent to testify; sufficiently shows that the complainants both signed the complaint and were both sworn.

The adjudication of a police court, to which a complaint is made on the St. of 1869, c. 415, § 44, preliminary to the issue of a search warrant, that there is probable cause to believe the complaint to be true, is conclusive and final.

COMPLAINT on the St. of 1869, c. 415, § 44, by William Mooney and Benjamin H. Linscott, "to the justices of the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business within and for said county," for a warrant of search for certain intoxicating liquors.

This complaint alleged that on July 7, 1869, the liquors, which it described, "were, and still are, kept and deposited by John Harvey of said Boston, in a certain dwelling-house situate on Portland Street, and numbered 57 on said street in said Boston, and occupied by said Harvey as a place of common resort kept therein," and that they were intended by Harvey for unlawful sale in this Commonwealth; and continued thus: "And I, William Mooney, one of the above named complainants, on oath say, that I have reason to believe, and do believe, that intoxicating liquor, such as is above mentioned, has been sold in the house above mentioned by the occupant of said house, and with the consent and permission of the occupant of said house, contrary to law within one month next before this day, and

that said liquor above mentioned is now kept in said house for sale by said Harvey contrary to law; and my belief aforesaid is founded on the following facts and circumstances: that sales of intoxicating liquors have been made in said dwelling-house within the time specified, and that a public bar-room is kept and maintained therein." It was then subscribed both by Mooney and Linscott; and was indorsed with a certificate of the clerk of the court as follows: "Received and sworn to at said Boston, before said court, this 7th day of July, in the year 1869; and it appears to said court that there is probable cause to believe the foregoing complaint to be true."

On this complaint the court issued a warrant of search, which recited that, "whereas William Mooney and Benjamin H. Linscott," "both of full age and competent to testify," on July 7, 1869, at Boston, in behalf of the Commonwealth, "on oath complained" to the court, &c., (setting forth here all the allegations of the complaint, except the special affidavit of Mooney above quoted,) "and William Mooney, one of the said complainants, has duly made oath," &c., (setting forth here the allegations of that affidavit,) "and whereas it appears to said court, on the complaint aforesaid, that probable cause has been shown for the issuing of a warrant of search thereupon," therefore the officers were required to search "said dwelling-house," and make seizure, &c. But it was nowhere alleged, either in the complaint or the warrant, that said dwelling-house was not in the southern district of Boston.

On this warrant, certain intoxicating liquors, and the vessels in which they were contained, were seized upon the search of the premises described, and, upon the return of the warrant into the court from which it was issued, the property seized appearing to exceed twenty dollars in value, notice was ordered to be given to Harvey to appear in the superior court, pursuant to § 56 of the statute.

In the superior court, Harvey appeared as claimant, and filed a motion to quash the proceedings for the following reasons: 1. "that it does not appear that the complaint was made before a justice of the peace or police court, or that the warrant of

search was issued by a justice of the peace or police court, as the law requires, and the complaint was not so made;" 2. "that it does not appear, by or from said complaint, that the court below had jurisdiction of the offence set forth, or that the alleged offence and keeping of said liquors and vessels was not committed, had and done within the southern district of the city of Boston;" 3. "that it does not appear from the complaint herein, that either of the complainants severally swore to the complaint, or that they made oath or affirmation thereto, or that they signed the same." Thereupon, by agreement of the claimant and the attorney for the Commonwealth, the questions of law arising on this motion were reported by *Scudder, J.*, before verdict, for the determination of this court.

C. F. Donnelly, for the claimant.

J. C. Davis, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

WELLS, J. 1. The St. of 1869, c. 415, § 44, designates the tribunal that is authorized to receive complaints, by its character and jurisdiction, and not by the name it may happen to bear. In this sense, the "municipal court of the city of Boston" is a police court.

2. By St. 1869, c. 17, § 2, the municipal court of the city of Boston has concurrent jurisdiction with the municipal court for the southern district of the city of Boston, over cases of this nature arising in said southern district. The exclusive jurisdiction intended by said section has reference to the exclusion of other police courts, as provided in Gen. Sts. c. 116, § 12.

3. We think it sufficiently appears by the record, of which the complaint is a part, that the complainants both signed the complaint and were both sworn. If they were sworn at all their oaths were several, and not joint.

It does not appear that the court which issued the warrant "inferred probable cause" from the complaint solely; and we cannot assume that the fact was so. But if it was so, the complaint contains, in addition to that which charges the offence, an affidavit of facts upon which such "reasonable cause to believe" might properly be found and certified by the court. The

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statute, § 45, contemplates that the facts should be so recited; and although the justice or court may require further evidence, it is only necessary that the probable cause should be made to appear to the satisfaction of such justice or court. We cannot go behind the certificate. *Motion to quash overruled.*

COMMONWEALTH vs. JOHN HARVEY.

A record of proceedings upon a criminal complaint which sets forth that the defendant on his arraignment was "asked by the court whether he guilty or not guilty of the offence charged upon him;" sufficiently shows that the defendant was asked to plead to the charge.

COMPLAINT on the St. of 1869, c. 415, to the municipal court of the city of Boston, against the claimant in the case next preceding this, for keeping intoxicating liquors for unlawful sale. By the record certified to the superior court on appeal, it was set forth that in the municipal court the complaint was in open court read to the defendant and he was "asked by the court whether he guilty or not guilty of the offence charged upon him," "and the said Harvey refuses to plead to said complaint, and it is ordered by the court that a plea of not guilty be entered for said Harvey, who thereof puts himself on trial," &c., and was found guilty and appealed. Thereupon, in the superior court the defendant filed a motion to quash the proceedings on six grounds, the fifth of which was, "that it does not appear from the record of the court below, where the complaint was made, that the defendant was asked to plead to the charge or offence in said complaint set forth, or that he was required to plead by said court below, or that he had any opportunity so to do, or that he did plead in said court;" and by consent of the defendant and the attorney for the Commonwealth the questions of law arising on this motion were reported by *Scudder, J.*, before verdict, for the determination of this court.

C. F. Donnelly, for the defendant.

Commonwealth v. Hallett.

J. C. Davis, Assistant Attorney General, (*C. Allen*, Attorney General, with him,) for the Commonwealth.

WELLS, J. The first four grounds for the motion to quash are waived upon the argument here. The fifth ground is based upon a clerical omission of the word "is," which does not leave the meaning of the record in doubt. It clearly appears that the defendant was asked whether guilty or not guilty; that he refused to plead; that the court ordered the plea of "not guilty" entered for him; and that upon that plea he was tried and convicted. The sixth ground is disposed of in the case of *Commonwealth v. Intoxicating Liquors*, ante, 448.

Motion to quash overruled.

COMMONWEALTH vs. NATHAN F. HALLETT.

To a complaint on the St. of 1869, c. 415, for making an unlawful sale of intoxicating liquor, it is no defence that the seller believed that what he sold was a medicine or was not intoxicating.

A defendant who has been convicted of making an unlawful sale of intoxicating liquor under the St. of 1869, c. 415, cannot for the first time at the argument of exceptions in this court set up that the liquor which he sold was cider.

COMPLAINT on the St. of 1869, c. 415, to a trial justice in Barnstable, for an unlawful sale of intoxicating liquor to Toby Scoby. At the trial, on appeal, in the superior court, before *Dewey, J.*, Scoby testified that the defendant sold to him a bottle containing what was called "plantation bitters;" and that he drank all the contents of the bottle the next day and thereby got grossly drunk. "The defendant, being called as a witness in his own behalf, and having admitted the sale, was asked by his counsel whether he in good faith sold the article as a medicine, and whether it was generally sold as a medicine. The judge excluded both inquiries, and ruled that the defendant might show that the article sold was a medicine, or that it was not intoxicating liquor, but that his statement that he sold it as medicine in good faith, and proof that it was generally sold as a

medicine, would not be a defence; that it was his duty to ascertain what was the character of the article he sold, and if he sold it without ascertaining its true quality, and it was intoxicating liquor, he would be liable therefor. And the judge instructed the jury to the same effect, and that the question was not what the article was sold as, but what it really was; that if the article sold was a medicine, intended and put up in good faith as a medicine, though it may have contained some intoxicating liquor essential to the medicinal preparation, then the defendant would not be liable." The defendant was found guilty, and alleged exceptions. It did not appear by the bill of exceptions whether or not the liquor was sold to Scoby at a public bar or to be drunk on the premises.

J. M. Day, for the defendant, argued that the instruction that, if the defendant sold the liquor without ascertaining its quality, and it was intoxicating liquor, he would be liable, was too broad; for by § 26 of the St. of 1869, c. 415, cider was regarded as an intoxicating liquor, while under § 29 a sale of cider not at a public bar nor to be drunk on the premises was lawful.

C. Allen, Attorney General, for the Commonwealth. It is immaterial whether the defendant knew or believed plantation bitters to be intoxicating or not. He was bound at his peril to ascertain. *Commonwealth v. Boynton*, 2 Allen, 160. *Commonwealth v. Farren*, 9 Allen, 490. *Commonwealth v. Goodman*, 97 Mass. 119, 120. *Commonwealth v. Raymond*, Ib. 569. *Commonwealth v. Emmons*, 98 Mass. 6, 8. This was the only question raised at the trial; and no other is now open. *Commonwealth v. Stahl*, 7 Allen, 303, 304. *Alexander v. Carew*, 13 Allen, 71.

CHAPMAN, C. J. The defendant had no right to sell intoxicating drinks, even if he sold them in good faith as a medicine; so that the evidence on that subject was immaterial. Nor was the question whether he knew the character of the liquor material.

The instructions given to the jury are not to be understood as applicable to cider, because it was not pretended that the article sold was cider.

Exceptions overruled.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, Walter H. Foster & another, claimants.

When proceedings on a complaint under the St. of 1869, c. 415, § 44, are quashed for defects in matters of form, the owner of the intoxicating liquors seized upon the warrant is entitled under § 53 to an order for their return.

COMPLAINT on the St. of 1869, c. 415, § 44, to the municipal court of the city of Boston, for a warrant of search for certain intoxicating liquors alleged to be kept for unlawful sale by Walter H. Foster and Joseph Foster. On the warrant, seventy-eight gallons of whiskey, ninety-five gallons of ale, and various quantities of other intoxicating liquors, and the vessels of various kinds in which they were contained, were seized; and Walter H. Foster and Joseph Foster were summoned as claimants. They appeared accordingly in the superior court, and made their claim to the property seized; and the proceedings against it were quashed on their motion for formal defects in the complaint and warrant. Thereupon they further moved for an order for the return of the liquors; but *Pitman, J.*, overruled this motion, and they alleged exceptions.

N. St. J. Green, for the claimants.

C. Allen, Attorney General, for the Commonwealth.

MORTON, J. The fifty-first section of chapter 415 of the acts of 1869 provides that, "at the time and place designated in the notice, the person complained against, or any person claiming an interest in the liquor or vessels seized, or any part thereof, may appear and make his claim verbally or in writing, and a record of his appearance and claim shall be made, and he shall be admitted as a party in the trial. Whether a claim as aforesaid is made or not, the justice or court shall proceed to try, hear and determine the allegations of such complaint, and whether such liquors and vessels, or any part thereof, are forfeited. If it appears that the liquor or any part thereof was, at the time of making the complaint, owned or kept by the person alleged therein, for the purpose of being sold in violation of this act, the court or justice shall render judgment that such and so

much of the liquor so seized as was so unlawfully kept, and the vessels in which it is contained, be forfeited to the Commonwealth." The fifty-second section makes provision for the disposition to be made of liquors adjudged to be forfeited. The fifty-third section provides that, "if it is not proved on the trial that all or part of the liquor seized was kept or deposited for sale contrary to law, the justice or court shall issue a written order to the officer having the same in custody, to return so much thereof as was not proved to be so kept or deposited, with the vessels in which it is contained, to the place as nearly as may be from which it is taken, or to deliver the same to the person entitled to receive it; which order the officer, after executing the same, shall return to the justice or court, with his doings indorsed thereon."

These enactments appear to be designed to make provision for two alternatives; one, where it is shown that the liquors seized are liable to forfeiture; the other, where it is not so shown. We are of opinion that the fifty-third section was intended to apply to cases like the one at bar, in which the proceedings are quashed by reason of formal defects in the complaint, or other irregularities not affecting the jurisdiction of the court, as well as to cases in which, upon the trial of an issue of fact, there is a failure to prove that the liquors seized are liable to forfeiture. The language admits of this construction; and, thus construed, the statute makes provision, in all cases properly before the court, for the disposition of the property, which by the service of the search warrant is placed in the custody of the law and the control of the court; while the opposite construction leaves the disposition of the property entirely unprovided for in a large class of cases constantly arising in the practical administration of the law. Unless the court orders a return, the only remedy of the owner is a suit against the officer, and it is not to be presumed that the legislature intended a result so vexatious both to the owner and to the officer having the custody of the property. All the reasons, of justice and of policy, in favor of issuing such order in any case, apply with equal force to cases like the present. It would have a tendency

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to prevent litigation, to preserve the rights of the owner, and to protect the officer. We are therefore of the opinion that the motion of the claimant for an order for a return should have been granted.

The decision of this court in *Ewings v. Walker*, 9 Gray, 95, does not conflict with these views. In that case, the notice issued by the police court was not returned to the court of common pleas, so that the latter court acquired no jurisdiction of the case, and the complaint was therefore abated, and no order for a return issued. In that state of facts, the plaintiff demanded his property of the officer having the custody of it, who refused to deliver it up; and the court held that the owner could maintain tort for its conversion. The question was not raised whether, in a case like the one at bar, it was the duty of the court to issue an order for a return. The remarks in the opinion, as to the provisions in relation to an order for the return of liquors, if they can be construed so as to include this case, have not the weight of an adjudication, as the question was not involved in the decision of that case. *Exceptions sustained.*

ATTORNEY GENERAL vs. JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON.

The municipal court of the city of Boston has jurisdiction to enforce the destruction of gaming apparatus and implements seized in a gaming-house on a searchwarrant issued from and returned to that court, under the Gen. Sts. c. 170, §§ 1-5, and St. of 1869, c. 364; and also the forfeiture and sale of furniture, fixtures or personal property seized, on the warrant, in such a house at a time when persons were there found playing at an unlawful game.

A court of competent jurisdiction, to which is returned a searchwarrant under the Gen. Sts. c. 170, §§ 1-5, and St. of 1869, c. 364, on which gaming apparatus and implements have been seized in a gaming-house, cannot lawfully cause them to be destroyed without first causing such notice to be given as is reasonable and likely to inform the parties interested, and affording to them an opportunity to be heard; and furniture, fixtures or personal property seized on the warrant cannot lawfully be forfeited and sold, except on written application, describing the things, and when, where and wherefore they were seized, and sufficient generally to inform any claimant what it is to which he must answer

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in order to defend his right, and upon a judicial hearing with reasonable notice to claimants and opportunity for them to have their rights determined by jury trial.

It seems, that money, seized in a gaming-house on a searchwarrant under the Gen. Sta. c. 170, §§ 1-5, and St. of 1869, c. 364, is not subject to forfeiture.

PETITION, filed November 15, 1869, for a writ of *mandamus* to be directed to the justices of the municipal court of the city of Boston for the transaction of criminal business.

The petition alleged that on August 2, 1869, Harrison D. Littlefield presented to said justices his complaint under oath, "setting forth that he believed that gaming apparatus and implements were used, kept and provided to be used, in unlawful gaming, in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered 9 in Howard Street, in said Boston, that is to say, in the rooms in the second story of said building, and also that furniture, fixtures and personal property were contained therein, and might be found therein at a time when persons were there found playing at unlawful games, which said rooms were occupied by some person whose name was to said complainant unknown, and praying for a warrant to search therefor and to seize the same; that upon this complaint a warrant was duly issued, addressed to the sheriff of Suffolk, his deputies, and the constables and police officers of said city of Boston, and the constable of the Commonwealth, or either of his deputies, commanding them to enter said premises and search for and seize said gaming apparatus and implements, and if the same, or any part thereof, should be found on such search, to bring said apparatus and implements so found, together with the body of the person or persons in whose possession found, if they might be found in said city, before said court, to be disposed of and dealt with as to law and justice should appertain, and in like manner to search for and seize all the furniture, fixtures and personal property found in the rooms described, at the time when any persons were there found playing at any unlawful game, and to bring said furniture, fixtures and personal property before said court, to be disposed of and dealt with as to law and justice should appertain; that said warrant was duly committed to said Littlefield, a deputy of the constable of the Com-

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monwealth, for service, who duly made return thereon, that he on said second day of August entered and searched said premises, and there found and seized certain implements of unlawful gaming, and certain personal property and furniture, as particularly set forth in his said return, and that he had the same before the court, and prayed for an order to dispose of the same, legally, for the reason that at the time of said seizure an unlawful game was being played for money, and said game was stopped by him; that afterwards said Littlefield made formal application to said court by motion that said gaming apparatus and implements so found and seized be burned or otherwise destroyed by the constable of the Commonwealth, and that a decree of condemnation might issue according to law, as authorized in the St. of 1869, c. 364, § 3, against the furniture and personal property so found and seized; and that said motions, having been presented to the said court in writing, and placed on file with the records of said court, were thereupon disallowed by said court, for the reason that said court has no jurisdiction in the premises."

It further alleged "that by the Gen. Sts. c. 170, §§ 1-5,* and

* By the Gen. Sts. c. 170, § 2, any magistrate authorized to issue warrants in criminal cases may, upon complaint made on oath as described in § 1, "issue searchwarrants, when satisfied that there is reasonable cause, in the following cases, to wit: First. To search for and seize counterfeit or spurious coin, forged bank notes, and other forged instruments, or tools, machines or materials, prepared or provided for making either of them. Second. To search for and seize books, pamphlets, ballads, printed papers, or other things, containing obscene language, or obscene prints, pictures, figures or descriptions, manifestly tending to corrupt the morals of youth, and intended to be sold, loaned, circulated or distributed, or to be introduced into any family, school or place of education. Third. To search for and seize lottery tickets or materials for a lottery, unlawfully made, provided or procured for the purpose of drawing a lottery. Fourth. To search for and seize gaming apparatus or implements used, or kept and provided to be used, in unlawful gaming, in any gaming-house, or in any building, apartment or place resorted to for the purpose of unlawful gaming."

By § 3, "all searchwarrants shall be directed to the sheriff of the county or his deputy, or to any of the constables of a city or town, commanding such officer to search, in the daytime, the house or place where the stolen property or other things for which he is required to search are believed to be concealed

by the St. of 1869, c. 364,* the justices of the said court have jurisdiction in the premises; and that if they fail to exercise the same there will be a manifest failure of justice in the administration of the criminal laws of the Commonwealth;" and therefore the petitioner prayed that a writ of *mandamus* might be issued, directed to said justices, "requiring them to proceed and take jurisdiction of the said matters so brought before them, and

(which place and property, or things to be searched for, shall be designated and described in the warrant,) and to bring such stolen property, or other things, when found, and the persons in whose possession they are found, before the magistrate who issued the warrant, or some other magistrate or court having cognizance of the case."

By § 4, provision is made for the allowance of searches in the night time.

By § 5, "when an officer, in the execution of a searchwarrant, finds stolen or embezzled property, or seizes any of the other things for which a search is allowed by the provisions of this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all the other things seized by virtue of such warrants shall be burnt or otherwise destroyed under the direction of the court or magistrate."

* By the St. of 1869, c. 364, § 2, the Gen. Sts. c. 170, § 2, are amended so "that all provisions relating to the search for and seizure of gaming apparatus or implements used, or kept and provided to be used, in unlawful gaming, in any gaming-house, or in any building, apartment or place resorted to for the purpose of unlawful gaming, shall also apply to the search for and seizure of all the furniture, fixtures and personal property found in such gaming-house, building, apartment or place, at the time when any persons are there found playing at any unlawful game."

By § 3, "after the seizure of any furniture, fixtures or personal property, as provided in the preceding section, application shall be made to a court of competent jurisdiction for a decree of condemnation of the same, and if, upon the hearing of said application, it shall be found and adjudged that the same, or any part thereof, was used as the furniture, fixtures or personal property of such gaming-house, building, apartment or place, and was found therein at a time when any persons were there found playing at any unlawful game, the same shall be adjudged forfeit, and the constable of the Commonwealth, or sheriff, or their deputies, shall sell the same in such manner as the court shall order, and, after deducting all costs and expenses allowed by the court, shall pay the balance of the proceeds of such sale to the use of the county."

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to consider and determine whether or not the said gaming implements so found and seized should be burned or otherwise destroyed, under the direction of said court; and whether or not a decree of condemnation should issue against said furniture and personal property so found and seized, and the same be adjudged forfeit and sold under the direction of said court."

The justices of the municipal court of the city of Boston answered "that they admit the truth of the facts stated in said petition, and of all and singular the matters and things therein alleged, except as follows, to wit: they do not admit that jurisdiction of the said case is conferred upon them by the Gen. Sta. c. 170, §§ 1-5, or by the St. of 1869, c. 364, as alleged in said petition, or by any other provision of law, or that they have any jurisdiction of the said case;" and they prayed for the judgment of this court upon the question whether they had such jurisdiction, and submitted themselves to its order and direction.

The case was reserved by the chief justice on the petition and answer for the consideration of the full court, and was submitted to their determination on a written argument filed by the attorney general, and a copy filed by the respondents of their opinion, rendered by *Hurd, J.*, in the refusal of the complainant's motions. The complaint, searchwarrant, officer's return and motions are printed in the margin.*

* "To the justices of the municipal court of the city of Boston, holden at said Boston, for the transaction of criminal business, within and for the county of Suffolk, Harrison D. Littlefield, of the city of Boston, in the county of Suffolk, deputy state constable, on oath informs the said justices, that he believes that gaming apparatus and implements are used, kept and provided to be used in unlawful gaming in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered 9 in Howard Street in said Boston, that is to say, in the rooms in the second story of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein at a time when persons are there found playing at unlawful games, which said rooms are occupied by some person whose name is to your complainant unknown, and prays for a warrant to search therefor and to seize the same.

"Harrison D. Littlefield.

"Received and sworn to, before said court, this second day of August in the

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AMES, J. The searchwarrant in the present case appears to have been issued in pursuance of the provisions of the Gen. Sts.

year of our Lord one thousand eight hundred and sixty-nine. Jacob Homer, Assistant Clerk."

"Suffolk, to wit: [Seal.] Commonwealth of Massachusetts.

"To the sheriff of our county of Suffolk, his deputies, and the constables and police officers of our city of Boston, and to the constable of said Commonwealth, or either of his deputies, Greeting.

"It now appearing to the said court that there is reasonable cause for the belief in the above complaint, we command you, and each of you, forthwith, with necessary and proper assistants, to enter, in the daytime or in the night time, into the rooms mentioned in the above information, and there diligently to search for and to seize said gaming apparatus and implements; and if the same, or any part thereof, shall be found on such search, that you bring the said apparatus and implements so found, together with the body of the person or persons in whose possession found, if they may be found in our said city, before said court, to be disposed of and dealt with as to law and justice shall appertain. You are also commanded in like manner to search for and to seize all the furniture, fixtures and personal property found in the rooms described in the above complaint, at the time when any persons are there found playing at any unlawful game, and to bring said furniture, fixtures and personal property before said court, to be disposed of and dealt with as to law and justice shall appertain. You are also commanded, in like manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said gaming apparatus and implements, furniture, fixtures, personal property and persons, or either of them.

"Witness, John William Bacon, Esquire, at Boston, this second day of August, in the year of our Lord one thousand eight hundred and sixty-nine.

"Jacob Homer, Assistant Clerk."

"Suffolk, ss. Boston, August 2, 1869. By virtue of this warrant, I have this day entered and searched the within described premises, and there found and seized the following described implements of unlawful gaming, to wit, one faro table, one lay-out, one shuffling board, one cue case, eight cue cards, nine packs cards, four card cases, two deal boxes, forty cappers, three hundred and ninety checks, and one card-table cover; also the following described personal property, furniture, &c., to wit, one sideboard and one marble top, one pine table, one hair-seat divan, one common lounge, eight cane chairs, one looking-glass, one plated pitcher, one lounge cushion, one tub, one towel, one fire shade, and one revolver; also one hundred and thirteen dollars and fifty-two cents in currency, taken from the faro bank; and now have the same before the court, and pray for an order to legally dispose of the same, for the reason that at the time of the above seizure of personal property an unlawful game was being

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c. 170, §§ 2, 3, 5, as modified by the subsequent St. of 1869 c. 364. The application and complaint were in proper form describing with all due precision the place that was to be searched, and giving, as the reason for the proposed search, the belief of the complainant that gaming apparatus and implements were used, and kept and intended to be used, in the place described as a common gaming-house; the warrant issued upon that complaint recites that it appears to the court that there is reasonable cause for that belief; and so far the proceedings appear to be regular and in conformity to the statute. The officer holding this warrant proceeds to make the search, and to seize the gaming apparatus and implements, and also the furniture, fixtures and personal property contained in the place searched, (which under the St. of 1869, c. 364, he is authorized to seize at the same time,) and he returns his warrant, with the property seized by virtue of it, into the court from which it issued. It does not appear from his return that he arrested anybody upon

played for money, and said game was stopped by me. Harrison D. Littlefield, Deputy State Constable."

"Commonwealth of Massachusetts. Suffolk, ss. Before the municipal court of the city of Boston, holden for the transaction of criminal business within and for said county. Boston, August 2, 1869. Commonwealth, on complaint of Harrison D. Littlefield, vs. Gaming Implements, etc. Now comes Harrison D. Littlefield, the officer who makes return on said warrant, and moves the court that the gaming apparatus and implements by him found and seized by virtue of said warrant in a certain building situated No. 9 Howard Street in said city, which said building is occupied by some person or persons unknown to said Harrison D. Littlefield, be burned or otherwise destroyed by Edward J. Jones, the constable of said Commonwealth. Harrison D. Littlefield, Deputy Constable of the Commonwealth."

"Commonwealth of Massachusetts. Suffolk, ss. Before the municipal court of the city of Boston holden for the transaction of criminal business within and for said county. Boston, August 2, 1869. Commonwealth, on complaint of Harrison D. Littlefield, vs. Gaming Furniture, etc. Now comes Harrison D. Littlefield, the officer who makes return on said warrant, and moves the court that a decree of condemnation may issue according to law, as authorized in § 3 of chapter 364 of the acts of 1869, against the furniture, fixtures and personal property found and seized by virtue of said warrant, as set forth in said return. Harrison D. Littlefield, Deputy Constable of the Commonwealth."

that warrant, although by the law he was authorized, and by the warrant he was required, to arrest not only the person or persons in whose possession the apparatus, &c., were found, but also all persons who were found present at the playing of any unlawful game in the place in question. We are therefore left to infer that all persons so present, at the time when the officer "stopped the game" as stated in his return, made their escape, and that the owner of the apparatus and other things seized under the warrant, or the person in possession of them, is some person unknown. No party defendant is before the court, and of course no issue is joined, and no trial in any constitutional or proper sense of the term is had. There is nothing before the court to be proceeded against, except the property seized; and the question then arises, what is to be done with that property?

The 170th chapter of the General Statutes authorizes, with certain preliminary formalities and conditions, the issue of search-warrants for the seizure of personal property, stolen, embezzled or obtained by false tokens or pretences; for counterfeit money and counterfeiters' tools; for obscene books and pictures; for lottery tickets; and for gaming apparatus and implements. It is the duty of the officer serving the warrant to bring it, with the property and "other things" so seized, and with the persons having such stolen property and "other things" in their possession, before the magistrate who issued the warrant, or other magistrate or court having cognizance of the case. In the present case, the warrant was properly returned into the municipal court of the city of Boston, not only as the court from which it issued, but as the court having "cognizance" of the case. That court has jurisdiction concurrently with the superior court "in all offences punishable by fine not exceeding one hundred dollars, or imprisonment in the jail or house of correction not exceeding one year, or both said punishments." Gen. Sts. c. 116, § 18. St. 1866, c. 279. The punishment for the offence of keeping a common gaming-house is within those limits. Gen. Sts. c. 85, § 7. The purpose for which the property and other things so taken are to be brought into court seems to be, by the Gen. Sts. c. 170, § 4, that they shall be safely kept, under

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the direction of the court or magistrate, so long as necessary for the purpose of being produced or used as evidence in any trial. The section then goes on to provide that, as soon as may be thereafter, that is to say, as soon as may be after it shall have ceased to be necessary to keep them for the purpose of being produced or used as evidence in a trial, the stolen and embezzled property shall be restored to the owner, and the other things seized by virtue of such warrant shall be burnt or otherwise destroyed under the direction of the court or magistrate.

In the present case, nobody has been arrested; nobody is accused by name or description of any offence; nobody is to be brought to trial; and the things seized are not wanted to be used as evidence. The terms of the statute, taken literally would seem to require their summary destruction in such a case, without any inquiry as to their ownership; and apparently the court or magistrate is to decide on mere inspection, and without any formality of notice or trial, whether the articles brought in with the warrant are correctly and truly described, in the complaint, as counterfeit money, or as obscene books or prints, or as gaming implements, as the case may be. But we think that the statute is not to be taken in quite such a narrow and literal sense. With regard to the various articles that may be seized upon a searchwarrant, it is easy to see, for instance, that it must be an important question, and may be a difficult matter to decide, whether bills that have been seized as counterfeits are spurious or genuine; or whether tools seized as counterfeiters' tools are really such, or honest and lawful implements. Even in the case of books or prints alleged to be obscene, there might be different opinions among different men and under varying circumstances. Pictures and illustrations, that might be considered unobjectionable in scientific and philosophical treatises upon medicine or surgery, might be highly indecent and immoral if intended for public circulation. Some of the finest works of art in painting and sculpture, though greatly admired by artists and critics, might be considered by a portion of the community as wholly improper for public exhibition. The general rule undoubtedly would be, that the magistrate would have

no practical difficulty in deciding whether the alleged counterfeit money, or obscene books or prints, were of such a character as not to be capable of being applied to any lawful or honest use; of such a character that the law will not recognize them under any circumstances as property, or entitled as such to its protection. But cases may arise, in which there would be much practical difficulty in drawing the exact line, in a matter in which no exact standard of judgment can be prescribed in advance. So also in the case of gaming apparatus and implements, they may happen to be composed of valuable materials, capable in some other form of being applied to lawful and proper uses; they may be entirely harmless and innocent in themselves without any change of form, and may have value as merchandise in honest hands. If at the time of their seizure the owner or keeper should be known, and arrested to be dealt with by indictment or other criminal proceeding, the trial of the case against him would of course involve a judicial investigation into the character and nature of the things seized; but in a case in which the offender is not known, and nothing is before the court to be proceeded against but the things themselves, those things being in the custody of the law, and for that reason not in a position for the time being to be dangerous to the public morals, there would seem to be no reason why notice should not be given before passing and carrying into effect a decree that they should be burnt or otherwise destroyed. The statute does not in terms require that such notice should be given, but it is entirely contrary to the spirit of our laws that property which may be valuable should be literally destroyed without some attempt to notify the owner in season to give some explanation or offer some excuse, or to have a hearing on the question whether the property can be said to be of that class which the statute intends to condemn.

In the case at bar, the articles described in the return upon the warrant, and seized as falling within the description of gaming apparatus and implements, are in the custody and subject to the jurisdiction of the municipal court of the city of Boston. They are not needed for the purpose of being used as evidence

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on any trial. We are of opinion that as to those articles it is within the power, and is also the duty, of that court, upon proper application, to order their destruction, provided that the court shall be satisfied that they are in fact gaming apparatus and implements, and provided also that notice be first given to the owner or keeper, if known, to appear and show cause why they should not be destroyed. If the owner be unknown, notice should be given by advertisement in some public newspaper published in the county, describing the articles, and the time, place and cause of their seizure, and naming the time at which the court will pass upon the question of their condemnation. In other words, the notice should be such as in the judgment of the court would be reasonable, and likely to convey the information to any party in interest. The owner certainly ought to have an opportunity to raise the question whether the very general terms used in the statute on this subject include everything that can be used for gaming purposes, or only such things as have little or no value except what may be found in their special adaptation to such purposes. It is easy to see that there might be cases in which that question would be altogether too complex to be decided by mere inspection.

With regard to the other articles seized at the same time, the question presents itself in a different aspect, and depends upon other considerations. The St. of 1869, c. 364, has greatly enlarged the range of the searchwarrant, and made it a much more efficient instrument for the suppression of establishments of this particular kind. The officer, to whom the warrant is committed, is required not only to seize the gaming apparatus and implements, but also "the furniture, fixtures and personal property, found at such gaming-house" "at the time when any persons are there found playing at any unlawful game." But articles falling within this latter description are not in themselves mischievous or objectionable. They are seized merely because they constitute part of the equipment of a gaming-house; but they do not on that account cease to be property and to have a value, for proper uses, which the law will recognize. As to them, the law that may be supposed to provide

for the summary suppression of nuisances, or the destruction of articles that are under all circumstances dangerous or prejudicial to the public morals, can hardly be said to be applicable. The law does not require that they should, in any event, be burnt or otherwise destroyed, as if they were not capable of being put to any good use; but that they shall be forfeited and sold for the benefit of the county treasury, on the ground that at the time of their seizure they were appropriated to a bad and unlawful use. The statute which has introduced this new provision into the law upon this subject does not point out with any precision the mode of proceeding in order to enforce the forfeiture. It merely provides, in very general terms, that there must be an application to a court of competent jurisdiction for a decree of condemnation, and that, upon the hearing upon said application, if it shall be found and adjudged, &c., the property shall be adjudged forfeit.

In the case at bar, the property in question was seized by virtue of a warrant from the municipal court, and is returned with the warrant into that court. That court has full jurisdiction over the offence for which the property became liable to seizure. The custody of the goods taken is incident to a lawful process issued from and returnable to that court. The keeper of the alleged gaming-house not having been ascertained or arrested, there is no reason why that process, and the goods seized by virtue of it, should be transferred to any other court. The statute plainly intends that there shall be a proceeding *in rem* against the property itself; and it is difficult to see why that proceeding, in the absence of any statutory regulation to the contrary, should not be had in the court which has the lawful custody of the property which is to be proceeded against. The provisions of the Gen. Sts. c. 153, do not in our judgment apply to the case at bar. That chapter is intended to apply to seizures without process; it gives a remedy, in the nature of a civil action, to any prosecutor (if he may be so called) who shall see fit to make a seizure for the purpose of recovering forfeited goods for his own benefit and advantage; it makes him liable not only to costs, but also to damages, if he does not succeed in estab-

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ishing his claim. The provisions of that chapter are wholly inapplicable to the case of goods, seized upon a searchwarrant, returned and placed in the custody of the law, and proceeded against not for the private benefit of a prosecutor, but claimed to be forfeited to the public for a criminal offence. The St. of 1869 certainly was not intended to compel the police officer, who serves a searchwarrant, to prosecute a civil action at his own expense and risk as to damages and costs. The proceeding against the property in such a case seems to be incident to and dependent upon the process issued from the municipal court, and it is difficult to see why (there being no defendant personally on trial) it may not be effectively prosecuted in that tribunal.

It must be admitted that the St. of 1869, c. 364, § 3, is unfortunately somewhat vague and indistinct as to the mode of proceeding in such a case. We may safely assume that it never could have been the intention of the legislature that the unascertained owner of all this furniture and other property, who may be wholly ignorant of its seizure, and innocent of all participation in its unlawful use, is to be deprived of it without notice, without trial and without appeal, upon a mere *ex parte* motion, upon a summary process, in which the only evidence is the oath of some person that he believes the place in which it was found was a common gaming-house. There can be no doubt that, in order to fall within the familiar provisions of our Constitution, the application, intended in the section above referred to, must be in writing, and must set forth the subject matter with such formality and detail that any claimant of the property shall have the means of knowing what it is proposed to have adjudged forfeit; when, where and on what ground it was seized; and generally, what it is that he is to answer to, in order to defend his right. The hearing and adjudication spoken of in the recent statute must be understood to mean a judicial hearing, with all its incidents, of notice, actual or constructive, trial, and the right of appeal to a jury if any claimant should see fit to appear and resist the application, or an inquiry by the court after default if he should not appear

We have therefore come to the conclusion that in a case like that at the bar the municipal court of the city of Boston is a court of competent jurisdiction, and may lawfully and properly proceed, to enforce the forfeiture provided for in the third section of the St. of 1869, c. 364. Upon a proper and formal application, we hold it to be the duty of that court, under such a state of facts, so to proceed. But a mere summary and *ex parte* motion, incidental to a process which is in its nature merely preliminary, and intended mainly for the seizure of the property for the purpose of bringing it within the jurisdiction of the court, is not the kind of application intended by the statute. There must be, as we have already said, a written application, describing the property, and setting forth all such particulars of time, place and cause of seizure as may fully inform the claimant what the charge is that he is to meet; and upon such application it would be the duty of the court to order such notice to be given as would be a proper preliminary to a judicial hearing, and such as shall reasonably give to the owner, whether known or unknown, a full opportunity to assert his rights. The motions which have been filed by the complainant do not come within this description, and for that reason do not furnish a proper foundation for any action on the part of that court.

With regard to the money seized by the officer, there seems to be no reason for saying that there is any legal authority for proceeding against it with a view to its forfeiture.

Petition dismissed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
JANUARY TERM 1870, AT BOSTON.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.	
HON. HORACE GRAY, JR.,	} JUSTICES.
HON. JOHN WELLS,	
HON. JAMES D. COLT,	
HON. SETH AMES,	
HON. MARCUS MORTON,	

MIDDLESEX COUNTY.

BENJAMIN W. DUNKLEE vs. JOHN CRANE.

A mechanics' lien under the Gen. Sts. c. 150, has priority over a mortgage executed after the making of the contract under which the lien is claimed.

MORTON, J. This is a petition for the enforcement of a mechanics' lien. It appears from the statement of facts that the petitioner performed labor and furnished materials actually used in the erection of several houses owned by the respondent, by virtue of a contract with him, and that the petitioner has complied with all the requirements of the statutes necessary to enable him to maintain this petition. After the contract was made, and while the work was in progress, the respondent mortgaged the premises to Daniel Simonds, who thereafterwar la, by

virtue of a power of sale contained in the mortgage, and for a breach of the condition thereof, sold them to George H. Simonds, who appears as claimant and resists the petition. The only question presented for our consideration is whether the petitioner's lien or the mortgage has priority.

The first section of chapter 150 of the General Statutes provides that "any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration or repair of any building or structure upon real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him." The third section provides that "such lien shall not avail or be of force against any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed." The statute contains no express provisions that the lien shall attach and have priority over mortgages and other incumbrances created after the contract, but such is the necessary implication. If it be not so, the provisions of the third section are entirely useless. The nature of the security intended to be created by the statute necessarily leads to this result. Any other construction would defeat the manifest purpose of the legislature to give to those who, by virtue of contracts with the owner, have by their labor and materials increased the value of his property, an interest in it until the debts due them for such labor and materials are paid.

We can have no doubt that, when the labor is performed or the materials furnished, the lien attaches and relates back to the time of the contract, and takes priority of all mortgages made subsequent thereto. *Howard v. Veazie*, 3 Gray, 233. *Howard v. Robinson*, 5 Cush. 119. *The Granite State*, 1 Sprague, 277.

The claimant relies upon the thirty-third section of chapter 150 of the General Statutes, which provides that "if the person for whom the work is done, or materials are furnished, has an estate for life or any other estate less than a fee simple in the

land, or if the property at the time of recording the statement is mortgaged or under any other incumbrance, the lien before provided for shall bind his whole estate and interest therein, in like manner as a mortgage would have done; and the creditor may cause the right of redemption, or whatever other right or estate the owner had in the property, to be sold and applied to the discharge of his debt, according to the provisions of this chapter." It may be admitted that this section, if construed independently of the other provisions of the statute, at the first view seems to give plausibility to the argument that the legislature intended to postpone liens to mortgages made before the recording of the statement, though made after the contract was entered into and the labor was performed under it. But, considered in its connection, as part of a system, it is apparent that such intention is not necessarily or naturally to be inferred.

This section does not purport to establish a rule to determine priorities between conflicting claims upon the property, or to fix the time when liens shall attach. It was enacted *alio intuitu*. The preceding sections furnish a remedy in cases where the person whose property is affected by the lien is the absolute owner, and provides that, if the lien is established, the court shall order a sale of the property. This provision is not applicable to cases in which the debtor has a less than an absolute estate, and therefore it was necessary to make provision for such cases. Accordingly the thirty-third section provides a remedy in cases where the person for whom the work is done has a less estate than a fee simple, or where the property is subject to a mortgage, or other incumbrance, which is preferred to the lien, and in which the creditor cannot sell the whole property, but only the interest to which his lien has attached.

We are of opinion that the provision, "if the property at the time of recording the statement is mortgaged," is intended to apply to mortgages named in the third section, that is, mortgages existing and duly recorded prior to the date of the contract under which the lien is claimed. This construction harmonizes the various provisions of the statute, and carries out the manifest intent of the legislature to give to the laborer an

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fectual security by a lien upon the property which his labor has created or enhanced in value.

Another consideration tends to strengthen this view. The thirty-third section is a reenactment of § 26 of chapter 117 of the Revised Statutes, which provides that if the land, at the time of recording the contract, is mortgaged or under any other encumbrance, the lien shall bind the whole estate and interest of the person who procures the work to be done, in like manner as a mortgage would have done, and the right of redemption may be sold to satisfy the lien.

No argument can be drawn from this provision of an intent to postpone the lien to a mortgage made after the contract under which the lien is claimed is recorded. On the contrary, the clear implication is that the lien has priority over such mortgages.

In the report of the commissioners on the revision of the statutes, no suggestion is made that they designed to change this provision, and it is not to be presumed that the legislature intended to make so vital a change in an important system of laws, unless such intention is manifested in clear language. *Francis v. Sayles*, 101 Mass. 435. We are therefore of opinion that the petitioner's lien has preference of the mortgage under which the respondent claims.

In the case of *Mulrey v. Barrow*, 11 Allen, 152, cited by the claimant, the question of the construction of the thirty-third section was not raised, probably because of no practical importance. It appears from an examination of the papers in that case, that the petitioner only claimed that his lien attached to the equity of redemption, and the question involved in the case was not brought to the attention of the court. The concluding statement in the opinion has not, therefore, the weight of an adjudication.

No other question is before us upon this report, and we cannot pass upon the rights of other creditors who have like liens, but the case must stand for trial in the superior court, where all such questions can be heard and determined.

Case to stand for trial.

I. S. Morse, for the petitioner.

G. A. Somerby, (*T. S. Dame* with him,) for George H. Simonds.

ANNE M. BARKER vs. JOHN FLOOD.

A mortgage is not discharged by its assignment to one of two tenants in common of the equity of redemption, and may be foreclosed by the assignee.

WRIT OF ENTRY to recover a parcel of land in Lowell. At the trial in the superior court, before *Rockwell, J.*, it appeared that Patrick Flood, being seised in fee of the demanded premises, mortgaged them in 1854 to Joshua Bennett, and in 1859 died intestate; that his sons, John Flood, (the tenant,) and Peter Flood, were his heirs; and that Peter Flood paid Bennett the amount due on the mortgage, took an assignment thereof to himself in 1860, made an entry to foreclose in 1861, a certificate of which was duly recorded, and in 1868 conveyed the premises to the demandant by a warranty deed.

The judge ruled that on these facts the action could not be maintained, and by consent of the parties reported the case to this court; if the ruling was correct, judgment to be ordered for the tenant; otherwise the case to stand for trial.

T. Wentworth & A. F. Jewett, for the demandant.

G. Stevens & W. S. Anderson, for the tenant.

CHAPMAN, C. J. The debt which the mortgage was given to secure was due from Patrick Flood, the mortgagor, and not from his heirs. By his death, his heirs became tenants in common, not of the legal estate, but of the equity of redemption. Neither of them was under any personal obligation to pay the debt; but each of them had an interest in acquiring the legal title, in order to prevent his interest in the equity from being lost by foreclosure of the mortgage. If Peter purchased the mortgage and took an assignment of it to himself, it would be for his interest that it should remain in force, as a security for the payment of the proportion due on it from his cotenant. And as he was under no obligation to his cotenant, who had paid nothing, the assignment would take effect according to his interest, and could not be regarded as a discharge for the benefit of John Flood. *Strong v. Converse*, 8 Allen, 557, and cases

 Fletcher v. Cary.

ited. If he held the legal title in mortgage, there is no reason why he should not be permitted to exercise his rights as assignee of the mortgage by foreclosure. He might take possession as mortgagee. His own interest in the equity of redemption would not prevent his holding under the higher title. His brother John could not be prejudiced; for he might redeem by payment of half the mortgage debt, and would thereupon hold his moiety of the land free from the incumbrance.

Case to stand for trial.

WILLIAM W. FLETCHER vs. MARY P. CARY.

entry to foreclose a mortgage is not waived by the mortgagee's bringing a writ of entry against a tenant at will of the mortgagor, and obtaining judgment for possession, but not seeking conditional judgment, nor causing the writ of possession to be served until after three years have elapsed from the recording of the certificate of entry.

BILL IN EQUITY to redeem land in Cambridge from a mortgage. The case was submitted to the judgment of the court on statement of facts agreed substantially as follows:

Moore R. Fletcher, in 1855, being the owner of the land, mortgaged it to John Henshaw, who in 1856 assigned the mortgage to the New England Mutual Life Insurance Company. In 1857 the plaintiff, through mesne conveyances duly recorded, became the owner of the land, subject to the mortgage, and demised it to Moore R. Fletcher, at a rent payable half yearly in advance, by a written instrument which did not specify any term for the demise. On October 29, 1861, the condition of the mortgage being broken, the insurance company made an open and peaceable entry on the land for the purpose of foreclosure, and the certificate of entry was duly sworn to and recorded, but the occupation of the land by Moore R. Fletcher was not disturbed. In 1862 the insurance company brought a writ of entry in the superior court against Moore R. Fletcher, who still occupied the premises. The declaration alleged that the tenant, in 1855, being seised of the premises in fee, mortgaged them to

Henshaw, who assigned the mortgage to the demandants, "by force whereof the demandants then and there became seised" of the premises "in their demesne as of fee and in mortgage as aforesaid, and ought now to be in quiet possession thereof; yet the tenant hath since and without judgment of law illegally entered into the demanded premises, disseised the plaintiffs, and still unjustly withholds the same from them." In 1863 the insurance company obtained judgment for possession, and a writ of possession was issued, but no conditional judgment was asked for or entered, and the writ was not put into the hands of an officer. On December 14, 1865, up to which time Moore R. Fletcher had remained in occupation, the company were put in actual possession of the premises by means of an *alias* writ of execution issued on the judgment in the writ of entry and duly recorded; and the company, on December 28, 1865, conveyed the premises to the defendant in this suit by a quitclaim deed containing the following clause: "And entry on said mortgaged premises made by the grantor corporation, under said mortgage and for the purpose of foreclosing the same for condition broken, on October 29, 1861; and full possession thereof acquired December 14, 1865, by writ of possession issued from the superior court, duly recorded with Middlesex deeds."

J. S. Abbott, for the plaintiff. The possession was not continued peaceably for three years. Gen. Sts. c. 140, § 1. The proceedings of the insurance company were a waiver of all rights under the entry. *Fay v. Valentine*, 5 Pick. 148. *Smith v. Kelley*, 27 Maine, 237.

C. P. Curtis, for the defendant, besides the cases referred to in the opinion, cited *Taylor v. Dean*, 7 Allen, 251; *Hobbs v. Fuller*, 9 Gray, 98; *Page v. Robinson*, 10 Cush. 99; *Devens v. Bower*, 6 Gray, 126; *Farlow v. Ellis*, 15 Gray, 229; *Joslin v. Wyman*, 9 Gray, 63; *Lawrence v. Fletcher*, 8 Met. 153, 165; *Erskine v. Townsend*, 2 Mass. 493; *Treat v. Pierce*, 53 Maine 71, 78; *Webster v. Vandeventer*, 6 Gray, 428; *Peck v. Hapgood*, 10 Met. 172; *Vinton v. King*, 4 Allen, 562; *Gordon v. Hobart*, 2 Sumner, 401; *Straw v. Greene*, 14 Allen, 206; *Robbins v. Rice*, 7 Gray, 203; *Adams v. Parker*, 12 Gray, 53; *Wolcott v. Winchester*, 15 Gray, 461; *Cronin v. Hazleton*, 3 Allen, 324.

AMES, J. The assignee of the mortgage made a peaceable entry, for breach of condition, upon the mortgaged property, October 29, 1861, and this entry was duly certified, sworn to and recorded, in compliance with the requirements of the Gen. Sts. c. 140, § 2. Whether, under the circumstances, the effect of that entry, and the lapse of three years without any attempt to fulfil the conditions of the mortgage, has been sufficient forever to foreclose the right of redemption, is the question submitted to the court.

The possession which the mortgagee is required to take and to maintain, in order to accomplish an effectual foreclosure of the mortgage, is by no means a personal occupation of the mortgaged estate by himself, or even the actual appropriation of the rents and profits. It is a formal entry, and a constructive rather than a literal taking of possession. It is of no importance that it produces no change in the occupation. It is not an entry for the purpose of literally ousting and expelling the mortgagor, but in the language of this court in *Swift v. Mendell*, 8 Cush. 357, 359, it is for the purpose of giving "ample and full notice to the mortgagor that his right of redeeming will be gone in three years." Even before the present system of certifying and recording the entry for breach of condition was established, it was not necessary that the entry and possession of the mortgagee should be notorious and public, but the object of the law was that "the mortgagor may know when the three years commence, beyond which his right to redeem will cease." See *Thayer v. Smith*, 17 Mass. 429, a case which certainly implies that actual notice to the mortgagor is equivalent to a continued possession. The registration of the certificate is a full and authoritative notice to all persons of the fact and date of the mortgagee's peaceable entry; of the cause of such entry, namely, the breach of condition; and of his purpose to foreclose; necessarily implying his intention to keep the possession he had lawfully acquired, for the term of three years. This makes the entry of the mortgagee a legal and binding act, as between the mortgagor and mortgagee, and affords full constructive notice of all the material facts to all other persons hav

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ing occasion to know and act upon them. *Bennett v. Conant*, 10 Cush. 163. If the entry be duly recorded, it is wholly immaterial whether the owner of the equity of redemption had actual knowledge of it or not. An entry upon a small portion of a large tract is sufficient. An entry on one of several lots included in the same mortgage is also sufficient, though they may be quite remote from each other. It is no valid objection to such entry that it was made in the night time, and was intended to be secret. *Ellis v. Drake*, 8 Allen, 161. "Permitting the mortgagor to continue in the occupation of the premises is also held not to defeat the operation of an entry for foreclosure. The rule of law as now held seems to be, that the entry by the mortgagee for condition broken, in the presence of two witnesses, and a certificate thereof duly sworn to before a justice of the peace, and duly recorded, are all that is necessary to effect a foreclosure." "Since the provision in the Rev. Sts. c. 107, § 2, for recording the evidence of the entry of the mortgagee, this must be considered constructive notice, by which all persons may ascertain the relation which the mortgagee holds to the property; and the mortgagor, and all claiming under him, are conclusively prevented from holding adversely to his paramount right." *Ib.* 163. *Lennon v. Porter*, 5 Gray, 318.

There would seem then to be no doubt that the mortgage is effectually foreclosed, unless the suit brought by the insurance company, as assignees of the mortgage, against Moore R. Fletcher, and the recitals in their writ and in their deed of the premises to the defendant are to be deemed conclusive, as matter of law, upon the point that the mortgagee did not retain the possession which had been taken. But this plaintiff was not a party to that suit. He does not claim under any title derived since the commencement of that suit from Moore R. Fletcher. It is true that in a writ of entry the demandant describes himself as out of possession, and represents the tenant as for the time being in possession, but as a wrongdoer, holding out the true owner. It is not uncommon for a party to elect to consider himself as disseised, in order to try his title in a real action; and it is very clear that a party may admit the

actual possession of another, for the sake of the remedy, without admitting such possession to be lawful. *Dorrell v. Johnson*, 7 Pick. 263. It would be a considerable stretch of a purely artificial rule to say that a technical and formal admission of this kind, made for the sake of enforcing a convenient remedy, and not intended as a literal description of the matter of fact, should operate as a conclusive admission in favor of a third person, who was not a party or privy to the suit. There is no legal or imperative necessity for holding that that suit was brought for the foreclosure of the mortgage. It was brought against a party that had no right of redemption, and did not claim to hold the equity, but whose title was only that of a tenant at will, or at most a tenant from year to year; and it is difficult to see how a conditional judgment, if such a judgment had been obtained, could have been of any avail against the true owner of the equity of redemption, who had never been made a party to the suit. A writ of entry to foreclose is in effect a bill in equity to foreclose, and the owner of the right of redemption is an indispensable party. *Walcott v. Spencer*, 14 Mass. 409. *Palmer v. Fowley*, 5 Gray, 545. The judgment actually taken was not the conditional but the common law judgment, and it has been held that a mortgagee, even after breach of condition, may take judgment at common law, when the object of the suit is not to foreclose the mortgage. *Green v. Kemp*, 13 Mass. 515. There are numerous authorities to the effect that the bringing of such a suit, even for the purpose of foreclosure, is not an abandonment of the possession previously taken. *Merriam v. Merriam*, 6 Cush. 91. *Mann v. Earle*, 4 Gray, 299. The defendant in that suit was claiming under a mortgage title, and could not lawfully allege his seisin to be other than "in mortgage." Gen. Sts. c. 129, § 3. The form of his declaration is therefore very far from being an indication that the suit was brought for foreclosure. No use was in fact made of the writ of possession taken out upon the judgment, until after the three years from the original entry had expired.

It appears to us then that the mortgagee, who has that kind of possession which is necessary and sufficient for the purpose

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of foreclosure, namely, the constructive possession, by no means admits himself out of possession, or waives the benefit of his formal entry, so far as the owner of the equity and himself are concerned, by bringing a writ of entry against a mere stranger or wrongdoer. The case of *Fay v. Valentine*, 5 Pick. 418, upon which the plaintiff relies, and which was decided before our practice act went into effect, differs from the case at bar in several material particulars. That was the case of a suit by mortgagee against mortgagor for foreclosure, for breach of condition, in which the conditional judgment was entered. Some months after the date of the judgment the mortgagee entered, *in pais*, in the presence of witnesses, for breach of condition. About a year later, he sued out a writ of possession upon the conditional judgment which he had obtained, and delivered the writ to a deputy sheriff, who executed it and made return that he had delivered possession to the mortgagee accordingly. The court held that the entry under the writ was a waiver of the previous entry *in pais*. In the case at bar, the suit was not necessarily or in fact a suit to foreclose; it was not a suit against the owner of the equity; no conditional judgment was rendered; and the writ of possession was only used, after three years from the date of the entry for breach of condition had expired, for the purpose of removing a stranger and intruder, and not for putting the mortgagor or any one holding his title out of possession. The case of *Smith v. Kelley*, 27 Maine, 237, cited by the plaintiff, was decided, so far as this point is concerned, on the authority of *Fay v. Valentine*. Both courts, in rendering their judgments, say that the case in that respect is in principle like that of a landlord accepting rent from his tenant after the expiration of a notice to quit; an analogy which under the peculiar circumstances of the case at bar is certainly somewhat remote.

For these reasons we hold the foreclosure, upon which the defendant relies, to have been effectual; and the order therefore must be

Bill dismissed, with costs.

SAMUEL D. FULLER vs. JOHN W. DAY.

the mortgagee of a chattel is entitled to possession of it as against a collector of taxes who has distrained it, after the mortgage, for a tax due from the mortgagor.

REPLEVIN of a horse. At the trial in the superior court, before *Rockwell, J.*, without a jury, it appeared that the horse was mortgaged in April 1868 by Asa F. L. Norris to the plaintiff, and was distrained in July 1868 by the defendant, acting under warrant from the collector of taxes of Woburn, for the taxes assessed on Norris, as an inhabitant of Woburn, for the years 1866 and 1867. The defendant requested the judge to rule that the mortgage did not prevent the distraining of the horse for the taxes due from the mortgagor; but the judge refused so to rule, and ordered judgment for the plaintiff; and the defendant alleged exceptions. There was also a question as to the validity of the warrant, which is now immaterial.

J. P. Converse, for the defendant.

A. F. L. Norris, for the plaintiff.

WELLS, J. Taxes upon personal estate constitute no lien. The liability attaches to the person, and not to the property on account of which the tax is assessed. After demand and non-payment, the collector, or officer having a proper warrant, may seize and sell personal property. But he can only seize property of which the person taxed is the owner at the time of the seizure. He may undoubtedly seize mortgaged property without being guilty of any wrong to the tax debtor; and may maintain possession against him, and transfer his title. But the tax warrant gives him no immunity in taking property of other persons than the tax debtor. It does not entitle him to disregard the rights of the mortgagee. The statute does not authorize him to take and hold such property, as it does in case of an attachment on mesne process. His only right is derived and must be maintained through the title of the person upon whose interest he levies. As against that interest, in whosoever hands it may be, and by whomsoever asserted, the mort

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gatee has the legal title, is entitled to possession, and may maintain that right in the mode by which the plaintiff undertakes to maintain it in this case.

It is not necessary to consider the question of the validity of the warrant, as the plaintiff is entitled to judgment in any event.

Exceptions overruled.

JAMES F. HUNTINGTON vs. WILLIAM H. CLEMENCE.

Personal property bought and held by A., although bought with money furnished by and for which he has given his promissory notes to B., and held under an unrecorded agreement which provides that he shall hold the property in trust to secure payment of the notes, employ it in his business, and apply half of the proceeds of the business to pay the notes, and that on such payment the property shall belong three quarters to A. and one quarter to B., is subject to attachment as A.'s individual property.

TORT for the conversion of tools and machinery alleged to be property of the plaintiff, "as he is trustee of Charles H. Dalton, Edward Atkinson, Nathaniel Farwell and Charles P. Talbot."

At the trial in the superior court, before *Rockwell, J.*, it appeared that the tools and machinery were attached by the defendant, a deputy sheriff, as the individual property of the plaintiff, on a writ against him; that they were bought and held by the plaintiff under a written agreement signed by him in which it was recited that Dalton, Atkinson, Farwell and Talbot had furnished him with \$6000 with which to purchase the machinery and tools needed for the cutting and manufacture of peat, and to pay the expenses incident thereto, had otherwise aided him, and had received from him his notes for \$6000 payable on demand with interest, and by which he agreed to purchase all the tools and machinery requisite for the business, in his name as trustee, and to hold the same in trust "for the security to said parties who have furnished said moneys, for the payment of said sums so furnished by them" respectively, and to apply, until the notes above mentioned should be paid in full at least one half of all the moneys received from the sale of

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peat, which should not be needed to pay the current expenses of the business, in payment thereof. The agreement further provided that if the majority of the parties holding said notes should in writing so request, then the business should be discontinued, and the said parties should, if they saw fit, take possession of the machinery and tools, sell the same and apply the proceeds to the payment of any amount remaining due on the notes; that when the notes should have been paid by the plaintiff, the machinery and tools should no longer be held by him in trust as before provided, but should be the property of the plaintiff and of said parties, in the proportion of three quarters as the property of the plaintiff absolutely, and the other quarter as the property of the said other parties; that thereafter the plaintiff should have the right to employ the machinery and tools in the business, on payment to said parties of a certain rent or royalty; that the plaintiff should have "no authority hereunder or otherwise to incur any liability or contract any debt or debts on account of either of the other parties named herein, or to act as their agent for any purpose whatsoever, nor shall this agreement in any way create or constitute a partnership between him and any one or more of said parties;" and that the plaintiff should devote his whole time and skill to the management and prosecution of the business, without charge to the other parties.

The judge ruled that "under this agreement property could not be bought and held in such manner as to be exempt from attachment as the individual property of the plaintiff, and so as to enable him to recover in this action in his capacity as trustee." Whereupon the jury returned a verdict, by consent, for the defendant, and the judge reported the case for the determination of this court; if the ruling was correct, judgment to be rendered on the verdict; otherwise, a new trial to be ordered.

T. H. Sweetser & J. F. McEvoy, for the plaintiff.

T. Wentworth, (*C. A. F. Swan* with him,) for the defendant.

MORTON, J. The contract under which the question in this case arises is peculiar, but in substance it is a contract by which a debtor undertakes to give collateral security to certain of his creditors, by agreeing to hold personal property as trustee for

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himself and them. The plaintiff borrowed money of Dalton and his associates, for which he gave his notes payable absolutely. The money thus became his. He bought personal property, having previously agreed in this contract that he would hold the same "in trust for the security to said parties who have furnished" said money. It is difficult to see how the creditors have obtained any title to such property which they can enforce either in their own names or in the name of Huntington. The property was purchased by Huntington, and remained in his possession and use. He was held out to the world as the owner, and thus obtained credit. When the property is attached by creditors, who may have given him credit upon the strength of his apparent ownership, he claims that he holds it upon a secret trust for the security of other creditors. Such a claim cannot be upheld in law.

It is the general policy of our laws that security upon personal property shall not be valid unless the property is delivered, or a mortgage is duly recorded. A trust of the kind set up in this case is a complete evasion of the laws respecting pledges and mortgages, and would produce all the mischiefs which those laws were designed to prevent. *Judgment on the verdict.*



JOHN BLODGETT & others vs. EPHRAIM HILDRETH.

A letter from A. to B., saying "I intend to settle up our affairs and give up your deeds that you intrusted me with," is not sufficient to establish a trust in B.'s favor in land which had been conveyed to A. by B. and others.

Oral evidence that a conveyance of land by a quitclaim deed in the usual form from A., B. and C., tenants in common thereof, to D., the other tenant in common, was made in pursuance of an agreement between the parties, that, in consideration of certain payments made and to be made by A., the land should be held by D. in trust for A., is admissible and sufficient, even after the death of all the tenants in common, to establish an implied trust in A.'s favor in the shares conveyed by B. and C. but not in the share conveyed by A. himself, nor in the share of D.

BILL IN EQUITY by the heirs of Sarah M. Blodgett, to redeem one undivided half of a parcel of land in Townsend from a

mortgage held by the defendant. At the hearing, before *Morton, J.*, there appeared the following facts, on which the case was reserved for the consideration of the full court.

John W. Swallow, owning the land in question, mortgaged it to Jephthah Cummings, and died in 1840, intestate, leaving his four sisters, Alice M. Swallow, Sophronia Swallow, Sarah M. Blodgett, and Lucinda S. Hildreth, his heirs. No administration was taken on his estate. In 1843, Alice, Sarah and Lucinda made "a deed of quitclaim" of the premises to Sophronia, the husbands of Sarah and Lucinda joining therein; afterwards, Alice died, unmarried and childless; then Sarah died intestate, leaving the plaintiffs her heirs; and then Sophronia died, intestate, unmarried and childless. Subsequently the mortgage to Cummings was assigned to Lucinda, and she afterwards conveyed the premises by quitclaim deeds through a third person to her husband, the defendant, and in 1857 died.

The defendant contended that the deed made to Sophronia by her sisters was made in trust for the sole use and benefit of Lucinda; and he was allowed to introduce in evidence, against the objection of the plaintiffs, a letter written in 1853 by Sophronia to Lucinda, containing this passage: "I intend to settle up our affairs and give up your deeds that you intrusted me with."

The defendant was also allowed, against the plaintiff's objection, to introduce oral evidence showing that the heirs of John W. Swallow made an oral agreement that Lucinda should take the premises, she agreeing to pay all her brother's debts and to pay \$25 to each of her sisters; that, in pursuance of this agreement, the deed of 1843 was made to Sophronia, at the request of Lucinda, and to be held in trust for her; that at the time the deed was made Sophronia paid some of her brother's debts out of money in her hands belonging to Lucinda, and Lucinda's husband, the defendant, gave Sophronia a receipt in full of a debt due to him from her brother's estate; that, after the deed was made and delivered to Sophronia, Lucinda, from time to time, paid the other debts of her brother, and also paid \$25 to each of her sisters; that, after the making of the deed to So

phronia, Lucinda and the defendant paid the taxes on the premises up to the time of Sophronia's death, since which time the plaintiffs voluntarily paid one half of the taxes; and that Lucinda, at the time of making the deed to Sophronia, held promissory notes against her brother, which were found among her papers at her death, and were now in the possession of the defendant.

D. S. Richardson, for the plaintiffs.

F. A. Worcester, for the defendant.

WELLS, J. 1. The writing produced in this case is not sufficient to satisfy the requirements of the statute of frauds. It fails to identify the property or interests to which it relates, or to afford means by which its identity may be made certain. It does not disclose the terms of the trust, or the conditions upon which the sister was entitled to have the deeds surrendered to her. The trust must be established, if at all, by implication of law.

2. As to Sophronia's original share of the land, the case stands merely upon an oral agreement to hold it for the benefit of Lucinda, and payment of the value or consideration therefor. This will not create a valid trust. Gen. Sts. c. 100, § 19. Payment of the whole purchase money will not take an oral agreement concerning land out of the statute of frauds. *Purcell v. Miner*, 4 Wallace, 513. *Thompson v. Gould*, 20 Pick. 134. *Glass v. Hulbert*, 102 Mass. 24. Lands already held by a party cannot be charged with an implied or resulting trust by reason of the receipt of money upon an oral agreement of sale or trust. *Rogers v. Murray*, 3 Paige, 390. *Forsyth v. Clark*, 3 Wend. 637, 651.

3. As to the share of Lucinda, conveyed by her to Sophronia without consideration and upon an agreement to reconvey or hold it for the benefit of Lucinda, no valid trust arises from that transaction. *Walker v. Locke*, 5 Cush. 90. A voluntary deed is valid between the parties as a gift, and does not raise any trust in favor of the grantor. It is otherwise with a feoffment, and perhaps in other conveyances whenever there is no declaration of the uses and the consideration is open to inquiry in determining the effect of the deed between the par

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ies and their privies. Cruise Dig. (Greenl. ed.) tit. 11, c. 4, § 16 and tit. 32, c. 2, § 38. In this Commonwealth the consideration is not open to such inquiry. Supposing the deed in question to have been in the common form, the recital of a consideration, and the declaration of the use to the grantee and her heirs in the *habendum*, are both conclusive between the parties, and exclude any resulting trust to the grantor. *Squire v. Harder*, 1 Paige, 494. Hill on Trustees, 112. 2 Story Eq. § 1197. *Philbrook v. Delano*, 29 Maine, 410. *Farrington v. Barr*, 36 N. H. 36. *Graves v. Graves*, 9 Foster, 129.

A trust may be established in favor of one who furnished the consideration, where a deed has been taken to a third party, because in that case the supposed *cestui que trust*, not being a party to the deed, is not estopped by its recitals or covenants from proving all the facts from which such a trust will result. *Livermore v. Aldrich*, 5 Cush. 431.

4. The two shares conveyed to Sophronia by the other two sisters come within the conditions from which a trust is held to result, by implication of law, in favor of the party who is the real purchaser and furnishes the consideration. It need not be money advanced or paid at the time of the conveyance. The mode, time and form in which the consideration was rendered are immaterial, provided they were in pursuance of the contract of purchase. It is sufficient if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf or upon her credit. The trust results from the purchase and payment of the consideration by or for one party, and the conveyance of the land to another. The receipt of a deed of conveyance founded on such a transaction raises a presumption that it was taken for the benefit of the party supplying the consideration. 2 Story Eq. § 1201. The implication of a trust from these facts may be overcome and disproved, or corroborated, by any oral or written testimony showing the circumstances of the transaction, and the expressed or probable intentions of the parties. Their admissions at the time or afterwards are competent to be proved. So also are their agreements; but agreements not in writing

have no force otherwise than as admissions tending to destroy or confirm the inference otherwise deducible from the facts of payment of the consideration and deed to a third party. The trust results only from that inference. *Adams Eq. 33. Hill on Trustees, 96, 97. Botsford v. Burr, 2 Johns. Ch. 405.*

Upon the report in this case, it appears that the whole consideration of the deed to Sophronia moved from Lucinda. It consisted partly in payments made at the time, out of money belonging to Lucinda, partly in payments then undertaken to be made, and subsequently made by her, and partly in the release or surrender of claims against the estate of their deceased brother. All these payments, releases and undertakings were for the use and benefit of the grantors, either directly or indirectly. It is enough, however, that, whatever of consideration there was, it moved from Lucinda. Proof of payments made subsequently has no other effect than to show that there was no failure of the consideration agreed upon when the deed was made, and on which it rested.

The other facts, including the letter of Sophronia, relied on as a declaration of trust, tend to corroborate and strengthen the implication of law which arises from payment of the consideration.

The fact that Lucinda joined in the same deed of quitclaim, in order to convey her own share to Sophronia, does not create any estoppel against her, beyond the interest which she conveyed. The deed is not set forth in the pleadings, nor in the report; and we are not to presume that Lucinda entered into any covenants, in relation to the shares conveyed by her sisters, which estop her from proving the facts from which an implied trust may result in her own favor. Her covenants, if any, in the deed, would be construed as extending only to the estate conveyed by her, unless the terms in which they are expressed require a different construction. *Blanchard v. Brooks, 12 Pick. 47. Allen v. Holton, 20 Pick. 458. Sweet v. Brown, 12 Met 175.*

The result is, that one half of the estate was held by Sophronia in trust for Lucinda; and the plaintiff, if permitted to re-

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deem, would at once be compelled to release it, in fulfilment of that trust. As to the other half, as no trust is legally established, it passed, upon the death of Sophronia, in equal shares to Lucinda and the representatives of Mrs. Blodgett, neither Sophronia nor her sister Alice M. having left issue.

The plaintiffs are therefore entitled to redeem one fourth part of the premises. If the parties shall not agree upon the amount to be paid upon such redemption, a master must be appointed to ascertain the amount.

Decree accordingly.

STEPHEN DOW & others, vs. WILLIAM B. DOYLE & others.

A testator directed his executors to procure a residence for a married daughter, at an expense not exceeding a certain sum, and hold the same in trust for her and her son "during their lives," and "upon the decease of both" gave the property over. The daughter died, and the testator made a codicil reciting her death, and increasing a bequest made to her husband, but expressly confirming the will. *Held*, that the gift did not lapse by the daughter's death, but went to her son for life.

BILL IN EQUITY by the executors of the will of Abijah Thompson, and the trustees under said will, praying for instructions. The material facts, as they appeared by the bill and answer, on which the case was reserved for the determination of the full court, were as follows :

The testator in 1866 made his will, by the fifth clause of which he gave \$15,000 to trustees in trust to pay the net income thereof to his daughter, Julia Ann Doyle, during her life ; upon her death the income to go to her son William B. Doyle, during his life ; in case, however, that his daughter should die before her son William became of age, the trustees to expend only so much of the net income as should be necessary for his support and education, and to retain the balance until he became of age. If the daughter should die without leaving issue, or after her decease her son should die without leaving issue, he gave the \$15,000 over. The clause then continued thus : "In case I shall not during my life procure a residence for my daughter Julia Ann Doyle, I direct my executors, out of my estate, to

procure, either by purchase or by building, a suitable residence for my said daughter, at an expense not exceeding \$6000 and to hold the same in trust for her and her said son during their lives and during the life of my said daughter to pay the taxes upon said property, whether procured by me or by my executors; and also all other expenses incident to said property, out of my estate. Upon the decease of both the said Julia Ann Doyle and her said son, I give said property to" other descendants named. By the eighth clause of his will, he gave to his daughter Julia and her husband, John B. Doyle, "and to the survivor of them, in case either of them shall die during my life, the sum of \$5000."

In 1867 the testator executed a first codicil to his will, by which he made devises and bequests to his grandchildren, additional to those in his will, and by the seventh clause gave \$5000 to the trustees of Warren Academy, in Woburn. Subsequently, Julia Ann Doyle having deceased, leaving her son William her only surviving issue, the testator executed a second codicil to his will, reciting the making of his will and first codicil, his desire "to alter in some respects the provisions contained in the eighth item of said will and the seventh item of said codicil," and "expressly confirming and republishing said will and codicil in all respects, saving and excepting so far as the same are altered by the provisions herein contained." This codicil contained two clauses: the first recited the gift of \$5000 to Julia Ann Doyle and her husband, or the survivor of them, by the eighth clause of the will, and the death of said Julia Ann since the making of the will, and "therefore" gave to John B. Doyle the sum of \$15,000 in addition to the said \$5000. The second clause gave a bequest to the trustees of the Warren Academy, additional to that given in the seventh clause of the first codicil.

The testator died in 1868, never having procured a residence for his daughter, and left William B. Doyle, still a minor, and other grandchildren him surviving. The question submitted to the court was, whether the gift of \$6000 in the fifth clause of the will had lapsed by the death of Julia Ann Doyle in the lifetime of the testator.

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H. N. Sheldon, for William B. Doyle.

W. A. Herrick, for other parties in interest.

GRAY, J. The testator, in the fifth clause of his will, by directing his executors to procure a suitable residence for his daughter Julia at an expense not exceeding six thousand dollars, and to hold the same in trust for her and her son William during their lives;" and, "upon the decease of both," devising said property over; clearly gave that daughter and her son an interest during their joint lives and the life of the survivor, which on her death before the testator's did not lapse, but went to her son for life. *Prescott v. Prescott*, 7 Met. 141. *Loring v. Coolidge*, 99 Mass. 191. This devise to William was not varied by the second codicil, which mentioned the death of his mother, increased a bequest made to his father by another article of the will, and one made to the Warren Academy by the first codicil, and expressly confirmed the will and the first codicil in all other respects.

Decree accordingly.



NICHOLAS H. EARLE vs. ELIZABETH L. FISKE & another.

Under the Gen. Sts. c. 80, § 2, an unrecorded deed is not valid after the death of the grantor, as against one holding by a recorded deed from the grantor's heir, without notice of the former deed.

WRIT OF ENTRY against Elizabeth L. Fiske, (wife of Benjamin Fiske,) and Mary E. Fiske, to recover land in Malden. Writ dated April 14, 1868. Plea, *nul disseisin*.

At the trial in the superior court, before *Putnam*, J., these facts appeared: Nancy A. Fiske, being owner of the demanded premises, conveyed them to Benjamin and Elizabeth for their lives, and, subject to their life estate, to Mary E. Fiske, by deeds dated April 22, 1864, but not recorded till 1867, and died in 1865, leaving said Benjamin, her son, as her sole heir, and he in 1866 executed and delivered to the demandant a deed of the premises, which was recorded in the same year. Upon these

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facts, the judge ruled that Nancy A. Fiske "had no seisin, at her death, which would descend to Benjamin Fiske, so as to enable him to convey a good title" to the demandant. Upon this ruling, the demandant, who made no claim to any estate less than a fee simple, submitted to a verdict for the tenants, and alleged exceptions.

J. G. Abbott, for the demandant.

R. D. Smith & H. H. Sprague, for the tenants.

AMES, J. The formalities which shall be deemed indispensable to the valid conveyance of land are prescribed and regulated by statute. A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration. No seisin remains in the grantor, and he has literally nothing in the premises which he can claim for himself, transmit to his heir at law, or convey to any other person. But when the effect of the deed upon the rights of third persons, such as creditors or *bonâ fide* purchasers, is to be considered, the law requires something more, namely, either actual notice, or the further formality of registration, which is constructive notice. It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bonâ fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or transfer which the statute recognizes as binding on them, or as having any capacity adversely to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent

seisin is not divested or affected by any unknown and unrecorded deed that he may have made. Gen. Sts. c. 89, § 3.

It is argued, however, that, as the unrecorded deed from Nancy A. Fiske was valid and binding upon herself and her heirs at law, nothing descended from her to her son Benjamin, and he had no seisin or title which he could convey to the plaintiff. A case is cited (*Hill v. Meeker*, 24 Conn. 211) in which the supreme court of Connecticut (Hinman and Storrs, JJ.) in 1855 decided that a deed of land, not recorded until after the death of the grantor, is valid against a purchaser from his heir at law, although such purchaser has no knowledge of the existence of the deed. From this decision the chief justice (Waite) dissented, saying, "So far as my researches have extended, this is the first case in the whole history of our jurisprudence, in which it has ever been holden that an unrecorded deed shall defeat the title of a *bona fide* purchaser or mortgagee, having no knowledge of the existence of any such deed, unless it were recorded within a reasonable time." The cases cited from the decisions of the supreme court of Kentucky are to the effect also that the protection afforded by their registration laws against an unrecorded deed only extend to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. *Ralls v. Graham*, 4 T. B. Monr. 120. *Hancock v. Beverly*, 6 B. Monr. 531. That court however in a more recent case, decided in 1857, say that, if it were a new question, "and had not been heretofore decided," they should be strongly inclined to give to the statute a liberal construction, and make it operate as a remedy for the whole evil which it was intended to guard against. They add, however, that as the previous decision had become a settled rule of property, it is better that the law should remain permanent, "although settled originally upon doubtful principles." *Harlan v. Seaton*, 18 B. Monr. 312.

We do not, under the circumstances, incline to yield to the authority of these cases in the construction of a local statute of this Commonwealth. It appears to us that the plain meaning of our system of registration is that a purchaser of land has a right to rely upon the information furnished him by the

registry of deeds, and in the absence of notice to the contrary he is justified in taking that information as true, and acting upon it accordingly. It is impossible to see why the unrecorded deed of Nancy A. Fiske should have any greater weight or force after her decease than it had immediately after it was first delivered. It could not be any more or less binding on her heir at law than it was upon herself; he was as much the apparent owner of the land as she had been during her lifetime. The manifest purpose of our statute is, that the apparent owner of record shall be considered as the true owner, (so far as subsequent purchasers without notice to the contrary are concerned,) notwithstanding any unrecorded and unknown previous alienation. As against the claim of this plaintiff, the unrecorded deed of Nancy A. Fiske had no binding force or effect, and the objection of the defendants, that in consequence of her having given that deed nothing descended to her son Benjamin from her, is one of which they cannot avail themselves. As a purchaser without notice, the plaintiff is in a position to say that the unrecorded deed had no legal force or effect; that she died seised; that the property descended to Benjamin, her son and sole heir at law. Upon that assumption, his deed would take precedence over the unrecorded deed of his mother, in exactly the same manner as a deed from his mother in her lifetime would have done over any unrecorded or unknown previous deed from herself. The ruling at the trial was therefore erroneous, and the plaintiff's

Exceptions are sustained.

BENJAMIN FISKE & wife vs. LYCURGUS W. CHAMBERLIN.

An officer, in executing a writ of possession, is justified in removing without force from the premises the wife of the person against whom the judgment was rendered on which the writ was issued, although she claims title in her own right, if her claim is invalid.

TORT by Benjamin Fiske and his wife, Elizabeth L. Fiske, for forcibly removing the female plaintiff on July 15, 1867, from a messuage in Malden. The defendant, who was a deputy sheriff, justified under a writ of possession issued in favor of Nicholas H. Earle on a judgment against Benjamin Fiske. The premises were the same as those demanded by Earle against Elizabeth L. Fiske and Mary E. Fiske in the action of *Earle v. Fiske*, ante, 491. Trial in the superior court, before Rockwell, J., who, after a verdict for the defendant, reported the case for the determination of this court. The facts appear in the preceding report of *Earle v. Fiske*, and in the opinion.

R. D. Smith & H. H. Sprague, for the plaintiffs.

C. Robinson, Jr., for the defendant.

AMES, J. One of the questions between these parties was disposed of in the preceding case of *Earle v. Fiske*, in which it was decided that Nicholas H. Earle, under whom this defendant justifies, had a better title to the estate described in the officer's precept than any person claiming under the deed from Nancy A. Fiske under date of April 22, 1864, referred to in the report. As it is not charged that the defendant, in the service of the precept, made use of any unusual or improper force, it would seem to follow that he is protected by his precept, and cannot be considered as a trespasser for obedience to its requirements. It is true that it was not an execution against the female plaintiff, but she had no title in the estate which was of any avail against the claim of the true owner, Earle. It does not appear that her removal from it, without force, was a wrong of which she had any right to complain (against the officer acting for the true owner) in the present action, which is in fact trespass *quare clausum*. The defendant's duty was to put the true owner in possession in obedience to the command of the execution, which

appears to be all that he has done. *Wilmarth v. Burt*, 7 Met. 257, 259. *Howe v. Butterfield*, 4 Cush. 302, 305. To put Earle into possession required of necessity the removal, not only of Fiske, but also of his family and effects. The title of the female plaintiff was derived from the same source, and depends on the same considerations, as that of her husband, which has already been adjudged insufficient as against the party in whose behalf this defendant was acting and under whom he justifies.

Judgment on the verdict.

ALBERT B. BROOKS & others vs. THOMAS F. TARBELL & others.

Exceptions do not lie to the refusal of the judge in a suit in equity to reform issues framed for a jury.

A. conveyed land to a trustee, to hold in trust for A. during his life, then for B. during his life, and on B.'s death to convey to B.'s heirs. After A.'s death, his heirs brought writs of entry for the land against the trustee, who was defaulted, and the demandants had judgment and execution for possession. *Held*, in a suit in equity brought, after B.'s death, by his heirs, against the trustee, that, on an issue whether the judgment was procured by the collusion of the trustee, he was a competent witness, under the St. of 1864, c. 304, § 1, to prove statements made by himself and by B. to the counsel whom he retained in the writs of entry, to the effect that A. made the conveyance while insane and under the undue influence of B., and also to prove that the counsel advised him that he had no defence.

On an issue whether a deed for the benefit of B., signed by A., was executed while A. was insane and under the undue influence of B., a witness testified that, shortly before the time when the deed was executed, an attorney, whom B. had asked to make a deed in his favor for A. to sign, after talking with A. in the presence of B. and the witness, told B. that A. was not competent to execute any paper, that B. gave the attorney a nudge, and told him to go ahead and it would be all right, and that the attorney refused. *Held*, that the evidence was admissible.

BILL IN EQUITY by the heirs of Phelps Brooks against Thomas F. Tarbell, Samuel Brooks and Walter Fessenden. The bill alleged that Samuel Brooks, Senior, owning parcels of land in Townsend, and in Brooklyn in the state of New Hampshire, conveyed them by indenture, dated September 27, 1847, to Tarbell, to hold in trust for the support of the grantor during his life, then for the support of Phelps Brooks and his wife during their lives, and after their decease to convey the land to the

heirs of Phelps Brooks in fee, and Tarbell in the indenture accepted the trusts and covenanted to perform them; that Samuel Brooks, Senior, died August 9, 1848, leaving, as his heirs, his sons Phelps Brooks, Abner Brooks and Samuel Brooks, (the defendant,) and the children of a deceased son Benjamin; that in September 1849 Abner Brooks brought a writ of entry against Tarbell to recover an undivided fourth of the parcel of land in Townsend, claiming by descent from Samuel Brooks, Senior, and in September Samuel Brooks, the defendant, and others of the heirs of Samuel Brooks, Senior, brought a writ of entry against Tarbell to recover other undivided portions of said parcel; that Tarbell in both these actions was defaulted, and judgments were rendered therein, execution issued and the demandants put in possession; that the demandants afterwards conveyed all their interest to the defendants in the present suit, Samuel Brooks and Walter Fessenden; that the said judgments were fraudulently obtained with the collusion of Tarbell and the other tenants; and that Phelps Brooks died in 1865; and the bill prayed that Tarbell and the other defendants might be ordered to convey the land to the plaintiffs.

The answer admitted the making of the indenture and deeds, and the bringing of the writs of entry and proceedings thereon, as alleged in the bill, but alleged that Samuel Brooks, Senior, was insane at the time of making the indenture; that its execution was procured by the fraud and undue influence of Phelps Brooks; that Tarbell never took possession or control of the land, and never accepted said trust or acted in the capacity of trustee in any manner; and that the indenture was void, and Tarbell was never seised of the estate. The answer also denied that the judgments in the writs of entry were obtained by collusion, and alleged that Tarbell entered faithfully upon the defence of the actions, retained counsel, laid the case fairly before them, and was advised by them that he could not successfully defend said actions; and that the judgments were recovered in good faith.

On these pleadings, twelve issues were framed for the jury by Foster, J.; the first, as to the capacity of Samuel Brooks,

Senior, at the time of the execution of the trust deed ; the second, as to whether Phelps Brooks fraudulently and by undue influence induced his father to execute the indenture ; the third, as to whether the judgments were recovered in good faith without collusion ; and the other nine, as to whether the conveyances made by the demandants in the writs of entry after they were put in possession, and through which the defendants Samuel Brooks and Walter Fessenden claimed, were made and received for a valuable consideration and in good faith.

At the trial, before *Morton, J.*, the plaintiffs, before the case was opened to the jury, objected to any but the first two issues being tried, and asked the judge to reform the issues, and reject those of them that were unnecessary and improper ; but the judge declined to reform them, and the trial proceeded upon all the twelve.

Tarbell was called by the defendants as a witness on the third issue, to show that the judgments were not recovered by collusion, and was allowed, against the plaintiffs' objection, to testify that he retained George F. Farley, a counsellor of law, in the writs of entry against him ; "that he stated to Farley that he went to Samuel Brooks, Senior, a few days after the indenture was made, and he did not seem to know him or remember anything about the indenture, and asked him what he had to do with his estate ; that he told Farley that when the indenture was signed they had to steady Samuel Brooks's arm ; that Phelps Brooks got the pen and put it into his hand ; that he (the witness) kept from Farley no information, and himself honestly believed he had no defence to the actions ; that Farley wished to see Phelps Brooks, and he took him to him, and that Phelps Brooks told Farley that 'he got up the indenture and influenced his father to sign it, his father was not competent, was forgetful and had not knowledge of what he was doing, he had once before got Squire Russell up to make the deed, and Russell thought his father was not competent, and he was not willing to defend ;' and that Farley advised Tarbell that he had no defence to the writs of entry, and he acted on that advice and was defaulted."

The defendants also called Edward G. Russell as a witness, who was allowed, against the plaintiffs' objection, to testify "that in September 1847 Phelps Brooks came to the office of his father, who was a lawyer, and wanted him to go up and make out a trust deed for Samuel Brooks to sign, which would be a trust deed for the express benefit of Phelps Brooks; that a day or two after he went with his father to Samuel Brooks; that Phelps and Samuel Brooks were both present; that his father held a conversation with Samuel Brooks to ascertain if he was willing to make a trust deed, and, after talking some time, his father turned towards Phelps Brooks and said, in the hearing of Samuel Brooks, he did not think Samuel Brooks was in a fit state of mind or competent to make any paper; and that Phelps Brooks then approached the witness's father, gave him a nudge and told him to go ahead and all would be right, and his father in an indignant manner refused."

The jury found on all the issues in favor of the defendants; and the plaintiffs alleged exceptions.

D. S. Richardson & S. Haynes, for the plaintiffs.

W. S. Gardner & F. A. Worcester, for the defendants.

CHAPMAN, C. J. Since the existence of the provision contained in Gen. Sts. c. 113, § 10, the decree of a judge on the subject of framing issues to a jury is subject to the right of appeal, but it has never been subject to exception. *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45. *Wright v. Wright*, 13 Allen, 207. We have no power, therefore, to revise the rulings of the judge on this point.

It appears that Samuel Brooks, Senior, who was the owner of the real estate in controversy, made a deed to the defendant Thomas F. Tarbell, to hold in trust for the support of the grantor during his life; then for the support of Phelps Brooks and his wife during their lives, and at their decease to convey the land to the heirs of Phelps Brooks in fee simple. Samuel Brooks, Senior, and Phelps Brooks and his wife, have deceased, and the plaintiffs, who are the children and heirs of Phelps Brooks, bring this bill to compel Tarbell to convey the premises to them, according to the terms of the trust. There are several other de-

endants, some of whom are the heirs of Samuel Brooks, Senior and others of whom hold under them, and make claim to their several proportions of the property on the ground that he was not of sound mind when he made the deed to Tarbell, and that Phelps Brooks procured him to make it by fraud and undue influence.

Abner Brooks, one of the defendants, after the decease of his father brought an action against Tarbell to recover one undivided fourth part of the land, claiming title as one of the heirs of Samuel Brooks, Senior, and recovered judgment on the default of Tarbell. The plaintiffs allege that Tarbell fraudulently suffered this judgment to be recovered. Samuel Brooks, Junior, and others recovered a similar judgment against him; and among the issues to the jury in the present suit was the question whether these judgments were recovered in good faith and without collusion. Tarbell was admitted as a witness on this issue, to testify to facts tending to prove the incompetency of Samuel Brooks, Senior, to make the deed to him, and the conduct of Phelps Brooks in procuring the execution of the deed. The plaintiffs allege that he was not a competent witness, as Samuel Brooks, Senior, is deceased. But as Tarbell is a mere trustee, he is made a competent witness by the St. of 1864, c. 304, § 1. This case is not like that of *Ela v. Edwards*, 97 Mass. 318, in which the party, though an executor, was held incompetent to testify as to his own private dealings with his testatrix in her lifetime, not relating to his trust. Nor is it like the case of *Straw v. Greene*, 14 Allen, 206, in which the witness had not acted in a representative capacity, nor was he called to testify to anything of that kind. In this case, it was not contended that Tarbell was connected with the estate otherwise than as trustee. If he was chargeable with any fraud, or any omission or violation of duty, it was merely in this capacity.

A further objection was made, to the admissibility of his testimony. But as the question in issue was, whether, in suffering default, he acted in good faith, it was proper to prove that he acted under the advice of able counsel, and that the case was rightly understood by his counsel. *Robinson v. Wadsworth*,

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8 Met. 67. The fact that his counsel, Farley, took pains to have an interview with Phelps Brooks in respect to the transaction, and the admissions made by Brooks as to what he had done, and the influences under which his father had made the deed, were pertinent and admissible on this point.

The testimony of Russell as to the efforts of Phelps Brooks to procure the deed, and as to what took place in the presence of Samuel Brooks, Senior, was pertinent to the same issue, and admissible. *Somes v. Skinner*, 16 Mass. 348. *Winchester v. Charter*, 97 Mass. 140

Exceptions overruled.

**CHARLES H. DAVID vs. WILLIAM H. PARK.
DANIEL T. BUTTRICK & another vs. SAME.**

An action may be maintained by the buyer of a patent right on false representations of the seller, which induced the purchase, as to what was covered by the patent, or what was not covered by an earlier patent; although by searching the records of the patent office the buyer might have discovered the fraud.

An action for deceit in the sale of patent rights may be maintained in a state court, although its determination involves collaterally the construction and validity of the letters patent.

TWO ACTIONS OF TORT for deceit. The declaration in the first action alleged that the defendant, to induce the plaintiff to purchase his rights, in certain towns, under letters patent of the United States for an "improvement in well tubes," represented to the plaintiff that the patent included a certain apparatus for driving down well tubes, and the defendant was possessed of the exclusive right to said apparatus; but that the representations were false and known by the defendant to be so; and that the plaintiff, being induced by the false representations, bought said rights under said letters patent. The declaration in the second action alleged that the defendant, to induce the plaintiffs to purchase his rights, in certain other towns, under the letters patent above mentioned, exhibited to the plaintiffs the above mentioned apparatus, and represented to them that there was

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no patent on said apparatus, and that the plaintiffs could use the same without infringing any patent; but that these representations were false and known by the defendant to be so; and that the plaintiffs, being induced by such false representations, bought said rights under said letters patent.

The actions were tried together, in the superior court, before *Rockwell, J.*, when the plaintiffs introduced evidence tending to show that the defendant represented to the plaintiff in the first suit that the exclusive right to use the said apparatus was covered by the patent, his rights in which he was proposing to sell; that he represented to the plaintiffs in the second suit that said apparatus was not covered by any patent; that the plaintiffs in both actions were induced by these representations to purchase said rights; and that in fact said apparatus was covered by letters patent issued before those under which the defendant claimed, and the defendant knew it.

The judge ruled that the evidence would not support the actions; and directed verdicts for the defendant. The grounds of this ruling and direction, as stated by the judge, were: "The statement of the defendant was not a statement of any fact within his exclusive knowledge; and the plaintiffs might, and ought to, have ascertained whether the statements were true or not. It seems to be a case involving questions of construction and conflict of patent rights, and the question whether or not there was a previous patent for the same thing; said questions not being within the jurisdiction of the court." The jury returned verdicts for the defendant, according to this direction; and the plaintiffs alleged exceptions.

T. L. Livermore, for the plaintiffs.

J. H. Buller, for the defendant.

GRAY, J. Neither of the grounds assigned by the learned judge who presided at the trial, for the ruling under which a verdict was returned for the defendant in each of these cases, is tenable.

1. The evidence introduced tended to show that the defendant falsely and fraudulently stated, as of his own knowledge, and not as matter of opinion, in the one case, that he had the inter-

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ent in the patent right which he undertook to sell, and in the other, that the invention was not covered by any other patent. A distinct statement of such a fact by a seller, knowing it to be false, and with intent to deceive the buyer, and on which the buyer acts to his own injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records of the patent office. *Brown v. Castles*, 11 Cush. 348. *Manning v. Albee*, 11 Allen, 520; S. C. 14 Allen, 7. *Watson v. Atwood*, 25 Conn. 313.

2. Questions of the existence, validity or construction of letters patent for inventions, when arising collaterally in a suit in a state court, must be there tried and determined. *Nash v. Lull*, 102 Mass. 60.
Exceptions sustained

SIDNEY A. FISHER vs. CHARLES N. MELLEN

In an action for deceit, the declaration alleged that the defendant represented that he was the owner of certain stock, and induced the plaintiff by false representations as to its value to purchase it. *Held*, that the plaintiff need not prove that the defendant was actually the owner of the stock.

In an action for false representations as to the condition of land, the plaintiff contended that the representations were false in fact and made as of the defendant's own knowledge, but did not contend that the defendant had personal knowledge of the condition of the land. *Held*, that the fact that the defendant had not such personal knowledge, but derived his information from others, was no defence to the action; and that, on the issue thus presented, evidence of such fact was immaterial.

TORT. The declaration alleged that the "defendant represented that he was the owner of one third share of the Winthrop Petroleum Mining Company," and being desirous of selling his interest in said company, contriving and intending to deceive, defraud and injure the plaintiff, falsely and fraudulently made certain specified representations as to the land and property of the company; that the plaintiff, confiding in these representations, paid the defendant \$1000 for "the said one third share" of the company; and that said representations were false and "said one third share" of no value to the plaintiff, as the defendant well knew. The answer was a general denial.

At the trial in the superior court, before *Wilkinson, J.*, the plaintiff testified that the defendant made the representations alleged; that he asked the defendant "if he knew these things were so," and the defendant said "Yes, and he should not tell the plaintiff so, if he did not know it;" and that he paid the defendant \$1000 for one third of a share. The defendant testified that he gave the \$1000 to Daniel F. Fitz, the treasurer of the company, and received from him a voucher that the plaintiff was entitled to one third of an original share from the company, which voucher he gave to the plaintiff; and that he did not sell to the plaintiff any part of his own share in the company. He also denied making the alleged representations. The defendant also offered evidence tending to show that at the time he was alleged to have made the false representations he did not know, of his own knowledge, the condition and situation of the land of the company; that he had never been to the land; and that all the knowledge he had of it was derived from communications made to him by third persons, whose statements to him, in reference to the subject, he also offered in evidence. The plaintiff objected, on the ground that the evidence offered was immaterial to the issue, and stated "that he claimed to recover, so far as to representations in regard to the land, only upon the ground that the defendant's representations as to the condition of the land were false in fact and that he made them as of his own knowledge;" and the plaintiff's counsel said that "he should not claim to the jury that, as to that class of representations, the defendant had personal knowledge of the condition of the land." Thereupon the judge refused to admit the evidence.

The defendant requested the judge to instruct the jury, 1. that, "in order for the plaintiff to recover under the pleadings, he must prove, and the burden of proof was upon him affirmatively to show, that the defendant sold the plaintiff one third of the defendant's share;" 2. that "if, upon all the evidence, the burden upon this point being on the plaintiff, the jury were not reasonably convinced that the defendant sold to the plaintiff one third part of the defendant's share, then the plaintiff could not recover;" and 3. that "if the defendant only received the \$1000

from the plaintiff to give to Fitz, the treasurer, and the defendant did give the \$1000 to Fitz, and Fitz gave the plaintiff a receipt for the money, and a voucher, as the treasurer, that he was entitled to one third of an original share from the company when this action could not be maintained."

The judge declined to rule as requested in the first and second prayers; but gave the instructions asked for in the third prayer, and further instructed the jury that, "unless, from all the evidence, they were satisfied that the one third share sold was part of the defendant's share, or was so represented to be by the defendant at the time of sale, and so understood by the plaintiff, the action could not be maintained." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. A. Somerby, for the defendant.

L. Marrett, for the plaintiff.

WELLS, J. 1. Upon the instructions given and refused, the question raised by these exceptions is, whether it was incumbent upon the plaintiff to prove that the share of stock which he was induced to take and pay for belonged to the defendant, and was sold by him to the plaintiff. As a question upon the pleadings, this cannot be necessary in order to avoid a variance. The declaration does not allege that the defendant was the owner, but only that he represented himself to be the owner. It is equally well adapted to a sale of stock of which the defendant was the owner, or of stock which he did not own, but undertook to sell as if he were the owner of it. As a matter of substance, it is immaterial. It is not necessary that it should be alleged or proved that the defendant was the owner of property which the plaintiff was induced to buy through his fraudulent representations. The *gravamen* of the charge is, that the plaintiff has been deceived to his hurt; not that the defendant has gained an advantage. *Stone v. Denny*, 4 Met. 151, 163. *Tryon v. Whitmarsh*, 1 Met. 1. *Medbury v. Watson*, 6 Met. 246. *Stiles v. White*, 11 Met. 356. *Pasley v. Freeman*, 3 T. R. 51, and notes thereon in 2 Smith Lead. Cas. (6th Am. ed.) 157. Upon this declaration, it was only necessary to show that the defendant undertook to sell the share to the plaintiff. The third

instruction prayed for was given by the court, and was sufficiently favorable to the defendant upon this branch of the case.

2. The ground upon which the plaintiff sought to recover was, that the representations of the defendant in regard to the lands were false in fact, and made as of his own knowledge; the plaintiff's counsel stating "that he should not claim to the jury that, as to that class of representations, the defendant had personal knowledge of the condition of the land." This rendered the evidence that he had not such personal knowledge irrelevant. Evidence of information from others, upon the strength of which he made those representations, even if it were such as to lead him to believe in the truth of the facts which he stated, would not be a defence against such a charge as the plaintiff relied on. If, to induce the plaintiff to make the purchase, the defendant stated, as of his own knowledge, material facts susceptible of knowledge, which were false, and the plaintiff, relying upon his statements so made, was thereby induced to purchase the stock, the defendant is liable, notwithstanding proof that he was himself misinformed as to the facts. See cases above cited; and also *Hazard v. Irwin*, 18 Pick. 95, and *Page v. Bent*, 2 Met. 371. Such evidence would not disprove the fraud, which consists in representing the statements to be true of his own knowledge.

We must presume that the instructions given to the jury were adapted to the form of the issue as it would stand upon this presentation of the plaintiff's counsel: and therefore that, in order to render a verdict against the defendant on account of his representations in regard to the land, the jury were required to find that these representations were made by him as of his own knowledge. In that aspect of the case, the exclusion of the testimony offered was proper. The point is presented as one of evidence merely, and raises no question of pleading.

Exceptions overruled.

EDWARD D. CARTER *vs.* EZRA TOWNE & another.

A boy bought some gunpowder, and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away; a week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off and was injured by the explosion. *Held*, that the injury was not the direct or proximate, natural or probable, result of the sale of the powder, and the seller was therefore not liable to the child for the injury.

TORT for carelessly and unlawfully selling to the plaintiff, a child eight years old, two pounds of gunpowder, which the plaintiff fired off and was thereby injured. After this court had overruled the demurrer to the declaration, as reported 98 Mass. 567, the defendants filed an answer, denying each and every allegation in the declaration, and alleging that, if the sale was made to the plaintiff, it was made with the knowledge and assent of the plaintiff's father.

At the trial in the superior court, before *Putnam, J.*, the plaintiff testified that he became nine years old in March 1867, and that on June 27, 1867, he went alone to the shop of the defendants and purchased of them a pistol, a box of percussion caps, and two pounds of gunpowder in four packages containing one half pound each; that he carried these articles home, and with the knowledge of his aunt, who was in charge of the house and of himself in the absence from town of his father and mother, placed them in a cupboard in the sitting room; that the powder remained in the cupboard until July 4 following, when his mother took the pistol and a portion of the powder from the cupboard and gave them to him, and with her knowledge he fired about a pound of the powder from the pistol, until he broke the hammer of the pistol lock; that on July 9, he, with the knowledge of his mother, took from the cupboard a flask, containing a quarter of a pound of the powder, carried it into the yard adjoining the house, strewed part of the powder on the ground, left the flask containing the rest of it near the trail he had made, and fired the powder; that the flask exploded and he was burned thereby; that he bought this pow-

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der and pistol to use on July 4; and that his father was at home at night, but absent through the day, and knew nothing about this powder; and there was no evidence that the father did know anything about it. The plaintiff's mother denied any knowledge of his use of the powder on July 9.

The defendants offered no evidence, but requested the judge to instruct the jury "that there was no legal and sufficient evidence to authorize the jury to find a verdict for the plaintiff; and that the act of selling the gunpowder was not the immediate and proximate cause of the injury." The judge declined so to instruct the jury, and instructed them that "if the mother knew of the use of the powder by the plaintiff at the time of the accident, the defendants would not be responsible; but that the fact that she knew of his use of it on the preceding 4th of July would not necessarily prevent the plaintiff from recovering, unless the jury found that the fact that she knew of his use of it on the 4th of July ought to have led her to believe that the plaintiff might have obtained possession of it and used it without her knowledge, on the occasion of the accident, and if so, then it was her duty to have put it where he could not possibly have got hold of it, and the defendants would not be liable." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. A. Somerby, for the defendants.

N. St. J. Green, for the plaintiff, to the point that the immediate and proximate cause of the injury was the sale of the gunpowder, cited *McDonald v. Snelling*, 14 Allen, 290; *Underhill v. Manchester*, 45 N. H. 214; *Holden v. Rutland & Burlington Railroad Co.* 30 Verm. 297; *McGrew v. Stone*, 53 Penn. State, 436; *Marble v. Worcester*, 4 Gray, 395.

GRAY, J. The testimony introduced for the plaintiff at the trial discloses quite a different case from that alleged in the declaration, which was held sufficient when the case was before us on the demurrer; and shows that the gunpowder sold by the defendants to the plaintiff had been in the legal custody and control of the plaintiff's parents, or, in their absence, of his aunt, for more than a week before the use of the gunpowder by which he

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was injured. Under these circumstances, that injury was not the direct or proximate, the natural or probable, consequence of the defendants' act; and the jury should have been instructed, in accordance with the defendants' request, that there was no legal and sufficient evidence to authorize them to return a verdict for the plaintiff. As this strikes at the root of the action, it is unnecessary to consider the other questions argued by counsel.

Exceptions sustained.

**JOHN H. BLOOD & wife vs. INHABITANTS OF TYNGSBOROUGH.
AMOS W. WYMAN & wife vs. SAME.**

In an action against a town for an injury from a defect in the highway, the plaintiff testified that she was driving a steady and gentle horse, which she was accustomed to drive, over a road with which she was acquainted, and down a hill about a quarter of a mile long, on which there were several water-bars, over which she knew that the horse could not trot in safety; that, thinking that she had passed them all, she allowed the horse to trot, having a rein in each of her hands, looking at the horse, keeping control of him, and having the wheels of her carriage in the regular ruts; but that she was mistaken in supposing that she had passed all the bars, and came upon a bar, which she did not see, and which overturned the carriage and caused the injury. *Held*, that this was some evidence for the jury that she was in the exercise of due care.

TWO ACTIONS OF TORT on the Gen. Sts. c. 44, § 22, for injuries occasioned to the female plaintiffs by a defect in a highway which the defendants were bound to keep in repair. These cases were tried together in this court, and verdicts found for the plaintiffs, before *Morton, J.*, who overruled a request of the defendants for a ruling that on the evidence the plaintiffs failed to use due care at the time of the accident, and submitted that question to the jury. The defendants alleged exceptions, the material part of which is stated in the opinion.

T. H. Sweetser & W. S. Gardner, for the defendants.

D. S. Richardson, (*G. F. Richardson* with him,) for the plaintiffs.

CHAPMAN, C. J. At the time of the accident which caused the injury complained of, Mrs. Blood was driving the horse; and the question presented is, whether any evidence was offered

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sufficient in law to authorize the jury to find that she used due care. If there was none, a verdict for the defendants should have been ordered by the court.

On examining the bill of exceptions it appears that there was some evidence of care on her part. She was accustomed to drive the horse, and he was steady, kind and gentle; she was acquainted with the road; she was driving down a hill about a quarter of a mile long upon which there were several water-bars in the road, and she knew the horse could not trot over them with safety; she thought she had passed them all, and then allowed the horse to go upon a trot, but she held the reins in each hand, and appears to have had control of the horse. The wheels were in the regular ruts, and she was looking at the horse. On account of her mistake in supposing she had passed all the bars, she did not see the bar that caused the accident, and the wagon was suddenly turned over by it. The jury would be authorized to find that ordinary and reasonable care was quite consistent with a mistake as to the number of water-bars, and that, taking into consideration all the circumstances of the case as stated in the bill of exceptions, and the inferences of fact to be drawn from them, the plaintiffs had sustained the burden of proof on their part. The case is unlike that of *Gilman v. Deerfield*, 15 Gray, 577, where there was no evidence that the plaintiff used any care. *Exceptions overruled.*

WILLIAM FORSYTH *vs.* BOSTON AND ALBANY RAILROAD
COMPANY.

In an action against a railroad corporation for a personal injury, it appeared that the plaintiff was a passenger on the defendants' cars, and alighted from the cars at night, at a station of the defendants, on one of two platforms extending along each side of the track to a highway, (which, as the plaintiff knew, crossed the railroad,) and having a step at the end next the highway; that, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle-guard dug across the track, and was injured; that the night was so dark that he felt with his feet to find the edge of the platform; and that he did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover.

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Tort for personal injuries received at the defendants' railroad station called Rice's Crossing, in Needham. Trial in the superior court, before *Wilkinson, J.*, who reported the case for the determination of this court substantially as follows :

"Only three trains a day each way stopped at the station, and those only when there were passengers to get in or out there. No tickets were sold there, or for the station by that name, and there was no accommodation for passengers, other than a shelter, which was a building, but the defendants advertised Rice's Crossing in the newspapers as one of their stations, and sold tickets to persons for Rice's Crossing, as they did to the plaintiff in this case.

"The plaintiff, being in Boston, wished to go to Newton Lower Falls, where he lived, but no train left for that place, which was on a branch from the main track, until 11 o'clock p. m.; and he, wishing to go sooner, went to the ticket office of the defendants in Boston, and asked for a ticket for Rice's Crossing on the main track nearest Newton Lower Falls, to go on the half past 9 o'clock p. m. train; the ticket agent told him to tell the conductor of the train to stop at Rice's Crossing and let the plaintiff get off, and sold him a railroad ticket marked 'Newton Lower Falls;' the plaintiff took the half past 9 o'clock train, told the conductor to stop at Rice's Crossing, and gave up his ticket to the conductor; the train did stop there, at about ten minutes before 10 o'clock, p. m.; the plaintiff got out from the cars on to the platform furthest from and about opposite to the station-house" as shown on a plan which was made a part of the case; "the cars came from Boston on the track furthest from the station-house; the night was quite dark, and there was no light at the station, or on the premises of the defendants, or otherwise, and the plaintiff had never before been out in the cars from the direction of Boston and stopped at the station, but had previously taken the cars from the station to Boston on the opposite side of the track, in the daytime, and knew the locality and that there was a crossing there, and could see the crossing-sign on the other side, but did not know and had not seen a cattle-guard which extended all the way between

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the two platforms, and was about four feet in width and from three to four feet deep. The plaintiff, in going to the station in the daytime, always came from Newton Lower Falls, and went diagonally from the highway, before he got to the station, up a footpath, which would not require him to go over the road at the spot where the cattle-guard was. No passengers got into the cars at the station, and the only other passengers, besides the plaintiff, who got out of the cars were two men, who were strangers to the plaintiff, were lower down on the platform towards Boston than the plaintiff, and about six feet from him, and, after having walked down the platform furthest from the station and near to its end in the direction towards Boston, stepped off the end and side of the platform next to the station, and walked directly towards the public highway on the other side of the railroad, which led to Newton Lower Falls. The plaintiff, at the same time, walked after them on the platform in the same general direction, voluntarily stepped off the side of the platform nearest to the station, knowing that he was stepping on to the railroad, and that the highway crossed the railroad at that place, and intending to cross the railroad to the highway on the other side thereof; and in stepping off the side of the platform nearest the station, stepped directly into the cattle-guard, (which came up to the platform,) and was injured. In stepping from the platform, he felt with his feet to see that he had got to the edge of the platform before stepping off, but did not do anything to ascertain what would be found on stepping off the platform. Neither the conductor of the train nor any other person ever gave the plaintiff any notice of the existence of this cattle-guard, nor had he any notice or knowledge of it, until he fell into it; and there was no guard or rail or anything to prevent him from stepping immediately from the side of the platform into the cattle-guard. There was nothing in the construction of the platform or the railroad to have prevented the plaintiff from walking on the platform to its extreme end, in the direction he was walking, and thence continuing in a straight line to the highway, and there was a step at the end of the platform towards the highway, and a travelled place on

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the other side of the platform, communicating with the highway on that side. The defendants at the time employed a flagman at the station, who remained during the day and up to the time which the last train left the station for Boston, which was about twenty minutes before 8 o'clock, P. M.; but this flagman was not placed there under any orders of the selectmen or the county commissioners."

The judge ruled that the action could not be maintained upon these facts, and directed a verdict for the defendants, which was returned accordingly.

G. A. Somerby, for the plaintiff.

G. S. Hale, for the defendants.

GRAY, J. The facts upon which the decision of this case depends may be briefly stated. The accident for which the plaintiff seeks to recover damages of the defendants occurred at their station called Rice's Crossing in Needham, near the point where the railroad is crossed by a highway. At this station the defendants had provided a platform on each side of the track, extending to the highway, or to a travelled place connected with it, with a step at the end next the highway. The plaintiff alighted from the car upon the platform farthest from the station-house, about ten o'clock at night. Instead of walking along that platform to the end towards the highway, he voluntarily stepped off the side of the platform next the track, knowing the place where the highway crossed the railroad and that he was stepping upon the railroad, and with the intention of going, not directly across the track to the platform on the opposite side, but obliquely to the highway; and stepped into a pole or cattle-guard, which extended from one platform to the other, and was made there to prevent cattle from straying from the highway upon the railroad. The night was so dark that before stepping from the platform he felt with his feet in order to know whether he had come to the edge. Yet, in the words of the report, "he did not do anything to ascertain what would be found on stepping off the platform."

Under these circumstances, we are unanimously of opinion that the plaintiff had no right to assume that the construction

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and condition of the railroad track were such that he might safely walk across it towards the highway; and that in voluntarily and unnecessarily stepping from the platform down upon the track in the dark, without taking any precaution to ascertain whether he could do so with safety, he was wanting in ordinary care, and cannot therefore maintain an action against the railroad corporation for the injuries received by stepping into the cattle-guard.

The cases of *Warren v. Fitchburg Railroad Co.* 8 Allen, 227, *Caswell v. Boston & Worcester Railroad Co.* 98 Mass. 194, and *Gaynor v. Old Colony & Newport Railway Co.* 100 Mass. 208, on which the plaintiff principally relies, are quite distinguishable from this. In each of them, the injury was not occasioned by anything in the track itself, upon which the plaintiff stepped, but by being struck by an engine in motion. In the first and second cases, the acts of the defendants' agents and servants conduced to lead the plaintiff into the place of danger. And in the third case, the plaintiff had alighted upon a narrow platform, provided by the defendants for the purpose, between two tracks, one of which he must necessarily cross; and he testified that before stepping off he looked up and down the track and saw nothing approaching. But in this case there is no evidence tending to show that the defendants held out any inducement to him to cross the track in the direction in which he did, or that he took any precaution whatever.

Judgment on the verdict.

HUGH CREELEY vs. BAY STATE BRICK COMPANY.

On a bill in equity to restrain the construction of a permanent causeway across the plaintiff's land, the objection that the plaintiff has an adequate remedy at law must be raised by demurrer or at least be specially relied on in the answer, and cannot be raised for the first time at the hearing; and if it appears that the defendants have been, through mistake of boundaries, constructing such causeway on the plaintiff's land, they will be decreed to discontinue its use and restore the plaintiff's land to its former condition.

BILL IN EQUITY, praying that the defendants might be restrained from constructing a causeway on the plaintiff's land,

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and be ordered to remove earth and stones which they had brought thereon. An injunction was granted, but afterwards dissolved on the defendants' giving bond. The defendants moved that issues might be framed for a jury; but afterwards the parties agreed that the demand for a jury should be waived, and the case tried by the court. The case was accordingly heard by *Ames, J.*, on whose report and the pleadings it was reserved for the determination of the full court. The facts are stated in the opinion.

J. L. Stackpole, for the plaintiff.

A. A. Ranney, for the defendants.

AMES, J. The facts reported present a plain case of that particular kind of injury that is described by the term nuisance. The defendants, at the time of the service of the injunction, were constructing, and since then have completed, a causeway of two or three feet in height, and about twenty-five feet in width, across the plaintiff's land, without his consent and in violation of his right. It is true that in so doing they were acting under a mistake as to boundaries, and were not wilful or malicious trespassers; but it is not less true that they were in the act of erecting a permanent structure, and claiming a permanent right, to be exercised according to their own will, and whenever they found convenient, on what proves to be the plaintiff's land. The subject matter of the bill, therefore, was clearly within the equity jurisdiction of the court. The objection that the plaintiff has a complete and adequate remedy at common law, even if well founded, comes too late. An objection of this kind should have been made on demurrer, or at least should have been specially relied upon in the answer, and not raised for the first time at the hearing upon pleadings which suggest no such ground of defence. Under such circumstances, the court can hardly do otherwise than retain the cause, provided it is competent to grant relief and have jurisdiction of the subject matter; and of this we have no doubt. The mode of trial adopted in the case has settled the question of title in favor of the plaintiff, and it is found as matter of fact that the boundaries of his lot are substantially as claimed by him, and that the road which the defendants have

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constructed crosses his land in such a manner as to separate about one fourth part of it from the rest. It is true that the act of the defendants was a trespass, and would have furnished sufficient ground for an action at law, but it was also an appropriation of the plaintiff's land of a continuous and permanent nature, as to which the plaintiff had a right to resort to the preventive as well as to the remedial power of the court, and to seek for a decree directing the removal of the structure, or requiring its discontinuance.

The plaintiff is therefore entitled to a decree requiring the defendants to discontinue the use of so much of the road as lies within the limits of his land, and also that they restore his land to its former and usual condition. The plaintiff is also to recover such a sum in damages as an assessor to be appointed by the court may, upon the hearing of the parties, award, with the costs of suit.

Decree accordingly.

ALFRED BUNKER vs. ANDREW J. BENNETT & others.

In an action for breaking and entering the plaintiff's dwelling-house and using abusive language and insulting his wife in his absence, she is not a competent witness under the St. of 1865, c. 207, § 2, to the defendants' acts.

TORT for breaking and entering the plaintiff's dwelling-house under the pretence of having a warrant to arrest the plaintiff's daughter in law for larceny, and of having a searchwarrant; searching the house and taking possession thereof; making a great noise and disturbance therein; and using vile and abusive language to the plaintiff's wife and daughter in law.

At the trial in the superior court, before *Putnam, J.*, the plaintiff's wife was allowed, against the defendants' objection, to testify to the entry of the defendants into the house, and their acts done therein in her husband's absence.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

T. P. Healy, for the defendants.

N. St. J. Green, for the plaintiff.

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MORTON, J. The rule of the common law, that a wife is not a competent witness in a suit in which her husband is a party, remains in force in this Commonwealth, except so far as it is modified by statute. It is conceded that the plaintiff's wife is not a competent witness in this case, unless she is made so by the St. of 1865, c. 207, § 2. By this statute, the wife is not made a witness in cases where a transaction takes place in her presence and not in the presence of her husband, and in which she has no part, but only where "the contract or cause of action in issue and on trial was made or transacted" with her. This action is tort for a trespass, and the cause of action is, that the defendants broke and entered the plaintiff's dwelling-house. The allegations that the defendants used abusive language and insulted the plaintiff's wife and daughter in law, are available merely in aggravation of damages, and do not change the cause of action. The trespass committed by the defendant occurred in the presence of the wife, but it was a transaction entirely independent of her, and in which she took no part. It cannot in any proper sense be said that the cause of action was transacted with her. *Bliss v. Franklin*, 13 Allen, 244.

Exceptions sustained.

ADOLPHUS J. CARTER vs. JOSIAH A. KINGMAN.

A person who had received goods from the owner, with the right to use them and to become owner of them on fulfilment of certain conditions, among which were that he should not sell or remove them from a certain place without the owner's consent, and that they should not become his till paid for, sold them to a third person, who removed and resold them. *Held*, that the third person was liable to the owner of the goods for their conversion, although he had acted in good faith, and had parted with them before any demand upon him.

TORT for the conversion of household furniture. At the trial in the superior court, before *Putnam*, J., the plaintiff offered evidence tending to prove that on March 6, 1868, he, being then the owner of the furniture, delivered it to George F. Clark

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at the house of the latter in Charlestown, under a written agreement signed by Clark, which contained an acknowledgment that he had "leased and received" the furniture from the plaintiff, to be paid for in payments of \$10 a week, and also the following provision: "For the rent and use of which I promise to pay him [the plaintiff] or his order, the sum of conditions as above; and to return the same on demand if the payments are not made according to said lease; and not to sell, convey, underlet or remove the articles from where they are leased, without first getting the consent of said Carter, under the penalty of the laws of the Commonwealth as against theft;" that at the time of making this agreement Clark paid him \$75 as part payment for the furniture; and that it was orally agreed that the furniture should be delivered into Clark's possession, and Clark should retain such possession and become the absolute owner of the furniture upon fulfilling the conditions of the written agreement, and the first payment should be put off to March 20; that Clark, on March 7, without the plaintiff's consent or knowledge, sold the furniture to the defendant, who on the next day removed it from Clark's house to his own shop; that the plaintiff, on learning of Clark's conduct, demanded the furniture from the defendant; but that the defendant had then sold it, and could not therefore restore it. The defendant testified that he purchased the furniture in good faith from Clark, and without any knowledge of Clark's fraud or breach of agreement.

The plaintiff requested the judge to rule "that if Clark, at the time of making the lease or agreement with the plaintiff and obtaining the furniture, intended thereby to defraud the plaintiff, then the plaintiff's right of possession in the furniture was not thereby parted with or suspended; that the fraudulent breach by Clark of either of his agreements contained in the written agreement destroyed any right of possession he might have had in the furniture, and restored such right to the plaintiff; and that the defendant's acts in relation to the furniture were tortious as against the plaintiff, and rendered him liable to the plaintiff without previous demand."

The judge declined so to rule; but instructed the jury that, "if the defendant bought the property of Clark in good faith and for a valuable consideration, having no notice of the relations between the plaintiff and Clark, or of any fraud or fraudulent intent on the part of Clark, or of the fact that Clark had no right to sell the property, and if all his acts in relation to obtaining possession of and reselling the property were in good faith, and he resold it before any notice of the fraud, or any claim to the furniture by the plaintiff, or demand for it by the plaintiff, then this action could not be maintained; and that this would be so, even if the acts of Clark in obtaining the property were fraudulent as to the plaintiff, and although the plaintiff might possibly have reclaimed the goods themselves, by reason of such fraud, had not the defendant sold them in good faith and without such notice, before demand made upon him." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. B. Richardson, for the defendant, was first called upon.

W. S. Stearns, for the plaintiff, was not called upon.

CHAPMAN, C. J. It appears that Clark received the goods from the plaintiff with the right to use them at the place mentioned, and that they were to become his on the fulfilment of certain conditions. Among these conditions were the following, namely, that he was "not to sell, convey, underlet or remove the articles from where they are leased, without first getting the consent" of the plaintiff, and the property was not to become his till he paid for it. By the sale and delivery of the property to the defendant in violation of these conditions, he did not vest in the defendant any right to it as against the plaintiff. *Coggrill v. Hartford & New Haven Railroad Co.* 3 Gray, 545. And the plaintiff may maintain this action without a demand. *Gilmore v. Newton*, 9 Allen, 171. The doctrine applicable to an unconditional sale and delivery of goods, which is voidable by the vendor on account of the fraud of the vendee, as in *Hoffman v. Noble*, 6 Met. 68, does not apply to a case like this. Nor is this case like that of *Day v. Bassett*, 102 Mass. 445; for, though in that case the vendee took the property to use, but not

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to have title till he should pay a certain sum, and sold the property before making the payment, yet his vendee did not remove the property, or change the position or use of it, and the money was tendered by him to his vendor before default of payment.

Exceptions sustained.

MICHAEL M. BARRY vs. JOHN O'BRIEN.

When the verdict in replevin is for the defendant upon an issue of the right of possession, the burden of proof is on the plaintiff to show that a return should not be ordered.

At the trial of an action of replevin the plaintiff contended that he owned the goods replevied, had allowed the defendant to keep them until demanded, and had demanded them. The defendant contended that he himself was the owner. The jury found for the defendant on the ground that the plaintiff had made no demand, but did not pass upon the question of title. *Held*, that the defendant was entitled to a return.

REPLEVIN of household furniture. The answer denied that the property in the furniture was in the plaintiff, and that he had any right of possession at the date of his writ; and alleged that the furniture was then rightfully in the possession of the defendant.

At the trial in the superior court, before *Putnam, J.*, both parties claimed title to the furniture. The plaintiff contended that he owned it and "let it to the defendant, at a monthly rent to continue until he demanded it back." The defendant contended that he himself was the owner of it.

The judge instructed the jury, that, "to entitle the plaintiff to recover, he must satisfy them that he was the owner of the furniture and was entitled to the possession of it before action brought, by having demanded it back from the defendant, he having admitted (assuming him to have been the owner) that he let it to the defendant to retain it till he demanded it back; and that, if they were not satisfied of both of these propositions their verdict must be for the defendant." No exception was taken to these instructions.

The jury returned a verdict for the defendant, and, having been asked by the judge, at the request of the plaintiff, on what

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ground they found for the defendant, answered that "they found for him on the ground that no demand had ever been made upon him for the furniture, and that they did not determine the question of ownership as between the parties."

The judge ordered a return of the furniture, to which order the plaintiff excepted.

N. C. Berry, for the plaintiff.

W. W. Warren, for the defendant.

COLT, J. In order to maintain his action, the plaintiff in replevin, where the issue raises the question of title, must show both property in the goods taken, and the right of immediate and exclusive possession. If he fails to establish his right of possession, he fails to establish his title as against the defendant, as much as if he failed to prove his general or special ownership; and from the nature of the case, the verdict in his favor must leave the ownership unsettled. A return of the property as a general rule follows of course. If the defendant be not the true owner, he may still be accountable over for it to such owner. And the burden is on the plaintiff to show sufficient reason for refusing the order for a return. This he may do by showing that the title of the defendant, or his right of possession, has terminated since the commencement of the suit, or that the property has in fact gone to the possession of the true owner. *Dawson v. Wetherbee*, 2 Allen, 461. *Johnson v. Neale*, 6 Allen, 227. *Collins v. Evans*, 15 Pick. 63.

The pleadings in this case put in issue the plaintiff's title and right of possession. The trial was had upon that issue. The judge instructed the jury, in substance, that the plaintiff must satisfy them, both that he was the owner, and that he was entitled to the possession of the goods before action brought, and the finding of the jury was for the defendant on the last proposition, leaving the question of ownership, as to which there was conflicting evidence, unsettled by the verdict. In this there was no irregularity, because the question of ownership was immaterial, so long as the jury was satisfied that the plaintiff was not entitled to the possession as against the defendant.

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Upon the case presented, the plaintiff, in opposing an order for a return, fails to bring himself within any of the exceptions to the general rule, which requires a return when the verdict is for the defendant upon the issue of property and right of possession. *Simpson v. McFarland*, 18 Pick. 427.

Exceptions overruled.

WILLIAM E. BOORAEM vs. JOHN CRANE.

If a person to whom intoxicating liquors have been delivered for examination, under an agreement that he shall pay cash for them if they suit him, and return them if they do not, and that they shall not become his property till paid for, refuses, on demand, to pay for them or to return them, and conceals them, he is liable to an action for their conversion, notwithstanding the statutes forbidding the sale of intoxicating liquors.

TORT for the conversion of some whiskey. At the trial in the superior court, before *Wilkinson, J.*, the plaintiff introduced evidence tending to show that the whiskey was sent by the plaintiff to the defendant for him to examine it, under an agreement that, if it did not prove satisfactory, he would return it, but, if it suited him, he was to pay cash for it, and, until paid for, it should remain the property of the plaintiff; and that the defendant refused on demand to pay the price or return the whiskey, and concealed it.

The defendant requested the judge to rule that the evidence would not support the action; but he declined so to rule, and instructed the jury that, if they found that there was no sale of the whiskey by the plaintiff to the defendant, the action could be maintained. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

I. S. Morse, for the defendant, relied on the Gen. Sts. c. 86, and c. 168, § 8.

G. A. Somerby, (*T. S. Dame* with him,) for the plaintiff.

AMES, J. The property in question was intrusted to the defendant's hands, in order that he might examine it with a view to a purchase. It was not sold to him on credit, and by the terms of the contract was not to become his property until he

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should pay the agreed price. According to the well established rule laid down by this court in *Coggill v. Hartford & New Haven Railroad Co.* 3 Gray, 545, and in many other cases to the same point, the merchandise continued to be the property of the plaintiff. It was property which the law protects against wrongdoers; and the defendant, in removing it out of the owner's reach and converting it to his own use, was a mere wrongdoer. There is nothing in the statutes in relation to the sale of intoxicating liquors to prevent the owner of such liquors from maintaining an action to recover them or their value, when they are tortiously taken from him. *Breck v. Adams*, 3 Gray, 569. *Fisher v. McGirr*, 1 Gray, 1, 46. *Commonwealth v. Coffee*, 9 Gray, 139. *Brown v. Perkins*, 12 Gray, 89.

Exceptions overruled.

DANIEL W. HIGBEE vs. SAMUEL T. DRESSER & another.

In an action by the indorsee against the makers of a promissory note, an attorney at law, called as a witness by the defendants, was allowed, against the objection of the plaintiff and of himself, to testify that he received a letter from the payee of the note, containing a claim for intoxicating liquors against the defendants; that he advised his correspondent to get a promissory note on time signed by the defendants, and to indorse it, for value, before it was due, to an innocent third person; and that he afterwards received the note in suit from the plaintiff. The plaintiff also produced at the request of the defendants, but against his own objection, the letter to the attorney, which stated that the defendants owed the payee a running account for intoxicating liquors furnished to them in Wisconsin. Held, that the admission of the attorney's testimony and of the letter was a violation of the rule excluding privileged communications between attorney and client.

CONTRACT upon a promissory note on ninety days, made by the defendants, Samuel T. Dresser and John C. Newcomb, doing business under the name of Dresser & Newcomb, to Darius R. Brant and John H. Peck, (who were traders in Chicago, under the name of Brant & Company,) or their order, dated February 7, 1867, and transferred to the plaintiff by Brant and Peck by indorsement bearing the same date, without recourse to them. Writ dated April 18, 1868.

At the trial in the superior court, before *Rockwell, J.*, the defendants called as a witness John C. Abbott, an attorney at law

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residing in Lowell, who was allowed to testify, against the objection of the defendants, that he received a letter from Brant & Company containing a claim against the defendants; and that he had an interview with the defendant Dresser, and Dresser refused to pay the claim, which was for intoxicating liquor. It appeared that the note in suit was afterwards given in settlement of the claim. Abbott, upon being asked, objected to testify what advice he gave to Brant & Company, unless the judge should rule that it was not privileged. The judge allowed him to testify, and he testified, that, after receiving the letter, he advised Brant & Company to get a promissory note on time signed by the defendants, and transfer it to an innocent party for value before due; that, after this, he received the note in suit in a letter from the plaintiff; that he had an interview with Dresser about the note, and Dresser refused to pay it; and that afterwards he received other letters from the plaintiff concerning the note. The defendants notified the plaintiff to produce at the trial the letter of Brant & Company to Abbott, and also the letters of the plaintiff to him. The plaintiff produced the letters, under objection; and objected to their being put in evidence, as being privileged communications; but the judge allowed them to be put in evidence.

The material part of the letter from Brant & Company was as follows: "Chicago, March 29, 1867. A Mr. Samuel T. Dresser, of your city, owes us a balance of a running liquor bill or account created and made while running a saloon in Waukegan, Wisconsin, in company with John C. Newcomb, of \$245.35, besides some \$15 of interest. Newcomb, his partner here, says by their settlement Dresser was to pay our debt, about which there is no dispute, and that Dresser is well off and perfectly able to pay, and took away from here with him some two or three thousand dollars and deceived him, as he was to pay our claim before he left. We desire you to look him up, (he is a saloon and billiard man in Lowell,) and present our demand, and if he pays you, well, and if not, let us hear from you per return mail, and we will forward the account. Please see if you cannot get him to acknowledge the debt and make it at once, and let us hear at your earliest convenience."

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The first letter from the plaintiff was as follows: "Chicago, May 18, 1867. I have written two letters, dated respectively April 13 and May 6; the first containing a promissory note signed by Dresser & Newcomb, transferred by the payees, Brant & Company, to myself for \$262.14. In each letter I requested an immediate answer; if you have not received the same please let me know at once. Inform me also as to the responsibility of Dresser & Newcomb." The second letter was as follows: "Chicago, March 9, 1868. I today sent a letter to John Davis asking him to collect that note against Dresser & Newcomb, which I hope you will be kind enough to hand over, together with what information you may have on the matter."

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

J. Davis, for the plaintiff.

C. A. F. Swan, for the defendants.

AMES, J. The case finds that Brant and Peck, who were traders residing in Chicago, sent a letter by mail to the witness Abbott, an attorney at law residing at Lowell, for the purpose of consulting or employing him as such, in the collection of a debt which they alleged to be due to them from the defendant; and that he, in answer to their letter, gave them some advice as to the best mode of proceeding in order to accomplish that object. No other communication appears to have passed between them, and no proceedings were commenced against the defendants for somewhat over a year. To require him to produce the letter, and to testify as to his own reply to it, was apparently in direct violation of the rule that professional communications between attorney and client are so far privileged that the attorney, when called as a witness, shall not be either compelled or permitted to disclose them. The defendants do not in our judgment relieve the case of this difficulty by the suggestion that there was some fraud or collusion between Brant & Company and the plaintiff, to which the attorney was privy, or in relation to which he gave some advice. The nature of this alleged fraud is not indicated with much distinctness in the bill of exceptions. We are unable to see anything in the case, as re-

ported, that has any appearance of fraud or collusion, except possibly some ground to suspect that the plaintiff may be but a nominal party, and that the suit is really prosecuted for the benefit of Brant and Peck. There is, however, nothing in the case to show that the sale of intoxicating liquors is prohibited by the laws of Wisconsin, where the contract was made, or that the contract was illegal under our own statutes, or that any advantage, dishonest or otherwise, could be gained by bringing the suit in the name of Higbee. A mere suggestion of fraud, in general terms, does not furnish sufficient ground for setting aside so well known and salutary a rule as that which protects and privileges the communications of counsel and client. If the case disclosed anything having a tendency to show that the witness was acting for himself as a party to the transaction, or that he was consulted in aid of any intended fraud, or that his advice was asked for any dishonest purpose, the matter would have raised a more serious question. It was to all appearance the ordinary case of information obtained by the witness, in his professional capacity as an attorney, in the ordinary course of business as such. We see nothing, in any of the facts reported, to take the case out of the well known rule. It was a mistake in the trial, therefore, to compel him to testify, and the evidence so obtained was incompetent and inadmissible. 1 Taylor on Evidence, §§ 833 & seq.

The two letters from the plaintiff to the same witness do not necessarily fall within the rule referred to, and are not of a specially confidential character. In the first of them he does little more than inquire whether certain earlier letters have been received; and in the second he simply requests him to deliver the note declared on to another attorney. The error in the other part of the case, however, renders it necessary to sustain the plaintiff's exceptions.

Exceptions sustained.

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MILTON ALDRICH vs. ALPHEUS R. BROWN & another.

After a commissioner has been appointed to take the evidence upon a petition to establish the truth of exceptions disallowed by the judge presiding at a trial, a motion filed before such appointment, to dismiss the petition on the ground that it was not seasonably presented, cannot be entertained.

On an issue between attorney and client of the value of the former's services in a suit in which the latter was plaintiff and which was settled without a trial, the opinion of the counsel of the defendant in such suit that the plaintiff therein had no case is competent evidence.

If by their client's authority attorneys have retained counsel and promised to pay him out of the proceeds of the suit, and he holds them responsible under this agreement, and the proceeds of the suit have come to their hands, it is too late for the client to forbid them to pay the counsel.

An attorney retained in a suit is entitled to a reasonable retainer without any special contract therefor.

CONTRACT for \$800 money had and received. The answer alleged that the defendants, who were attorneys at law, received the sum of \$2500 in settlement of a suit brought by the plaintiff against the Nashua & Lowell Railroad Corporation, paid \$1700 thereof to the plaintiff and retained \$800,—\$500 for their own fees and disbursements, and \$300 for the fees of Theodore H. Sweetser. The defendants also filed a declaration in set-off for said fees and disbursements, the first item of which was \$100 for a retainer.

It appeared by the records of the superior court that the case was tried in that court, and a verdict returned for the defendants at December term 1868, to wit, in January 1869; that exceptions were then presented by the plaintiff, and not allowed by the presiding judge, and that the case was continued to March term 1869, when judgment was rendered upon the verdict and execution issued. At January term 1869 the plaintiff presented to this court a petition, under the Gen. Sts. c. 115, § 11, to establish the truth of the exceptions; and the defendants moved to dismiss the petition as presented too late; but the court appointed a commissioner to take the evidence. The defendants at January term 1870 insisted on their motion to dismiss the petition.

D. S. Richardson, for the defendants.

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A. F. L. Norris, for the plaintiff.

BY THE COURT. This motion cannot be entertained. It must be taken to have been either overruled or waived, when the commissioner was appointed to take the evidence; for if the petition was not regularly before the court, there was nothing here to be referred to a commissioner.

FROM the report of the commissioner, filed at January term 1870, the following facts appeared :

At the trial in the superior court, before *Brigham*, C. J., the plaintiff introduced evidence tending to show that he employed the defendants to bring an action against the said corporation; that subsequently, upon the suggestion of the defendants, Theodore H. Sweetser was employed as counsel, and, upon the negotiation and by the advice of the defendants and Sweetser, the action was settled upon the defendants' receiving \$2500 from the corporation; that the defendants paid \$1700 to the plaintiff, and retained \$500 for themselves and \$300 for Sweetser, informing the plaintiff that Sweetser claimed that sum; and that the plaintiff then forbade the defendants to pay said sum to Sweetser.

The defendants introduced evidence tending to show that they, with the plaintiff's assent, applied to Sweetser, and told him that his compensation must substantially depend upon the result of the case, to which he assented; that they and Sweetser became of opinion that the action could not be maintained, and negotiated the settlement with the corporation; that Sweetser informed the defendants that his charge would be \$300; and that the defendants agreed to retain that sum for him, and had paid him part thereof.

The defendants called as a witness Josiah G. Abbott, who was of counsel for the corporation in the action; and were allowed, against the plaintiff's objection, to ask him whether, from his preparation of the defence and his knowledge of the plaintiff's case, the action could, in his opinion, have been maintained. The witness testified that his opinion was that the plaintiff had no case and the defendants were not liable, and

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that he said so to the corporation, and to the defendants and Sweetser.

The plaintiff asked the judge to instruct the jury that "if the plaintiff forbade the defendants' paying Sweetser the sum of \$300, before they paid the same, it was a revocation of their authority to pay; and if they afterwards paid it, or any part of it, such payment could not be set up by them as a set-off or other defence to this action." The judge declined to give the instruction as prayed for, but instructed the jury that "if the plaintiff forbade the payment before it was made, that would be a revocation; but that if the defendants employed Sweetser by authority of the plaintiff, and agreed to pay him out of what should be obtained in the suit, with the plaintiff's assent, and Sweetser held the defendants responsible under this agreement, and the jury should find that Sweetser's services were of the value of \$300, then the defendants would have the right to retain that sum, even if it had not been paid over."

The plaintiff also asked the judge to rule that the defendants could not recover in set-off for a retainer, unless there was a special agreement between the parties to pay the same; but the judge refused so to rule.

The jury returned a verdict for the defendants, and the plaintiff filed a bill of exceptions, which was neither allowed nor disallowed.

A. F. L. Norris, for the plaintiff.

D. S. Richardson, for the defendants, was stopped by the court.

BY THE COURT. 1. In order that the jury might be able to judge correctly of the nature and value of the services of the defendants and of Sweetser, it would be necessary for them to ascertain whether the claim was plain and indisputable, or of a doubtful character. The testimony of an expert as to the nature of the questions involved in it was proper in this point of view.

2. The ruling of the court was correct, that if, by the plaintiff's authority, the defendants retained Sweetser, and agreed to pay him out of what should be obtained in the suit, by the

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plaintiff's assent, as stated, and Sweetser held the defendants responsible under this agreement, the money being then in the defendants' hands, it was too late for the plaintiff to revoke the defendants' authority.

3. After the defendants were retained, it was proper for them to charge a reasonable fee for the retainer without any special contract.

Exceptions overruled.

ELLEN S. PRIEST vs. INHABITANTS OF GROTON.

At a term of the superior court at which verdict was rendered in a case, exceptions were filed by agreement, and no judgment was entered, but the case continued to the next term, on the last day of which the exceptions were allowed and returned to the files by the judge, and they were entered on the proper docket of this court twenty-seven days afterwards and more than a month before the next law term, at which in the usual course they would be argued. *Held*, that they were duly allowed in the superior court, and seasonably entered in this court.

A petition to establish the truth of exceptions to be argued in the law term of this court for the Commonwealth must be entered on the docket of said court within a reasonable time after they are taken, and at the same term at which they would by law be entered if duly signed and allowed.

This court, at its term for a county, questions of law arising in which are to be argued in the law term for the Commonwealth, has no jurisdiction of a petition to establish the truth of exceptions arising in that county.

In an action for an injury alleged to have been caused to a traveller by a defect in a highway which the defendant town was bound to keep in repair, the answer denied each and every allegation of the declaration. At the trial, the only defect contended for by the plaintiff was the absence of a railing by the side of the way at the time of the accident; and the town did not deny that there was no such railing at that time, but only that the absence of it was a defect, and conceded that the way had been in substantially the same condition for the five years previous, and that its condition was known to every town officer. *Held*, that the plaintiff was not bound to accept these concessions and might prove both that the defect had existed more than twenty-four hours, and that the town had notice of it.

On the trial of an action for physical injuries sustained by the plaintiff, the physician who attended her, being called as a witness in reference to the nature of the injuries, was asked and answered questions objectionable as calling for his judgment on the credibility of information given him concerning them, and on the truth of controverted facts. But before his examination was finished, on the suggestion of the judge, hypothetical questions upon the same points were put to and answered by him in a manner avoiding such objections; and the judge thereupon instructed the jury that they should exclude from their consideration the previous questions and answers. *Held*, that the defendant had no ground of exception without some evidence that he was prejudiced by this course of examination of the witness.

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the trial of an action for an injury alleged to have been caused to the plaintiff by a defect in a highway which the defendant town was bound to keep in repair, and on which the plaintiff was travelling, in a vehicle, with a companion, who was driving at the time of the accident, a witness for the town, who came to the place of the accident immediately after its occurrence, testified that he then asked the plaintiff's companion how it happened, and she replied that she did not know unless the horse was frightened or she pulled the wrong rein. *Held*, that evidence was inadmissible, in the plaintiff's behalf, for the purpose of contradicting the witness, that the witness, being himself asked, later on the same day, how the accident happened, replied that the horse shied.

TORT for injuries alleged to have been occasioned to the plaintiff by a defect in a highway, which the declaration alleged that the defendants were bound to keep in repair, but negligently suffered to be out of repair, whereby the plaintiff, travelling thereon and using due care, was hurt. The answer merely denied each and every allegation of the declaration. Trial in the superior court, at June term 1869, before *Putnam, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions.

The dockets of the superior court contained the following entries in the case: Of June term 1869—"July 3, verdict for plaintiff \$2250; July 7, motion for new trial; July 7, exceptions filed by agreement." Of September term 1869—"June, verdict for plaintiff; motion for new trial; exceptions filed by agreement, and allowed. Law." September term was adjourned without day on the 15th of October. The certificate of the presiding judge, allowing the exceptions, stated that the intervening delay had been necessary for that purpose; and bore no date. The exceptions allowed were entered on the law docket of this court at Boston on the 11th of November.

The defendants addressed a petition to this court "within and without the county of Middlesex," alleging that their bill of exceptions, as originally filed and presented to the superior court, was in conformity with the truth, and should have been allowed; but that it was materially altered by the presiding judge in certain particulars, which they specified; and praying for leave to establish the truth of their exceptions as originally presented. This petition was entered by the defendants on the 2d of November in the clerk's office of this court for the county of Middlesex, during October term of this court in that county; and

on the 12th of January, during the second week of the present term, in the clerk's office of this court for the Commonwealth in Boston. The defendants' counsel made affidavit that a copy of the petition was served on the plaintiff's counsel on the 2d of November.

The plaintiff now moved to dismiss the exceptions allowed, and also the petition to establish the truth of the exceptions as originally presented.

T. H. Sweetser & F. A. Worcester, for the plaintiff.

A. A. Ranney, for the defendants.

GRAY, J. These motions present important questions of practice as to the time and manner of bringing before this court exceptions alleged to the rulings and instructions of the superior court.

1. The plaintiff in the first place objects that the exceptions were not duly allowed by the superior court. But the docket of that court of June term 1869, at which the verdict was returned, shows that the exceptions were filed by agreement, and does not show that judgment was rendered on the verdict; and by the existing laws no judgment could be entered, unless the exceptions were adjudged immaterial, frivolous, or intended for delay. Gen. Sts. c. 115, § 9. The case was therefore continued with other unfinished business to the ensuing September term; and at that term the exceptions appear to have been allowed and filed by the presiding judge. The objection that they were not duly allowed cannot therefore be sustained.

In *Barstow v. Marsh*, 4 Gray, 165, cited for the plaintiff, the docket of the term at which the trial was had stated that no exceptions were filed, and contained nothing from which a continuance of the case could be inferred; and by the laws then in force a formal judgment was entered on the verdict in the court below, under the general order at the close of the term, even in cases in which exceptions had been taken. Rev. Sts. c. 82, § 13.

2. The plaintiff in the next place objects that the exceptions were not seasonably entered. In support of this objection, she relies upon the provision of the Gen. Sts. c. 115, § 12, that copies and papers relating to a question of law, raised by bill of excep-

one or otherwise, "shall, within twenty days from the adjournment of the court for that term without day, be transmitted to and entered in the law docket of the supreme judicial court for the proper county." But by the St. of 1864, c. 111, such copies and papers shall be so transmitted and entered "as soon as may be after such question of law is reserved and duly made matter of record in the court where the action is pending," and so much of the Gen. Sts. c. 115, § 12, "as is inconsistent herewith, is hereby repealed." The effect of the St. of 1864 is to change the corresponding provision of the General Statutes in two important particulars. It enables questions of law to be transmitted to, and entered on the law docket of, this court at any time after they become matter of record in the court in which they are reserved, without waiting for the close of the term of that court; and by the words "as soon as may be" it also substitutes, for the definite period of twenty days, a reasonable time, which may under some circumstances exceed that period.

The copies of papers are to be prepared and transmitted by the clerk of the court in which the question of law arises. Gen. Sts. c. 114, § 14. But the case is to be entered by the party making the exceptions. Gen. Sts. c. 112, §§ 11, 16. The clerk of this court is not bound to enter any case without payment of his entry fee. *Knapp v. Lambert*, 3 Gray, 377. In practice, the mere name of the case is often transmitted by the clerk of the other court to the clerk of this, and entered upon the law docket, without insisting upon previous payment of the fees for copies or entry, and the papers themselves are not actually copied and transmitted for some time afterwards. This course of proceeding is found convenient by the clerks and the counsel, on the pressure of other business, and is open to no just objection, if the cases are seasonably entered and the copies are completed and furnished to this court in time for the argument.

In this case, the exceptions were allowed and returned to the files of the superior court by the judge at September term; and in the absence of any evidence, either upon the exceptions or on the docket, of the day on which this was done, it may fairly be presumed to have been on the last day of that term, which

was the 15th of October. The case was actually entered on the law docket of this court on the 11th of November, twenty-seven days afterwards, and more than a month before the next law term, at which in the usual course the case would be argued. There does not appear to have been such unreasonable delay in entering the exceptions as to require the court to dismiss them.

3. The petition of the defendants for leave to establish the truth of the allegations contained in their bill of exceptions as presented to, but disallowed by, the superior court, stands upon different grounds; and in disposing of this petition it becomes necessary to state the provisions of the statutes more fully.

Power to entertain such petitions and to prescribe rules about them was first given to this court by the St. of 1851, c. 261. Under the power thus conferred, the court established a rule requiring the petition to be filed "at the term of the court at which the exceptions would by law have been entered, if duly signed and allowed." 4 Gray, 570 note. At the time of the passage of that statute and of the establishment of that rule, that term for each county in the Commonwealth was the next term for the county, whether a law term or not, although the case, when entered, was placed on the law docket. Rev. Sta. c. 82, §§ 6, 7, 14. *Commonwealth v. Marshall*, 15 Gray, 202. Upon the abolition of the court of common pleas and creation of the superior court, like powers in relation to proving exceptions alleged in the superior court were given to this court; a law term of this court for the Commonwealth was established, with a clerk of its own, at which questions of law arising in the nine eastern counties should be entered and heard; and it was provided that the copies and papers relating to any question of law arising in the superior court should, within fifteen days, at first, and afterwards twenty days, after the final adjournment of that court for the term, be transmitted to and entered in this court; but the same statutes declared that questions of law arising in the five western counties should (unless specially agreed or ordered to be entered in the law term for the Commonwealth) be entered in the separate law terms for those

counties. St. 1859, c. 196, §§ 34, 36, 41. Gen. Sts. c. 112, §§ 11, 26, 27, 33; c. 115, §§ 11, 12, 13. After the passage of these statutes, this court, in revising its rules, included the rule requiring a petition to prove exceptions to be filed "at the term of the court at which the exceptions would by law have been entered, if duly signed and allowed." Rule 32; 14 Gray, 349. And it was held, taking these statutes and the rule together, that in the nine eastern counties a petition to establish the truth of exceptions must be filed not only at the same term, but at the time in the term at which the exceptions, if duly allowed, should have been entered; *Elwell v. Dizer*, 1 Allen, 485; while in either of the five western counties such a petition might be entered at the next law term for the county. *Whitford v. Knowlton*, 6 Allen, 557.

Since the General Statutes, separate terms for the entry and hearing of questions of law have been established in the counties of Bristol, Plymouth and Essex. Sts. 1861, c. 206; 1862, c. 215; 1868, c. 168. But questions of law arising in the counties of Middlesex, Norfolk, Barnstable, Nantucket and Dukes County, as well as in the county of Suffolk, are still to be transmitted to and entered at the law term for the Commonwealth at Boston; by virtue of the St. of 1864, c. 111, they must be transmitted and entered "as soon as may be after such question of law is reserved and duly made matter of record in the court where the action is pending;" and, construing this statute and the rule of court by the same principle which was applied to the former statute in *Elwell v. Dizer*, above cited, petitions to establish the truth of exceptions must be entered at the same term and within the same time. The difficulty of determining how many days may be deemed a reasonable time for the transmission to and entry in this court is no greater in the case of such a petition than in that of exceptions which have been allowed, and may easily be avoided by promptness and attention on the part of the party alleging exceptions.

Due regard to the administration of justice requires that a petition, the object of which is to control the official certificate of the judge before whom the trial was had, by evidence in

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great part oral and depending upon the recollection of witnesses, should be presented without unnecessary delay; and parties have always been held to the strictest compliance with the statute and the rule of court upon this subject. *Phillips v. Hoyle*, 4 Gray, 568. *Commonwealth v. Wilson*, 99 Mass. 427.

The necessary consequence is, that this petition cannot be entertained. Instead of being entered at the same term of this court for the Commonwealth, and at the same time in that term, as the exceptions signed and allowed in the case should have been and were in fact entered, to wit, during the adjourned session in Boston in November 1869 of the law term for the Commonwealth in that year, it was first filed here at the present term. The previous filing of the petition at October term of this court within and for the county of Middlesex was of no avail, since that was not a term at which, under the existing statutes and rule of court, either exceptions allowed or petitions to prove exceptions could be entered, and the clerk for that county had no duty or authority with respect to such a petition. See *Commonwealth v. Field*, 11 Allen, 498, 499. Service of a copy of the petition on the opposite party did not dispense with the duty of seasonably filing the original petition. *Marble v. Keyes*, 4 Gray, 570, note. *Petition dismissed.**

* A similar decision was made in the case of *EDWARD A. UPTON vs. NATHAN P. PRATT & others*, in which a trial was had and exceptions were allowed at March term 1869 of the superior court in Middlesex, and a petition to establish the truth of exceptions disallowed in that court was filed in this court on the first day of this term. The case was then argued on the exceptions allowed, and is reported *post*, 551.

The Twenty-eighth Rule 1870 of this court provides that "whenever a party shall seek to establish before this court the truth of any allegations in a bill of exceptions, which a judge shall have refused to allow and sign, he shall, within twenty days after notice of such refusal, file his petition, verified by affidavit, setting forth in full said allegations and all facts material thereto, in the court in which the exceptions would by law have been entered, if duly signed and allowed; and shall, before filing his petition, give notice thereof to the adverse party, by delivering a copy thereof to him or his attorney of record. And no party shall be allowed to establish the truth of any such allegations in this court, if he shall have failed to comply with the requisitions herein prescribed."

The exceptions allowed stated the following case: The plaintiff and another woman testified that, about half past ten o'clock on a forenoon in October 1867, they were travelling in a buggy drawn by one horse, on the highway, the plaintiff's companion driving, when, at a place where the road ran along the top of an embankment, "the horse shied, or stepped quite suddenly from the travelled way at the left hand side of the driver, and ran the wheels off the bank; that the wagon was overturned, the body and hind wheels separating from the fore-axle by the transom-bolt coming out; that the horse did not go off the bank, but went slowly on with the fore wheels, without appearing to be frightened; that the plaintiff was thrown out upon grassy ground at the side of the road, falling partly on her back and partly on her side; and that she had been suffering since from a spinal affection and difficulty, among other things."

The only defect which the plaintiff contended that there was in the highway was the absence of any railing by the side of the road on the embankment; and the plaintiff introduced in evidence a surveyor's plan of part of the highway and the adjoining land, including the place and vicinity of the accident, and called the surveyor as a witness, who testified to the correctness of the plan, and to various measurements made by him of the width and slopes of the road and of the embankment at the place of the accident and at various points from one rod to one hundred and fifty feet distant from it. The defendants "denied that the road was defective as claimed;" and with the plaintiff's assent, they at the same time put in evidence another plan, and memoranda of measurements made by one of their counsel, conflicting somewhat with the plaintiff's plan and measurements.

Moseley Gibson, one of the plaintiff's witnesses, testified that at the time of the accident, and for more than thirty years before, he lived at a place on the same highway, about a quarter of a mile distant from the place where the accident occurred; "that the road at the place in question had been substantially in the same condition ever since he could remember;" and "that he noticed this embankment the same season before the

accident." "The plaintiff then asked him, 'If you said anything to Shubael Shumway, chairman of the selectmen, in reference to the state of the road or bank at this point, please state it?' The question was objected to. The judge inquired its object, and the plaintiff stated that it was asked for the purpose of proving notice to the town of the state of the road, and that the plaintiff should prove that the road had been in the same condition for a year previous to the accident. The judge allowed the question to be put, and the witness answered, 'I told him the road was in a bad condition and there should be a railing there; and he answered that he knew it.' The defendants objected to the answer; but the judge allowed it to stand, but admitted it only as evidence of notice, and instructed the jury that the evidence was admitted only for that purpose, that as an expression of the opinion of the witness it was entirely incompetent, and that the reply of Shumway was entirely incompetent as an expression of opinion, but only admitted to show that he understood the statement made to him. Before the question was put to the witness, the defendants stated that they would concede that the road had been substantially in the same condition for five years and more, prior to the time of the accident, and that every person in town and every town officer knew of it. The plaintiff, however, declined to accept this concession."

William A. Webster, the plaintiff's physician, after testifying that the plaintiff had since the accident suffered from trouble in her back which he considered an affection of the spine, was asked by the plaintiff the following questions, and made the answers which are annexed to them: Q. "If, on examination of her person, and the statements she made to you of her condition, and the statements which she gave you for the purpose of informing you as to her condition, you have formed an opinion as to the cause of her trouble in the back, I wish you would state what, in your opinion, that cause is." Ans. "I did. I supposed it to be in consequence of a fall which she had received." Q. "What is your opinion now?" Ans. "That it was the effect of the injury received by the fall." "Before the examination of the witness was concluded, the judge suggested to the plain-

tiff that he should prefer to exclude from the consideration of the jury the last two questions and answers, and suggested their being put in another form. The plaintiff then put the question: 'Assuming that the plaintiff, on the same day before you were called, had been in a wagon, and was overturned and thrown with violence on the ground, upon her back and side, would the shock of her fall be sufficient, in your judgment, to account for the injury to her back, which you saw?' This question was objected to, but admitted; and the witness answered, 'I think it would; I think a simple fall that distance might cause the injury.' The judge then told the jury that they were to exclude from their consideration the two last previous questions and answers."

Francis F. Woods testified for the defendants, that at the time of the accident he was in an orchard near the place where it occurred; that he saw the plaintiff's buggy pass along the road, heard a scream soon afterwards, and, learning that there had been an accident, went to the place of its occurrence, and from there went after the horse, caught it, and brought it back to that place; that "he then examined the road, and noticed the track back for fifty feet to where it left the road, deflecting from it fifty-four feet, from where it went off the bank, and he drove a nail opposite the place where it so deflected, and had measured the distance; and that he inquired of the woman who was with the plaintiff at the time how the accident happened, and she replied that she did not know, unless the horse was frightened or she pulled the wrong rein."

"The plaintiff in reply recalled Webster, who testified that he was driving on the same road, in the afternoon of the same day, between six and seven o'clock, and had conversation with Woods; that he was looking down from his buggy, trying to find the place of the accident; that he asked how the accident happened; and that Woods replied that the horse shied. The judge ruled that this answer was competent as tending to contradict Woods; to which the defendants excepted."

Among numerous prayers for instructions to the jury, submitted by the defendants, were four, requesting rulings that the

want of a railing by the side of the way was not a defect, on assumptions respectively, that the plans and measurements respectively introduced in evidence by the parties, or specified portions of them, were correct; but the judge "declined to give the instructions asked, and left it to the jury, as a mixed question of law and fact, whether the want of a railing was a defect or not, giving them such instructions, as to when the want of a railing would be a defect or not, as seemed to the court proper and applicable, to which instructions no exception was taken if the court was right in excluding the instructions asked for."

A. A. Ranney, (J. K. Bennett with him,) for the defendants.

F. A. Worcester & W. S. Gardner, for the plaintiff.

AMES, J. The defect in the highway, complained of by the plaintiff, was the want of a railing by the side of the graded or travelled way. It was not claimed that this defect was the result of any accident, or that it was produced by any omission to keep the road in its usual state of repair, or that it was of recent occurrence. The defect, if any, arose from an error in judgment as to the proper construction and security of the roadway. A witness called by the plaintiff testified that he had lived near the place of the accident for thirty years or more, and that the road at that place had been substantially in the same condition ever since he could remember. The defendants conceded that there never had been any railing by the roadside at the place in question; and that the state of things had been substantially for five years before the accident the same as it was then.

In this state of the case, there was apparently no necessity to prove express notice to the town authorities as to the condition of the road. But as the defendants in their answer had denied everything that the plaintiff had alleged in her declaration, it can hardly be said that evidence tending to prove such express notice is literally irrelevant or immaterial to the issue. On this point she was not bound to accept their concessions made during the trial. The liability of the town however does not depend upon and is not at all affected by express notice of

the existence of the defect, if the defect had existed for the space of twenty-four hours previous to the occurrence of the injury or damage. Gen. Sts. c. 44, § 22. Under the pleadings, the plaintiff was at liberty to attempt to prove both that the defect had been in existence more than twenty-four hours, and also that notice had been given, in order, if the evidence should prove insufficient as to one, to rely upon the other of those two grounds of claim. The conversation between the plaintiff's witness and the chairman of the board of selectmen, though wholly irrelevant and immaterial if it occurred more than twenty-four hours before the accident, would be competent and admissible if it occurred within that time, and related to anything in the condition of the road which did not appear to have existed longer than twenty-four hours. The bill of exceptions does not make it certain what the fact was in that respect; but, as the verdict is to be set aside upon another ground, it is sufficient for the present to point out what we understand to be the true rule upon the subject. In any view of the case, the declaration of the chairman of the selectmen was incompetent, except for the very limited application of it allowed by the court.

Of the various questions addressed to the plaintiff's attending physician, as an expert, there were two which were not in conformity to the established rule, and were open to the objection that they called for a judgment, on the part of the witness, of the credibility of information, and the truth of controverted facts. After these two questions had been put and answered, the presiding judge, on consideration, suggested that they should be put in another form; and they were accordingly put hypothetically, and upon the assumption of certain supposed facts, and were then answered in such a manner as not to include a judgment as to the reality of the assumed facts, the jury being told that the original questions and answers were to be excluded from their consideration. It is to be presumed that in this respect the jury followed the instructions of the court. The error was rather in form than substance. It was seasonably corrected, and there seems to be no reason to suppose that it operated in any way to the substantial prejudice of the defendants.

Batchelder v. Batchelder, 2 Allen, 106. *Hawes v. Gustin*, Ib 406. *Whitney v. Bayley*, 4 Allen, 173. *Selkirk v. Cobb*, 13 Gray, 313. *Smith v. Whitman*, 6 Allen, 562. *Ellis v. Short* 21 Pick. 142.

It does not appear to us that the court was bound to give the specific instructions, in form or substance, requested by the defendants, or to rule, as a matter of law, that, upon the assumptions suggested by them, the want of the railing would not be a defect for which the town could be held responsible. We must assume, as the case is stated in the bill, that this question, which is not often a mere question of law, was submitted to the jury with proper instructions.

Upon another point in the trial, it appears to us that an error occurred, of sufficient magnitude to render it necessary to send back the case for a new trial. One witness (Woods) called by the defendants, had testified that he saw the buggy pass near the place where the accident happened; that he heard a scream and went immediately to give assistance; that he inquired of the plaintiff's companion, at that time, how the accident happened and that she replied that she did not know, unless the horse was frightened or she pulled the wrong rein. The plaintiff, in reply called a witness (Webster) who testified that he was riding late in the afternoon of the same day on the same road, and was looking down, trying to find the place of the accident; that he there met Woods, and asked how the accident happened; and that Woods replied that the horse shied. This testimony was admitted, under objection, as tending to contradict Woods. But it appears to us to have no such tendency. Woods had testified as to the explanation that the woman had given to him at the time,—an explanation which certainly was not given with any great positiveness or confidence. His answer to the question put by Webster was given at the place where the accident happened, and after a careful examination of the tracks, and a designation of the exact place. He did not in that answer undertake to give the woman's account, but his own version or theory of the accident in view of his own examination and measurements. It does not have any tendency to

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disprove his testimony as to what the woman said, to prove that Woods's own view of the case was very different from hers. In his testimony on the stand, he gave her explanation of the accident, and nothing more; and the supposed conflicting statement has no reference whatever to his conversation with her. For that reason there is no real discrepancy in his two statements, and the evidence given on behalf of the plaintiff contradicted nothing, and was therefore inadmissible. It is impossible to say that this error was wholly unimportant, or had no improper influence on the minds of the jurors, and therefore the

Exceptions are sustained.

INHABITANTS OF SUDBURY vs. HORACE HEARD.

a defence to an action by a town for a tax assessed on the defendant by persons chosen, sworn and acting as the plaintiffs' assessors, it is not open to the defendant to impeach the validity of their election on the ground of an omission to use the check-list in the balloting.

CONTRACT to recover a tax assessed by persons acting as assessors of the plaintiff town on the defendant for the year 1866; submitted to the judgment of the full court on a statement of facts in which it was agreed that, if the fact was competent and material, the defendant could prove that, in electing these persons assessors by ballot at the annual town meeting of that year, the check-list was not used. The case is stated in the opinion.

G. P. Sanger, for the plaintiffs.

G. A. Somerby, for the defendant.

CHAPMAN, C. J. The tax in question was assessed by persons who appear to have acted under color of an election by the town, evidenced by its records of the proceedings at the annual meeting of the inhabitants, showing that these persons were chosen assessors and they have taken an official oath as such assessors. They were therefore assessors *de facto*. The only defect relied upon to prove that they were not assessors *de jure* is, that the check-list required by our statutes was not used

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in balloting for them. Gen. Sta. c. 7, § 9. St. 1862, c. 180. St. 1868, c. 262. But it is well settled that the validity of the acts of officers *de facto* cannot be called in question in suits or proceedings to which they are not parties. *Elliott v. Willis*, 1 Allen, 461, and cases there cited. *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.* Ib. 552.

Judgment for the plaintiffs.

DANIEL W. WILCOX vs. COUNTY COMMISSIONERS OF MIDDLESEX.

Income derived from dealings in merchandise is not "derived from property subject to taxation," within the meaning of the Gen. Sta. c. 11, § 4.

A merchant's income from his business is taxable under the Gen. Sta. c. 11, § 4, though he is taxed also on his stock in trade.

PETITION by an inhabitant of Medford for a writ of *certiorari* to reverse the refusal of the respondents, on appeal from the assessors of Medford, to abate a tax assessed there in 1868 on the petitioner's income; heard by *Morton, J.*, and reserved for the determination of the full court on this case:

The petitioner's claim for an abatement was submitted to the respondents, and by them refused, on the following statement: "It is agreed that the petitioner is a resident of said Medford, and the owner of real and personal estate therein; that his place of business is in the city of Boston, where, as a member of the firm of Day, Wilcox & Company, he is engaged in trade as a leather dealer, in the ordinary course of such trade as a merchant keeping a stock in trade and selling therefrom, and is engaged in no other profession, trade or employment whatever, that said firm were duly assessed and taxed for the said year in Boston, where their stock in trade and business is and was, and have paid said tax as assessed by the assessors of said city; that the petitioner, as required by law, duly made a return to the assessors of Medford of all his real and personal estate taxable therein, verified by his oath, and, in said return or schedule fur-

nished him in blank to fill, he added, after the printed words 'Income from profession, trade or employment, exceeding \$1000,' the words, 'None that is taxable in Medford;' but, on being examined by the assessors, or one of them, as to his income exceeding \$1000, he informed them that the amount was \$4399.14, and added said figures to his said statement at the assessor's request, at the same time stating that said income was wholly derived from his stock in trade taxable in Boston, and claiming that it was not therefore properly taxable; that said assessors, understanding this claim, did assess the petitioner on said income at the same rate per cent. other property was assessed, to wit, the sum of \$54.10; that the petitioner duly applied to said assessors for an abatement of said sum as an overassessment; that an abatement was refused; that the petitioner duly complained to the county commissioners; that the petitioner is satisfied with the assessment of the tax upon him in every other particular than as above; that said income was wholly derived from the petitioner's said business as a merchant as above stated, and in no other way; and that the only question submitted is the legal right, under the statute, to assess said income so derived."

B. E. Perry, for the petitioner.

H. W. Paine, for the respondents.

AMES, J. The petitioner's complaint of the manner in which he has been taxed in the town of Medford, where he resides, is based entirely on the assumption that the income which he derives from his business as a member of the firm is derived from their "stock in trade" legally taxable and actually taxed in the city of Boston. On that ground, he claims that the tax upon his income is assessed in violation of that clause of the statute which provides that "no income shall be taxed which is derived from property subject to taxation." Gen. Sts. c. 11, § 4.

But it appears to us that the assumption on which the petitioner's case depends is a fallacy. The income from a "profession, trade or employment," which is taxable under our system of laws, is an entirely different thing from the capital invested in the business, or the stock of goods in the purchase of which

the whole or part of such capital may have been expended. The income meant by the statute is the income for the year, and is the result of the year's business. It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill. The stock of goods that happened to be in the possession of the firm on the first day of May might be, and it is perfectly fair to assume would be, in the ordinary course of business, for the most part sold out, and replaced by another stock; and in the course of the year this operation might be many times repeated. The income to which the statute refers does not mean merely the profits derived from the sale of the goods that happened to be on hand at the date of the tax, but the profits derived from the dealings and business of the firm for the year. It would not relieve the petitioner from any part of his tax, though it should be found that the goods on hand at the date of the tax had yielded no profit whatever, and had contributed absolutely nothing towards making up the sum which he reported to the assessors as his income from that business. It certainly is among possibilities, that the business for the first part of the year may have been conducted, and the entire stock on hand on the first day of May may have been sold, at a loss; and yet that a favorable change in the markets, at a later period, may have overbalanced this loss, and made the result of the whole year a profitable one. And even if it could be said that the "stock" of the firm taxable in Boston is meant by the statute to include the whole amount of the capital invested in its business, yet the profits of the business depend upon many elements and are affected by many causes other than the mere use of capital. The tax which has been assessed upon the peti-

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tioner is not for an income derived from specific goods and merchandise; but for an income derived from the business of dealing commercially in the like goods and merchandise with such a degree of skill, judgment and good fortune, that his share of the year's profits amounts to the sum which he returned as his income from business. We cannot doubt that this tax is allowed and justified by the laws of the state; and we see no reason for holding that the petitioner has been overtaxed.

Petition dismissed, with costs.

CORNELIUS O'CONNOR vs. PATRICK HALLINAN.

When the wife of one of the parties is offered under the St. of 1865, c. 207, § 2, as a witness on a trial, the determination by the judge, preliminary to her admission or exclusion, of the fact whether the cause in issue was transacted with her in her husband's absence, is not a subject of exceptions.

ACTION on the Gen. Sts. c. 137, for possession of a tenement in Cambridge. Trial and verdict for the plaintiff, in the superior court, before *Rockwell, J.*, who allowed a bill of exceptions of which this is the material part:

The defendant contending that he was lawfully in possession of the land by virtue of a contract of lease made with the plaintiff, "the plaintiff offered evidence tending to prove that the rent was in arrear, and that fourteen days' notice was given the defendant to quit. The plaintiff had testified that the contract was made with the husband, both the husband and wife being present. The defendant had testified that his wife made the contract. He testified also that the plaintiff told him, 'Mind you, it is not for two years that you get this home; it is for a year and eleven months;' and that he paid the plaintiff fifty dollars. The defendant called his wife as a witness, in his own behalf, under the St. of 1865, c. 207, § 2, and offered by her to prove that the contract and the cause of action in issue was made by her with the plaintiff, and in her husband's absence; and that by the terms of said contract no rent was due and payable, in respect to the premises described in the writ, to the

plaintiff, at the time of the service of said notice to quit, or at the date of the plaintiff's writ. But the judge refused to permit the defendant's wife to testify, and ruled that she was not a competent witness for him; to which refusal and ruling the defendant excepted."

J. W. Reed, for the defendant.

C. A. F. Swan, for the plaintiff.

MORTON, J. In this case the contract in issue and on trial was the contract by which the plaintiff leased to the defendant the land in question. The plaintiff's right to maintain his action depended upon the question whether by the terms of this contract rent was in arrear at the time he gave the defendant notice to quit. If this contract was made with the wife of the defendant in his absence, she was a competent witness under the provisions of the St. of 1865, c. 207, § 2. If it was not made with her in her husband's absence, she was not a competent witness. The plaintiff testified that the contract was made with the defendant, his wife being present. The defendant testified that his wife made the contract, without stating whether in his presence or not. The defendant then offered his wife as a witness, and she was rejected by the court.

The fact upon which the competency of the wife depended was in dispute. It is clear that this fact must be settled in some mode before the question of her competency, that is, of her legal right and capacity to testify, could be decided. The question, whether a witness is competent, is, in its nature, a preliminary one, which must be decided by the presiding judge, unless in his discretion he sees fit to call in the aid of the jury. Formerly, before the disqualification of witnesses by reason of crime, or interest, or want of religious belief, was removed by statute, questions of this nature were of very frequent occurrence; and it was uniformly held that the question of the competency of a witness must first be tried by the court, either by examining the witness on his *voir dire*, or by testimony *aliunde*, before he could be sworn in chief and be permitted to testify to the jury. 1 Greenl. Ev. § 425. *Dole v. Thurlow*, 12 Met. 157. *Commonwealth v. Hills*, 10 Cush. 530. In the modern practice, ques-

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tions of the competency of witnesses often arise in which the presiding judge is required to decide issues of fact, upon which their capacity to testify depends. It would be impracticable to submit these preliminary and collateral issues to the jury. *Kendall v. May*, 10 Allen, 59. The authorities cited above also fully establish the principle that in such cases the decision of the presiding judge of an issue of fact is final and not open to exception. See also *Commonwealth v. Morrell*, 99 Mass. 542; *Commonwealth v. Mullins*, 2 Allen, 295.

These considerations are decisive of the present case. The ruling that the defendant's wife was not a competent witness necessarily involved and depended upon the decision by the presiding judge of an issue of fact which cannot be revised by this court.

Exceptions overruled.

CHARLES E. SWEENEY vs. THOMAS GILLOOLY & another.

A recognizance under the Gen. Sts. c. 124, § 10, is avoided by the discharge of the debtor by a qualified magistrate after due proceedings begun within thirty days after the arrest notwithstanding another application more than seven days previously, during the thirty days, to another magistrate, by the debtor, and his failure to appear at the time and place thereupon fixed for his examination.

CONTRACT on a recognizance under the Gen. Sts. c. 124, § 10, submitted to the judgment of the court upon facts agreed, of which the following is the substance :

On November 3, 1868, John F. Sloan (one of the defendants, and the principal in the recognizance) was arrested on an execution in favor of the plaintiff, and desiring to take the oath for the relief of poor debtors, entered, with Thomas Gillooly, the other defendant, as surety, into a recognizance under the Gen. Sts. c. 124, § 10, in the usual form, conditioned "that the said Sloan, within thirty days from the time of his arrest as before stated, will deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided in and by the" Gen. Sts. c. 124, "and appear at the time fixed for his examination, and from

time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon; and if the said Sloan shall in all respects perform and keep the said condition, then this recognizance to be void, otherwise to be and abide in full force."

On November 4, Sloan, after the service of due notice on the plaintiff, appeared for examination on an application to take the oath before the magistrate who took the recognizance; the plaintiff also appeared; the examination was begun, and was adjourned by the magistrate to November 13; and at the time and place to which it was adjourned the magistrate and the plaintiff were present, but Sloan did not appear, and was thereupon declared by the magistrate to have made default.

On November 15, 1868, Sloan applied to another duly qualified magistrate for examination, who appointed a time and place therefor, and issued notice thereof to the plaintiff, which was duly served upon him November 16; and at the time and place thus appointed Sloan and the magistrate were present, and Sloan submitted himself for examination, but the plaintiff did not appear, nor any one in his behalf, whereupon Sloan was discharged from arrest, by this magistrate, who made a proper certificate thereof.

C. D. Dunton, for the plaintiff.

C. Robinson, Jr., for the defendants.

COLT, J. The defendant's discharge, granted upon a delivery of himself for examination within thirty days from the day of his arrest, and upon notice to the creditor, with no default or failure to abide the order of the court, on the proceedings then commenced and carried to their regular termination, as required by Gen. Sts. c. 124, is a good defence to this action. There was a strict compliance with the terms of the recognizance. And the effect of the proceedings is not impaired by the fact that he had made a prior application to another magistrate, and failed to appear for examination at the time fixed by him. His default upon this first application may have been occasioned by accident or mistake, or by circumstances which, without actual fault on his part, made it impossible for him to attend.

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The default under the first application would have given the plaintiff his action upon the recognizance, if no other proceedings had been had within the thirty days. But it was rendered of no account by his discharge under the subsequent notice. This construction is sustained by § 14, which gives an unrestricted right to a new application and notice at the expiration of seven days from the service of the former notice, without reference to the causes which produced failure in the former proceedings. *Skinner v. Frost*, 6 Allen, 285. *Sweetser v. Eaton*, 14 Allen, 157. *Judgment for the defendant.*

EDWARD A. UPTON vs. NATHAN P. PRATT & others.

The directors of a mutual fire insurance company are not personally liable under the Gen. Sta. c. 58, § 48, for neglecting to make an assessment upon subsequent policy holders to satisfy a judgment on a note given for a loss upon a policy in a class the business of which has been closed and all its policies cancelled.

CONTRACT with an alternative count in tort, on the Gen. Sta. c. 58, § 48, to enforce personal liability of the directors of a mutual fire insurance company for the amount of an unsatisfied execution on a judgment recovered by the plaintiff against the corporation. Writ dated February 24, 1868.

At the trial in the superior court, before *Putnam, J.*, it was proved that on June 5, 1867, the defendants were duly chosen directors of the Mutual Safety Fire Insurance Company in South Reading, which was incorporated by the St. of 1853, c. 46; that in May 1856 the then directors divided the property insured by the corporation into two classes, namely, the First Class, and the General Class; that on October 14, 1861, "all the business of the General Class was closed, and all the policies were cancelled, and on June 14, 1862, all the business of the First Class was closed and all its policies were cancelled, and since that time all the policies issued by the company had been in but one class;" that on September 23, 1867, the plaintiff recovered judgment against the corporation on the following promissory

note: "South Reading, March 30, 1866. Value received of Edward A. Upton, the Mutual Safety Fire Insurance Company General Class promise to pay him or order Nine Hundred Dollars in four months from date. Edward Mansfield, Treasurer of said Company;" and that on December 9, 1867, the execution, which was issued against the corporation October 10, 1867, on this judgment, was returned in no part satisfied.

"The plaintiff testified that, immediately after the rendition of said judgment, he demanded payment of the same from the president, treasurer, secretary and several of the directors of the corporation, which was refused; that on or about October 10, 1867, he demanded of them that they should order and make an assessment and deliver the same to the treasurer for collection, for the purpose of paying said judgment, which they refused to do." It was not proved, nor contended, "that the corporation, since the time when the defendants were chosen directors, had had any property or assets belonging to the General Class, or any notes in said class, which could have been assessed;" but it appeared that they had other premium and deposit notes, and among them some, exceeding in amount the amount of the plaintiff's judgment, which had been given before March 30, 1866; and it further appeared that the corporation had no property of any kind except these other premium and deposit notes.

On the cross-examination of the plaintiff, the defendants, against his objection, were permitted to put questions with a view to show that the note on which he recovered his judgment was given in renewal of other notes which had been given by the corporation for a loss by fire, prior to 1860, of property insured in the General Class; and thereupon the plaintiff consented to a verdict for the defendants, and alleged exceptions.

T. Weston, Jr., for the plaintiff.

J. P. Converse, for the defendants.

WELLS, J. The plaintiff seeks to recover, from the directors of a mutual insurance company, the amount of an execution which he has obtained against the corporation, on the ground of neglect by them to make an assessment for its payment.

His right depends wholly upon the Gen. Sts. c. 58, § 48. By that statute, the directors become personally liable for the amount of an execution, if there is "property belonging to the period assessed, the proceeds of which can be applied to satisfy such execution," and they neglect to pay the same; or if they "neglect for thirty days after the rendition of judgment to make an assessment and deliver the same to the treasurer for collection, or to apply such assessment when collected to the payment of the execution." By the same section, it is provided that, in case of classification of risks, the assessment "shall be made upon such premium and deposit as were given upon hazards associated with the property upon which losses have occurred." Section 51 entitles each member, at the expiration of his policy, to have a share in the profits of the company "during the time his policy was in force." By § 53, the directors are authorized to divide the property insured into not exceeding four classes; and it requires that the assessments shall be made upon premiums and deposits belonging to the class in which the loss occurs. It also provides that "no money belonging to one class, received either as premium or assessment in said class, shall be used to pay losses or expenses or other liability of any other class."

The directors of a mutual insurance company are, in effect, merely agents of the policy holders, charged with the administration of their mutual interests and relations, and the adjustment of their mutual rights and liabilities. Their responsibility for any claim due to one of the members upon a policy arises only from a failure to discharge their appropriate functions, or a neglect to perform some duty imposed upon them by their office. They cannot transcend those restricted powers which are so carefully defined in the statutes. They cannot be made liable for not applying to the payment of an execution funds which the statute forbids to be so applied; nor for neglecting to make an assessment upon a class whose liability to assessment has already been exhausted or discharged. The directors for 1867 cannot be held responsible for the defaults of their predecessors of 1860 or 1861.

Upon these exceptions, it must be assumed that the loss from which the plaintiff's debt arose occurred prior to 1860, upon a policy in the "General Class;" that the business of that class was closed in 1861, and all the policies cancelled. It was not claimed that there was any property or assets of that class which could have been used by the defendants to pay the execution; or that any assessment could have been made upon that class from which they could have derived means of payment. They are not in fault, therefore, for failure to attempt such an assessment.

The plaintiff contends that the execution is to be regarded as a loss occurring at the date of the judgment; and that the defendants were bound to apply to its payment the assets derived from current business, or to make an assessment upon present policy holders. But that would be in violation of their duty to those policy holders, and contrary to the provisions of the statutes. The plain intent of the statutes is, that the assessment shall be made in reference to the period in which the loss occurred under the policy, and not to the time when the liability for such a loss is ascertained and recognized, or fixed by a judgment; and the assets which may properly be applied to its payment are to be determined in reference to the same period. The inquiry into the consideration of the note upon which the judgment was based is in no sense an impeachment of the judgment. It may be true that the defendants are not entitled to impeach it. Their liability does not result from the validity of the judgment, but from neglect to do those acts which the plaintiff is entitled to have done as a policy holder who has suffered a loss, to enforce contribution from other policy holders sustaining mutual relations with him in respect to such policies. The judgment determines the fact and amount of the loss; but not the class or period upon which the obligation to contribute must fall; nor the property or fund which ought to be applied to its payment.

There being no fund or property which the directors could legally apply to the payment of this execution, and no class of policy holders against which an assessment could be enforced,

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the defendants are not shown to have failed in their duty as directors, and cannot therefore be made personally liable in this action.

Exceptions overruled.

MOWRY LAPHAM vs. LUTHER F. LOCKE.

A justice of the peace may fix the day when a writ shall be returned before himself, by altering the return day of the writ in the hands of the officer before service.

CONTRACT, brought originally before Levi Sherwin, a justice of the peace for Middlesex, who gave judgment for the plaintiff, after overruling a motion filed by the defendant to dismiss the action on the ground that "the said Levi Sherwin, before whom said action is returned, commenced said action, or has been concerned in the institution of said action, and is not competent on that account to try it." The defendant appealed.

On the appeal, in the superior court, before Putnam, J., it was agreed by the parties that, on December 21, 1867, a deputy of the sheriff of Middlesex, having received for service the writ, which was dated on that day, observed that it was made returnable before Sherwin on December 23, and consulted with him concerning said return day, "and he, the said justice, thereupon altered the return day, and made the writ returnable before himself on December 28;" that the writ was served, thus altered, and was entered before said justice on December 28; and that the fact of this alteration was the ground of the plaintiff's motion. On these facts, the judge ordered that the action be dismissed; and the plaintiff alleged exceptions.

J. Gerrish, for the plaintiff.

J. Spaulding, for the defendant.

CHAPMAN, C. J. A justice of the peace is prohibited by the Gen. Sts. c. 120, §§ 53, 54, from commencing or being concerned in the institution of a civil action returnable before himself, and from being employed as counsel in such action. His duty is to abstain from doing anything but what an impartial magistrate

may do in respect to the case. He cannot properly act even as the friend of one party, adversely to the other.

But there are some things that he may properly do as a magistrate towards instituting the process. He may prepare a blank writ and sign and seal it; and it cannot be material whether he signs and seals it before or after it is filled up. We see no reason why he may not fix the return day before himself; and it cannot be regarded as aiding either party to do this. And if he may do it while the writ is in blank, there can be no objection to his doing it at any time before it is served. As he has a right to determine that he will be at the place of holding his court on one day rather than another, there is nothing objectionable in the character of the act. It is unlike the correction of an error in the names of parties, or in the declaration, or even in the date; because he can have nothing to do with such alterations except as an attorney or friend of the party.

Exceptions sustained.

JACOB D. PUTNAM vs. GEORGE W. FIELD.

An agent who has settled with his principal an account in which he has credited himself with the amount of a debt, owed by the principal, as having been paid by himself to the creditor, is liable therefor to the creditor on a count for money had and received.

CONTRACT for the price of flour sold to the defendant by the plaintiff. The defendant declared in set-off on a count for money had and received to his use by the plaintiff. At the trial in the superior court, before *Rockwell*, J., the judge, on facts proved or offered to be proved, which are stated in the opinion, ruled "that the defendant could not avail himself of his set-off." There being no dispute that the defendant was liable to the plaintiff on the original cause of action, a verdict was returned for the plaintiff accordingly, and the defendant alleged exceptions.

D. S. Richardson & G. F. Richardson, (J. Davis with them, for the defendant.

G. Stevens & W. H. Anderson, for the plaintiff.

MORTON, J. If the defendant had a debt or demand against the plaintiff, for money paid, money had and received, or services done which existed at the time of the commencement of the suit, he can set it off against the plaintiff's claim. Gen. Sta. c. 130, §§ 1-5.

The declaration in set-off in this case is for money had and received. If, upon the facts proved and offered to be proved at the trial, the defendant could maintain an action of money had and received against the plaintiff, it is obvious that, under the provisions of the statute above cited, he has the right of set-off in this action. These facts are, that the Lyndeboro' Glass Company, of which corporation the plaintiff was the agent, owed the defendant \$228.48; in 1867 the plaintiff, as such agent, paid the defendant \$175 on account of this debt; at the same time the plaintiff charged the said corporation with the whole amount of \$228.48 as paid to the defendant; the account of the plaintiff, containing this charge, was audited and allowed by the corporation; and, prior to the commencement of this suit, the corporation settled with the plaintiff, and paid him the balance appearing to be due him according to said account. By this transaction, the plaintiff received of the corporation the balance of the debt due by it to the defendant; and by necessary implication, from his acceptance of the money, promised the corporation to pay it to the defendant.

Under such circumstances, the law implies a promise to the defendant to pay him the money which in equity and good conscience belongs to him, and he can maintain an action of contract for money had and received to his use, though there is no express promise to him and the consideration does not move directly from him. The law creates the privity, and implies the promise. *Mellen v. Whipple*, 1 Gray, 317. *Frost v. Gage*, 1 Allen, 262. Having settled his account and received the balance as above stated, the plaintiff cannot claim that he holds money as the mere agent of the corporation; and therefore the cases, cited by his counsel, of *French v. Fuller*, 23 Pick. 108, and *Weston v. Gibbs*, Ib. 205, are not applicable.

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We are therefore of opinion that the ruling of the presiding judge, that the defendant could not avail himself of his set-off, was erroneous.

Exceptions sustained.

JOSIAH W. TUESLEY vs. LEWIS O. ROBINSON.

A debtor gave a mortgage of his household furniture, fraudulent as against his creditors, but good between the parties; and then went into bankruptcy. The portion of the furniture exempt under the bankrupt act of 1867, c. 176, § 14, from being taken by the creditors was separated from the rest of it under an agreement to which the mortgagee was a party, and duly set off to the bankrupt by the assignee; the mortgage was decreed by the district court of the United States invalid as against the creditors; and the proceeds of all the rest of the furniture (which was sold under said agreement) were realized by the assignee. In the bankruptcy proceedings, the mortgagee never proved his debt, and the mortgagor received his discharge. *Held*, that the mortgagee might replevy from the mortgagor the furniture set off to him.

REPLEVIN of household furniture. Writ dated July 15, 1869. The case was submitted to the judgment of the court on a statement of facts in which it was agreed that the defendant, who kept a boarding-house, gave the plaintiff, on May 5, 1868 a mortgage of all his household furniture, including the articles replevied in this action; that the condition of the mortgage was broken; and that the plaintiff was entitled to recover, unless the following facts constituted a good defence:

The value of all the furniture covered by the mortgage was more than \$1000. On June 24, 1868, the defendant filed his petition for the benefit of the bankrupt act (U. S. St. 1867, c. 176) in the district court of the United States for the district of Massachusetts, and on June 27 was adjudged a bankrupt. On July 2, 1868, his creditors entered into an agreement with the plaintiff as mortgagee, which, after reciting the proceedings in bankruptcy to that date, set forth that, whereas the mortgagee claimed to hold, by virtue of said mortgage, the furniture of the bankrupt, and the creditors proposed to contest the validity of the mortgage, and to prevent expense and delay it was desirable that the property, or so much of it as was not exempt from being taken by creditors, should be converted into money

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before the appointment of an assignee, and the proceeds held subject to the relative rights of the mortgagee and the creditors, in the stead of the property itself, therefore it was agreed that, in event of a breach of the condition of the mortgage, the mortgagee should sell all said property, "except so much as may be left in the possession of the bankrupt as hereinafter provided," and hold the proceeds "subject to the same disposition of the court as the property itself would be," and it was provided that he might "leave in the possession of the bankrupt such part of the goods covered by the mortgage as are exempt from being taken by the creditors." Under this agreement the plaintiff, as mortgagee, took possession of all the furniture included in the mortgage, and sold it, except those articles which were replevied in this action, which articles he left in the defendant's possession. On November 2, 1868, the assignee of the defendant's estate in bankruptcy commenced proceedings in the district court to avoid the mortgage as fraudulent against the creditors of the bankrupt; in which proceedings that court passed a decree on May 12, 1869, declaring the mortgage "invalid as against the creditors of said bankrupt," and requiring the mortgagee to pay over to the assignee the proceeds of the property sold by him, in conformity with the agreement of July 2, 1868; and the plaintiff thereupon paid over those proceeds to the assignee. But the part of the furniture which the plaintiff did not take and sell, and which is the subject of this action, being of "the estimated value of \$500, was designated and set apart out of the whole goods, by the assignee, as exempt under the bankrupt act." The plaintiff never proved in bankruptcy his mortgage debt, or any part of it. "The proceedings in bankruptcy were regular and in due form, and the defendant is entitled to a discharge, and for the purposes of this case may be treated as if discharged under said bankrupt act."

C. G. Keyes, for the plaintiff.

C. W. Storey, for the defendant.

GRAY, J. The mortgage, though fraudulent and void as against creditors, was good as between the parties. So much of the mortgaged property as is claimed in this action was

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household furniture of the debtor, exempt by law from being taken by his creditors; was separated from the rest of the property by agreement between the debtor and his creditors, and duly set apart by the assignee as excepted from the operation of the bankrupt act; and the assignee had no interest therein, or authority to call in question the validity of the transfer thereof from the debtor to the plaintiff. U. S. St. 1867, c. 176, § 14. *Rayner v. Whicher*, 6 Allen, 292. *Mannan v. Merritt*, 11 Allen, 582. The decree of the district court of the United States, declaring the mortgage fraudulent as against creditors, did not affect its validity as between the parties, or its operation upon property in which the creditors had no rights. The mortgagee has done nothing, by proof of his debt in bankruptcy, or otherwise, to waive his mortgage; and his right to hold the property as security for his debt cannot be affected by the debtor's discharge in bankruptcy.

Judgment for the plaintiff.

WALTER MORSE vs. ASA F. MASON & wife.

A promissory note, given by a wife to the builder, for the price of a barn already built on her land, is invalid in his hands, for want of a sufficient consideration, if the barn was built by the order and on the account and credit of her husband; but valid, if in the transaction the husband was acting as her agent, and the credit was given to her.

CONTRACT on a promissory note, dated May 8, 1865, and signed by the defendants, Asa F. Mason and Eliza M. Mason, his wife, promising jointly to pay to Leonard Morse or order \$300 in three years, and indorsed in blank by the payee. Writ dated May 16, 1868. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon a statement of facts agreed, the substance of which appears in the opinion.

R. Gordon, for the plaintiff.

W. S. Gardner, for the defendants.

MORTON, J. The only question presented in this case is, as to the liability of Eliza M. Mason upon the note in suit. The

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statement of facts does not furnish us with the means of deciding this question. It appears that the note was given in payment for labor and materials furnished in building a barn upon land which was the separate estate of Mrs. Mason; but it also appears that it was given after the barn was finished. If Leonard Morse was employed by Asa F. Mason, and agreed to build the barn upon his account and credit, the note signed by Mrs. Mason would not bind her, for want of a sufficient consideration to support her promise. It would fall within the rule of law that an executed and past consideration is not sufficient to support a subsequent¹ promise. *Chamberlin v. Whitford*, 102 Mass, 448, and cases cited. On the other hand, if Morse contracted with Asa F. Mason as the agent of his wife, and upon her credit, the note given by her, with a knowledge of the facts, would be a contract in reference to her separate estate, founded upon a sufficient consideration and binding upon her. *Parker v. Kane*, 4 Allen, 346. It does not appear by the statement of facts whether the contract was made with the husband upon his own credit, or as the agent of the wife. If this essential fact is in dispute, it must be settled by a trial. This court cannot determine it.

We have not felt called upon to consider whether a note of a married woman, which in the hands of the original payee is invalid for want of consideration, can under any circumstances be enforced against her in a suit by an indorsee for value who takes it in the usual course of business before maturity. This question was not raised at the argument, and the agreed facts do not state when or under what circumstances the note in suit was indorsed to the plaintiff.

As the statement of facts does not contain all the facts necessary to determine the rights of the parties, it must be discharged and the

Case stand for trial.

Welch v. Welch.

MICHAEL WELCH vs. JAMES WELCH.

Money belonging to an infant, and received from him by his brother, with directions to use it for the support of their parents, if necessary, and so used by the brother before any revocation of the directions, cannot be recovered by the infant upon his coming of full age.

CONTRACT for money had and received by the defendant to the plaintiff's use. Writ dated December 6, 1867. At the trial in the superior court, before *Rockwell, J.*, it was agreed by the parties, (who were brothers,) that the plaintiff, in August 1852, being then under full age, enlisted into the military service of the United States, and the United States paid to the mayor of Lowell, on account of the enlistment, \$95; that the mayor, by direction of the plaintiff, paid this money over to the defendant during that month; and that the father of the parties was living at the time in Lowell. The defendant then offered to prove that he received the money under an agreement with the plaintiff that it should be used for the support of their father and his family, if necessary; that he did so use the money, it being necessary; that their father had no means of support, and was sick, and died during the month; and that the money was spent in defraying the funeral expenses, and supporting their mother afterwards. But the judge excluded the evidence, "upon the ground that said agreement was voidable, and that the plaintiff, on arriving at full age, might well maintain this action, even though said evidence was true;" and, after a verdict for the plaintiff, reported the case for the revision of this court.

R. B. Caverly, for the plaintiff.

J. C. Kimball & H. W. Boardman, for the defendant.

COLT, J. The evidence offered by the defendant was rejected by the court on the ground that it only proved an agreement which the plaintiff might avoid by bringing his action to recover the money on reaching his majority.

It has been held that the indorsement by an infant payee of a note cannot be set aside by him as void, so as to give him a right to recover of the maker, who has paid the indorsee before

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notice that the order of payment is countermanded; and for the reason that the transaction has become executed in favor of his appointee, and cannot be opened without reinstating the maker. "It would be absurd," says Parker, C. J., in *Nightingale v. Withington*, 15 Mass. 272, 274, "to allow one, who has made a promise to pay to one who is an infant or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise." Whether an infant may avoid an indorsement, or an order to pay money belonging to him, to a third person, before the order is executed, is another question.

The money which was paid by the plaintiff's direction to the defendant, in the present case, was paid on account of the plaintiff's enlistment in the military service of the United States, and belonged to him, and not to his father. *Taylor v. Mechanics' Savings Bank*, 97 Mass. 345. The defendant offered to prove that the money was received by him upon an agreement with the plaintiff that it should be used, if necessary, for the support of the plaintiff's father and family, and that it was so used. This evidence ought to have been received. It proved an executed agency; a payment by the infant's direction which cannot, for the reasons suggested, be avoided in this action.

Verdict set aside.

DARIUS WHITHED vs. JAMES M. WOOD & another.

an action by an indorsee against the maker of a promissory note, the payee of which is dead, the defendant is incompetent to testify in his own favor, under the Gen. Sts. c. 121, § 14.

CONTRACT on a promissory note made by James M. Wood, one of the defendants, under date of July 25, 1866, for \$400 payable, with interest, four months from date, to Henry W. Dresser, the other defendant, or his order, and indorsed in blank by Dresser. Writ dated March 15, 1867. Trial, and verdict

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for the plaintiff, in the superior court, before *Rockwell, J.*, who allowed a bill of exceptions of which the following is the material part:

"Dresser did not defend the action, but was defaulted at the first term, and died after said first term and before the trial. Wood defended the action, and, being a witness at the trial, called by his counsel, admitted that the signature to the note was his, but offered to prove, by his own testimony, that the words, 'with interest,' were added to the note by Dresser after it was signed and delivered to Dresser and without the consent or knowledge of Wood, and that the note, including the words so added, was in the handwriting of Dresser. To this testimony the plaintiff's counsel objected, and the judge excluded the evidence and refused to admit the testimony thus offered, and to these rulings Wood excepted."

C. A. F. Swan, for the plaintiff, was first called upon.

T. Wentworth & A. F. Jewett, for Wood.

GRAY, J. The contract in issue and on trial was a promissory note made by Wood to Dresser, and by him indorsed to the plaintiff. Dresser, one of the original parties to that contract, was dead, and Wood, the other party, was therefore rightly not permitted to testify in his own favor. Gen. Sts. c. 131, § 14. *Byrne v. McDonald*, 1 Allen, 293.

The bill of exceptions does not show any waiver of the objection to his competency; for it is at least ambiguous upon the point whether his admission of his signature was not made as party and not as witness, and the objection taken before he had begun to testify.

Exceptions overruled.

JOHN F. WETHERBEE vs. LAWRENCE B. NORRIS.

On the trial of an action on a promissory note, in which all the evidence was addressed to the issue whether the note was a forgery, and no other issue was directly raised or investigated, the judge refused as inapplicable a request of the defendant for instructions to the jury on the measure of damages in event that they should be satisfied that the note was genuine but given for too large a sum by fraud or mistake. *Held*, that the defendant had no ground of exceptions.

When on a trial the credibility of a witness is sought to be impeached by evidence of his reputation for truth and veracity, it is within the discretion of the presiding judge to require the impeaching witnesses to be first asked whether they know the reputation of the witness in that respect.

CONTRACT on an account annexed for \$682.25, and on a promissory note for that sum payable on demand, with interest, both counts being for the same cause of action.

At the trial in the superior court, before *Putnam, J.*, "the only issue presented to the jury, when the evidence was put in, was, whether or not the note was signed by the defendant." He contended that the plaintiff had forged the signature; and he testified that a less sum was due from him to the plaintiff at the date of the note, and that he gave a note for that sum to the plaintiff at that time; but the plaintiff contended that the note in suit was the only one given to him by the defendant.

The defendant requested the judge to instruct the jury "that, if they should be satisfied, upon the whole evidence, that at the time of the settlement between the plaintiff and the defendant the balance due from the defendant to the plaintiff was less than the amount of the note in suit, they should find their verdict for the plaintiff for the amount then due, and interest thereon from that time;" but the judge declined so to instruct the jury, and instructed them "that, if they should find that the note for \$682.25 was signed by the defendant, they should return their verdict for that amount, and interest thereon from the date of the note."

"The plaintiff testified as a witness in his own favor, at the trial. The defendant called a large number of witnesses, residing in the same place with the plaintiff, for the purpose of proving that the character of the plaintiff for truth and veracity

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was bad. The judge required of the defendant that each of the witnesses should be first asked this question, 'Do you know the reputation of the plaintiff for truth and veracity?' If the witness said he did, he was then to be asked, 'What was that reputation?' To this the defendant objected, on the ground that it was an inquiry into the means of knowledge of the witness. One witness, called by the defendant, upon this preliminary question being put to him, answered that he did not know it. The defendant did not put any further questions to him, and he was allowed to leave the stand."

The jury found for the plaintiff for the amount of the note and interest; and the defendant alleged exceptions.

E. A. Kelly, for the defendant.

T. H. Sweetser & L. W. Osgood, for the plaintiff.

MORTON, J. 1. It appears from the bill of exceptions that the only issue presented to the jury, when the evidence was put in, was, whether or not the note in suit was signed by the defendant. To this issue all the evidence was addressed. The defendant claimed that the note was forged, and to sustain this fact testified that when the note was dated he owed the plaintiff a less sum, and gave his note therefor, but did not give the note in suit. The trial proceeded exclusively upon the ground that the note was forged, and the question of the amount due by the defendant to the plaintiff at the date of the note was not raised or investigated, except thus incidentally. The defendant denied the genuineness of his signature to the note; but did not raise the defence that by fraud or mistake it was given for too large a sum. In this state of the case, the instruction requested by the defendant was not appropriate or applicable to the evidence, and was rightly refused.

2. The ruling of the presiding judge that each of the witnesses called to impeach the plaintiff should be first asked the question, "Do you know the reputation of the plaintiff for truth and veracity?" is not the subject of exceptions. The practice upon this subject differs in different courts. In this state, no practice is established as a rule of law, but it is within the discretion of the presiding judge to require the preliminary ques-

tion above stated to be asked of each witness if he shall deem that the interests of justice require it. The same principle is applicable to the examination of witnesses upon other subjects. It often occurs, in the trial of cases, that the judge is called upon to inquire of a witness whether he has knowledge of the matter of which he is called to testify. If it appears to be doubtful whether the witness understands and appreciates his duty to testify only to what he knows of his own knowledge, or if, for any reason, there is danger that he may testify to hearsay, it is the right, and may be the duty, of the presiding judge to inquire of him if he has knowledge of the matter as to which he is asked to testify; and the party calling the witness would not be thereby aggrieved, and no exceptions would lie. So in the examination of impeaching witnesses, if the presiding judge sees that there is danger that the witness, in answer to the usual question, "What is his general reputation for truth and veracity?" may give incompetent testimony, either because he fails to understand the exact character of the question, or for any other reason, he may require the witness first to be asked whether he knows what that reputation is. Whether the circumstances of this case required the preliminary question to be put, was a matter within the judicial discretion of the presiding judge, and cannot be revised on exceptions.

The case at bar is clearly distinguishable from the case of *Bates v. Barber*, 4 Cush. 107. In that case, the presiding judge directed that the witnesses must first be examined as to their knowledge and means of knowledge of the character of the witness attempted to be impeached, and upon such examination assumed the right to decide whether the witness offered had sufficient knowledge to qualify him to testify. In this case, the purpose and effect of the preliminary question appears to have been merely to ascertain whether the witness had any knowledge of the general reputation of the impeached witness, and not to inquire into the extent or means of such knowledge. The only witness rejected was rejected because he did not appear to have any knowledge; not because the amount of his knowledge was not satisfactory to the court.

Exceptions overruled.

Mather v. Corliss.

JOHN MATHER & others vs. HORATIO G. F. CORLISS, executor

After signing and acknowledging a deed of land, containing a covenant that the grantor or his executors or administrators should pay a sum of money to the grantee, the grantor delivered it to a third person for the grantee, and this person so received it from the grantor, and kept it till delivered by him to the grantee after the grantor's death, which occurred two days after said execution of the deed. *Held*, that the estate vested in the grantee, and the covenant became binding on the grantor, upon the delivery of the deed to the third person, although he was not employed by the grantee to receive it for him; and that the consideration of it was not open to inquiry.

CONTRACT by John Mather, Thomas Mather and Thomas Berry, the grantees named in a deed of Joshua Mather, dated June 20, 1865, against the executor of his will, on a covenant in the deed for the payment of \$15,000 to the plaintiffs. Writ dated October 1, 1867. The case was reserved by *Wells, J.*, for the determination of the full court, on a statement of agreed facts, of which the following is the substance of the material parts :

Joshua Mather died June 22, 1865, having made his last will June 11, and a codicil June 20, which were proved and allowed in the probate court for Middlesex October 10, and of which the defendant was duly appointed executor. On June 20, before executing the codicil, he signed and acknowledged before a magistrate a deed to the plaintiffs. Previously to making said deed, Joshua Mather wrote a letter to the plaintiff Thomas Berry, then in England, proposing to convey to the plaintiffs three undivided fourths of his mill property, and that they should come to Lowell and carry on the manufacturing business, which letter was received by Berry in England June 10, 1865.

This deed, after conveying to the plaintiffs, and their heirs and assigns, three undivided fourth parts of all the grantor's mill property on River Meadow Brook in Lowell, and three undivided fourth parts of all his real estate in Chelmsford and Westford, particularly his land and dam and mill privilege at the outlet of Baptist Pond, contained the covenant in question (preceding the *habendum* of the deed) in these terms : " I also agree and covenant with said grantees, that I will, or my executors or

administrators shall, pay to said grantees, for the use and benefit of said grantees and the owner of the other undivided fourth part of the property aforesaid, as a firm in carrying on the business of manufacturing at said mills under the firm name of John Mather & Company, the sum of fifteen thousand dollars in bills receivable."

The codicil, after appointing certain trustees of the estate which the testator might leave at his death, contained the following provision relating to the deed: "I having executed a deed of this date from me to my nephew John Mather, his son Thomas Mather, and my nephew Thomas Berry, of three undivided fourth parts of my mill property on River Meadow Brook in said Lowell, the other undivided fourth part of the property described in said deed, and not conveyed thereby, said trustees shall convey to John Berry, brother of Thomas Berry, if he elect to come to this country and join the said John Mather and other grantees in said deed in manufacturing with said mill property under the firm of John Mather & Company; but should he finally decline so to do, said trustees are to convey said undivided fourth part to said John Mather, Thomas Mather and Thomas Berry, as fully as they own or are to own the other three undivided fourth parts, which they are to own as fully as is in said deed expressed."

Joshua Mather, on the day on which he signed the deed, "delivered it to this defendant for said grantees, the plaintiffs;" and the defendant "so received it from said Joshua, and kept it till delivered by him to the grantees as hereinafter stated, but he was not employed by said grantees to receive the same for them." The plaintiffs lived in England; and the defendant "notified them by letters, while they were in England, of said will, codicil and deed, and inclosed in one of them, for their benefit, a copy of said will, codicil and deed, and kept said deed in his possession, from the time it was so delivered to him by said Joshua, until about November 3, 1865," when he delivered it to them, they having meanwhile, in August, come from England to Massachusetts; and they caused it to be duly recorded the next day.

John Berry, who also lived in England, elected to come to this country, in accordance with the terms of the codicil, "and did come to this country in May 1866, and joined the plaintiffs in manufacturing with the mill property described in the deed, under the firm name of John Mather & Company, the said John Mather, Thomas Mather, Thomas Berry and John Berry constituting said firm; and they commenced and conducted business with said property as such firm soon after said John came." The trustees appointed under the codicil accepted the trust, and during the winter of 1866-1867 conveyed to John Berry the remaining undivided fourth part of the mill property mentioned in the codicil.

On September 27, 1867, the plaintiffs made demand on the defendant, as executor of Joshua Mather's will, for payment to them of fifteen thousand dollars in conformity with the covenant quoted from the deed; and the defendant did not comply with the demand.

"If material and competent to be proved, there was no consideration paid or made by the grantees to Joshua Mather for his deed and covenant; unless the facts that, upon receiving his letter [on June 10, 1865], they closed up their business in England, sold out some of their property there, and after the death of the testator, and after the receipt of the notification aforesaid from the defendant, completed their preparations in England, came to this country, and with John Berry entered into business as aforesaid, amount to a consideration; and unless the facts herein admitted amount to a consideration; and unless the facts that said grantees and Berry were kindred of said Joshua, and the love and affection he bore them, amount to a consideration, said John Mather, Thomas Berry and John Berry being his nephews, and Thomas Mather being son of said John Mather."

E. A. Alger; (*A. R. Brown* with him,) for the plaintiffs.

D. S. Richardson, for the defendant.

MORTON, J. The facts of this case show conclusively that it was the intention of Joshua Mather to deliver the deed, upon which the plaintiffs rely, to Mr. Corliss for them, absolutely, and not as an escrow. He delivered it for said grantees to said

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Corliss, who so received it and kept it till delivered by him to the grantees. This deed took effect, and vested the estate thereby conveyed in the plaintiffs, from the delivery to Corliss. The case of *Foster v. Mansfield*, 3 Met. 412, is a conclusive authority upon this point, and renders further discussion of it unnecessary.

There being a valid delivery of the deed, all the covenants in it took effect and became binding upon the grantor. Among these covenants is the following: "I also agree and covenant with said grantees that I will, or my executors or administrators shall, pay to said grantees, for the use and benefit of said grantees and the owner of the other undivided fourth part of the property aforesaid, as a firm in carrying on the business of manufacturing at said mill under the firm name of John Mather & Company, the sum of fifteen thousand dollars in bills receivable." The only objection urged to the validity of this covenant is, that it is not supported by a sufficient consideration.

It is not necessary to determine whether the facts agreed show an adequate consideration; because, the covenant being under seal, the consideration cannot be inquired into. The elementary principle applies, that a seal implies a consideration, or, in other words, the existence of a consideration is conclusively presumed from the nature of the contract. *Page v. Trufant*, 2 Mass. 159. The plaintiffs are therefore entitled to recover in this action the amount named in the covenant. As no time for the payment of the amount was fixed in the covenant, the defendant was not in default until demand was made upon him, and therefore the plaintiffs are entitled to interest only from the date of their demand.

Unless the parties agree, the case is to be sent to an assessor to determine the amount for which judgment shall be rendered.

Judgment for the plaintiffs.

SARAH SIMONDS vs. FRANKLIN SIMONDS.

A special statute of the state of Maine, authorizing the supreme judicial court of that state in its discretion, to decree a divorce between individuals named, is unconstitutional, as granting a special indulgence by way of exemption from the general law.

LIBEL filed in September 1869, for a divorce from the bond of matrimony for the cause of the adultery of the libellee; heard by *Ames, J.*, who reported for the determination of the full court the case which is stated in the opinion.

J. W. Pettengill, for the libellant.

H. G. Hutchins, for the libellee.

CHAPMAN, C. J. The parties having been married in this Commonwealth, and having lived here as husband and wife, the libellant, in October 1863, filed a libel for divorce against this libellee for the cause of cruelty and ill treatment, and in the following November obtained a divorce from bed and board. In March 1864 he removed to the state of Maine, and has ever since resided there. In November 1867 he there married one Georgiana A. Mason, and lived and cohabited with her as his wife till her decease in September 1868. This sufficiently proves the allegation of his adultery, unless he establishes a valid justification of his acts.

He alleges that, before this marriage, he filed a libel for divorce against the present libellant, and procured an order of notice upon her to appear and answer thereto; that the notice was served upon her, but she made default, and that, at the April term 1867, a divorce was granted to him from the bonds of matrimony, on the allegation that she, in 1860, without cause, utterly deserted him, and since then refused to cohabit with him, and frequently threatened his life. We understand that, by the General Statutes of Maine, the court had no authority to grant the divorce, the parties not having been married there, nor having lived together there, and the cause of divorce not having occurred there. *Calef v. Calef*, 54 Maine, 365.

It is not contended that the court had such authority. But the legislature of Maine passed a special act, on the 27th of

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February 1867, entitled "An act in relation to the divorce of Franklin Simonds," which is as follows: "The supreme judicial court is hereby authorized and empowered in its discretion to decree a divorce from the bonds of matrimony between Franklin Simonds of Westbrook in the county of Cumberland and state of Maine, and Sarah Simonds of Malden and Commonwealth of Massachusetts, at any term of said court for the trial of civil actions holden for said county of Cumberland." Maine St. of 1867, c. 368. Under this act he filed his libel, and the court granted the divorce. If the existing decree, which was passed in this court the preceding year, when both parties were within its jurisdiction, and which of course justified the wife in living separate from her husband, was made known to the legislature or to the supreme judicial court of Maine, it must have been treated as a nullity. But this is not to be supposed. It must be presumed that Simonds fraudulently concealed the fact.

But we do not understand that by the laws of Maine, laying aside the question of fraud, the statute had any validity. In *Lewis v. Webb*, 3 Greenl. 326, a special act had been passed, authorizing in a particular case an appeal from a decree of the judge of probate; no appeal being allowable under the general law of the state at that time. This law was held to be unconstitutional, and Chief Justice Mellen says: "On principle, then, it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve, dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the operation and effect of such general law, leaving all other persons under its operation." 1b. 336. He cites the case of *Holden v. James*, 11 Mass. 396, in which it was held that the legislature had no constitutional right to suspend the statute of limitations in favor of one or more individuals, leaving it in force as a general law. In *Durham v. Lewiston*, 4 Greenl. 140, the court reaffirmed the principle stated in *Lewis v. Webb*, and applied it to a legislative resolve authorizing a party to prosecute a writ of review.

In 1840 a legislative request was made to the justices of the supreme judicial court of Maine to give their opinions on the

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question whether the legislature have the power to grant divorces in cases where the court have jurisdiction; and also on the question whether they have the power in cases where the court have no jurisdiction. It was held that, in the first case, the legislature have not the power, but have it in the second case. *Opinion of Justices*, 16 Maine, 479. See also *Adams v. Palmer*, 51 Maine, 480.

The divorce in this case does not purport to be a legislative act, but a judicial decree under the authority of a special statute, applying to a single case, and therefore unconstitutional. This being so, it is not necessary to inquire whether, if it were regarded as a valid divorce in Maine, it would have any validity in this Commonwealth. The libellant is entitled to a decree of divorce from the bond of matrimony for the adultery of her husband.

Divorce granted.

HENRY SCHROW vs. ANNE L. SCHROW.

PR. of that a husband and his wife lived at the same time in this Commonwealth, but without cohabiting or having any communication with each other, is not proof that they "lived together as husband and wife" here, within the meaning of the Gen. Sta. c. 107, § 12, specifying requirements of residence to give jurisdiction of libels for divorce.

LIBEL filed October 9, 1869, by a resident of Charlestown, for a divorce from the bond of matrimony for the cause of adultery alleged to have been committed at Springfield in this Commonwealth, San Francisco in California, and Hartford in Connecticut, "on September 15, 1867, and at other times since the marriage," by the libellee, who was described in the libel as comorant at said Hartford, and, after due service of notice on her was defaulted.

At the trial, before *Ames, J.*, it appeared that the parties were married at San Francisco at some time in 1867, and soon afterwards separated; that the libellant "returned" to Massachusetts, and had continued to reside in Massachusetts ever since that the libellee also came to Massachusetts, and resided for a

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time at Springfield, and for a time at Chicopee, and made a visit or visits at Charlestown; but that "the parties never cohabited or had any communication whatever with each other in this Commonwealth." The libellant offered proof of the acts of adultery alleged to have been committed at San Francisco and Hartford; but the judge declined to receive proof of them, and ordered the libel to be dismissed. The libellant alleged exceptions.

C. Cowley, for the libellant.

BY THE COURT. The parties never having "lived together as husband and wife" in this Commonwealth, and the libellant not having lived here for five consecutive years next preceding the time of filing the libel, this court has no jurisdiction of the cause. Gen. Sts. c. 107, §§ 11, 12. Their having lived in the state separately is not sufficient. *Exceptions overruled.*

MARTHA A. W. ROSS vs. LEWIS M. ROSS.

The requirement of the Gen. Sts. c. 107, § 12, that, to give jurisdiction in certain cases of application for divorce, the parties must have "lived together as husband and wife" in this Commonwealth, means that they must have had a domicile here.

An inhabitant of another state does not acquire a domicile in this Commonwealth by merely coming here to seek employment, with the intention of residing here only if he shall find it.

LIBEL filed November 26, 1867, for a divorce from the bond of matrimony for the cause of adultery alleged to have been committed by the libellee in this Commonwealth at divers times since August 30, 1866. The libellant described herself and the libellee as of Medford. The libellee filed a motion to dismiss the libel for want of jurisdiction. Trial before *Ames, J.*, who reported the following case for the determination of the full court:

"The parties were married at Newark in New Jersey, June 27, 1866, the libellee being then a citizen and resident of Newark, and the libellant at the time of the marriage living at that

place with her father, and never having resided in this Commonwealth. At the time of the marriage, the libellee was a clerk employed at Newark on a salary. Afterwards, about August 30, 1866, the parties came into this state, and lived for some weeks in the family of a relative of the libellant, in Medford. The purpose of the journey on the part of the libellee was to seek for employment in Boston or the vicinity, and he intended, if he found employment, to reside permanently in this state. With this view, he himself, and also some of her friends, made applications and efforts in various quarters, but without success. Having finally made up his mind that he could not get into business in this state, he returned to Newark in about six weeks after his arrival at Medford. He did not take her with him, for the reason that he had no means to pay her travelling expenses and to maintain her; and she has ever since that time continued to live at Medford. The adultery charged against him was shown to have been committed during his stay in this state. He has never, since his return to Newark, come back to this state except as a mere visitor, but is now resident at Newark."

A. R. Brown & E. A. Alger, for the libellee.

P. Ayer, for the libellant.

CHAPMAN, C. J. It is provided by Gen. Sts. c. 107, § 12, that, with certain exceptions, not applicable to this case, no divorce shall be decreed for any cause, if the parties have never "lived together as husband and wife" in this state.

We think the true interpretation of this provision is, that they must have had a domicile here, and not merely lived together as travellers passing through the state, or as visitors for a purpose that is merely temporary, or not with intent to acquire a domicile. The remedy is intended to be for the benefit of our own citizens, and not to enable the court to dissolve marital relations existing between citizens of other states, neither of whom has ever had a domicile here. *Harteau v. Harteau*, 14 Pick 183. *Shaw v. Shaw*, 98 Mass. 158. In *Calef v. Calef*, 54 Maine, 365 a similar interpretation has been given to a statute of Maine substantially like ours, though differing in its phraseology.

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While these parties were in this state they did not acquire a domicile here; and the intention of the husband to acquire one depended upon a contingency that never happened.

*Libel dismissed.**

MARTHA MAGRATH vs. THOMAS MAGRATH.

Proof that a husband, intentionally and against his wife's consent, has for five consecutive years abandoned all matrimonial intercourse and companionship with her, and denied her the protection of his home, will sustain her libel for a divorce from the bond of matrimony on the ground of his desertion; and it is immaterial that during the period he has regularly contributed money, and from time to time necessities, towards supporting the wife and their children.

LIBEL filed at April term 1868, for a divorce from the bond of matrimony for the cause of desertion continued for five con-

* A similar decision was made at September term 1870 for Hampden, in the case of

CAROLINE L. FANSLER vs. NEWTON O. FANSLER.

LIBEL for a divorce from the bond of matrimony for the cause of adultery alleged to have been committed at Cleveland in Ohio by the libellee, who was defaulted. The case was heard by *Wells, J.*, and reported for the determination of the full court on these facts:

"The parties were married in September 1866 at Westfield, where the libellant had previously, and until that time, resided with her father. The libellee was then, and ever since has been, a resident of Cleveland in Ohio, engaged in business there as a trader. Directly after the marriage, they spent several weeks together, at the house of her father in Westfield and elsewhere in Massachusetts, before going to Cleveland to reside; and at several times since have been for short periods in this state; but never with any intention of making their joint residence in the state. In May 1869, the libellant abandoned her husband, in consequence of information of such misconduct on his part as justified her in so doing, and of his neglect towards herself. She then returned to Massachusetts, where she has ever since remained, living in Westfield with her father. Her husband has since continued to reside at Cleveland until the present time. In September 1869, after her return to Westfield, he committed the offence of adultery at Cleveland, upon which this libel is founded."

Upon these facts, after argument by *W. G. Bates* for the libellant, THE COURT ordered that the

Libel be dismissed.

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secutive years; tried at April term 1869, before *Morton, J.*, and reported as follows for the determination of the full court:

"It appeared in evidence that the parties were married in October 1850, and lived together at Charlestown, and separated twelve years ago. After the separation, the libellant, being destitute, called upon the overseers of the poor for aid, who called upon the libellee; and thereupon the libellee allowed his wife seven dollars per month for her support, for two years, when the parties came together again, and continued to live together for a short time, when they separated again, and the libellee allowed his wife nine dollars per month, which sum was afterwards increased to ten dollars per month, and furnished some wood and coal and other supplies. The parties came together again; but in 1861 they separated, the libellee alleging that his wife's temper was such that he could not live with her; and he has continued to live apart from her ever since, although he did during all the time since, up to the time of filing the libel, supply her with fifteen dollars per month for the support of herself and children; and, from time to time, during the whole separation, and down to the time of filing the libel, the libellee has furnished to his wife some wood and coal, flour, clothing and shoes, for herself and his children, and, when called upon, as he was occasionally, sent to the libellant small sums of money, and furnished a physician when needed at all times. The libellant frequently applied to her husband to live with her; but he declined to do so, alleging as a reason that her temper was such that he could not live with her in peace, and that it was better that they should live separate. The parties have three children. During all the time since 1862 the parties have lived separate, the libellee declining to live with his wife for the reason before stated, but during all the time he has made the payments and advances before stated. Such payments were insufficient to support the libellant, and she has been obliged to labor constantly for the support of herself and the children. On the evidence, the judge was of the opinion, and found, that the libellee was not justified in refusing to live with his wife; and, at the request of the libellee, reserved for the consideration of the

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whole court the question whether upon the facts above stated a divorce from the bonds of matrimony should be decreed."

T. H. Sweetser & J. B. Goodrich, for the libellant.

I. S. Morse & C. Robinson, Jr., for the libellee.

COLT, J. It was held in *Southwick v. Southwick*, 97 Mass. 327, that the refusal of matrimonial intercourse, although unjustified by considerations of health or physical disability, inasmuch as it was a breach or violation of a single conjugal or marital duty only, would not support a libel for divorce on the ground of desertion, when it had continued for five years consecutively.

The case at bar goes much further. Here there has been for the time required by the statute, an abnegation on the part of the husband of all the chief duties and obligations which result from the marriage contract and distinguish it from others. There is no more important right of the wife, than that which secures to her in the marriage relation the companionship of her husband and the protection of his home. His wilful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is desertion within the meaning of our statute. And such conduct is not relieved by the fact that he has from time to time contributed to her support and the support of her children. A man may do as much as this, from motives of charity, or deference to the opinions of others, or in order to discharge, in part, a legal responsibility for the means of living furnished her; although he may all the time have a fixed intention permanently to abandon all personal relations with her. In the case at bar, indeed, the wife, in her destitution, first applied to the overseers of the poor, who then called upon the husband, as they had the right to do, for the aid which he was bound to furnish.

When the intention to desert is in controversy, and the evidence is meagre or conflicting, there are many cases, no doubt, where the fact that the husband continues supplies to his wife will be strongly significant, if not decisive in his favor. That is not the question here. And we are of opinion that, in a case like the one at bar, the right of the wife to a divorce, and to

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suitably alimony out of his estate, is not to be defeated by his contributions towards her support, made after his abandonment of her.

In the recent English case of *Yeatman v. Yeatman*, Law Rep. 1 P & D. 491, where it was contended by the husband that the fact that he had continued to support his wife prevented his conduct from amounting to desertion within the meaning of the divorce act, it was said by the judge ordinary, that, although the permanent denial of the right of the wife may be aggravated by leaving her destitute, or mitigated by a liberal provision for her support, yet, if cohabitation is put an end to, against the consent of the wife, with no intention of renewing it, the matrimonial offence of desertion is complete.

Divorce from the bond of matrimony decreed.

CYRUS R. WOOLSON vs. BOSTON & WORCESTER RAILROAD CORPORATION.

If the award of arbitrators, to whom a case is referred by rule of court, is silent on the subject of costs, the prevailing party is entitled to recover them.

Torr against a railroad corporation for injuries alleged to have been occasioned to the plaintiff's trees and herbage, in Framingham, by fire communicated by the defendants' locomotive engine. Writ dated November 21, 1866.

After the parties had filed an agreement at March term 1869 of the superior court that no costs should be taken up to and including that term, the case was, at September term 1869, by their agreement and under a rule of the court in the ordinary form, referred to three arbitrators, who under date of November 29, 1869, signed and returned the following award: "The undersigned do hereby award the plaintiff the sum of \$130." Judgment was ordered on this award for the plaintiff, and the defendants appealed to the court from the taxation of costs by

the clerk, in which were included items for the writ, service thereof and entry fee; for the rule referring the case, and the fees of the arbitrators; for a summons to a witness at the hearing before the arbitrators, and for service thereof; and for "witnesses as per certificate," no sum being carried out against this item, but a memorandum "to be added."

On the appeal, *Wilkinson, J.*, disallowed the items for the writ and its service and entry; allowed the fees for the rule, and the arbitrators' fees, but no other expenses of the reference; and affirmed in all other respects the taxation made by the clerk. The defendants appealed to this court.

G. S. Hale, for the defendants.

J. P. Converse, for the plaintiff.

AMES, J. There seems to be no doubt that referees, appointed under a rule of court, may award costs to either party, in whole or in part. *Nelson v. Andrews*, 2 Mass. 164. *Bacon v. Crandon*, 15 Pick. 79. They may, if they think it just and reasonable, award that the prevailing party shall pay the costs of the suit. *Bacon v. Crandon*, 15 Pick. 79. They may, if they choose, award a gross sum which they may intend shall cover both damages and costs. But it is equally certain that what is really referred to them, by such a rule, is the action; that is to say, the merits of the case; the claim which is the subject matter of the action, and all the grounds of defence against it. The costs of suit are incidents of the action, but not separate or independent grounds of claim. The referees have not the means of taxing the costs of court, and ordinarily would not be in a position to know their amount. They occupy the place of the jury, with larger powers, but it is entirely at their discretion whether they will or will not pass any special order on the subject of costs. The plaintiff in this case is the prevailing party; and as such is entitled to recover the costs of the suit, unless he must be considered as prevented from doing so by the fair interpretation of the award. It seems to us that the proper inference from the silence of the referees on the subject of the costs must be, that they did not act upon that subject or take it into consideration at all, and that on the contrary they considered the merits of the plaintiff's claim and the merits of the de-

fence against it, and found the sum named in the award to be due to the plaintiff. It is not a necessary or logical interpretation of this award, to say that the defendants owe the plaintiff the sum of one hundred and thirty dollars, but that the expense of the litigation, the amount of which they may not know, is to be the plaintiff's loss. The real question is, as to the meaning of the award; and, unless we are constrained by some inflexible rule of law to interpret it as meaning that the sum awarded shall be in full for damages and costs, we should put no such construction upon their silence as to costs.

A case is cited from 5 Dane Ab. 62, *Oliver v. Boynton*, decided in 1797, to the effect that, if the award is silent as to costs, it is erroneous to award costs, and a judgment to that effect would be reversed on a writ of error. This case is very scantily and imperfectly reported, and we find on examination of the record that it was in fact an entirely different matter from what the citation seems to import. The original award was, that Oliver should pay to Boynton the sum of ten pounds on demand; "that all actions, suits, quarrels and controversies whatever to the day of the date hereof shall cease and be no further prosecuted, and that each of said parties shall pay and bear his own cost and charges in any wise relating to or concerning the premises." The judgment rendered by the court of common pleas was, that Boynton should recover against said Oliver ten pounds damages, and costs taxed at twenty-eight shillings and six pence. This judgment was afterwards reversed on a writ of error, not on the ground that the award was silent as to costs, but that it expressly excluded costs.

Under the agreement that no costs up to and including the December term 1869 should be charged, the items taxed for writ, service and entry were properly disallowed. The referees' fees were of a later date, and were taxable, for that reason, as part of the plaintiff's costs. The attendance and travel of witnesses, not being taxed by the referees, are properly omitted. The rule adopted in the superior court appears to us to have been correct, and the

Judgment is therefore affirmed, with costs of this appeal for the plaintiff.

EDWARD SAFFORD vs. BOSTON & MAINE RAILROAD.

A fire, set by sparks from a locomotive engine of a railroad corporation to wood piled against a freight-house at the railroad station in a village, consumed the freight-house, and spread to and injured the station-house, which was thirty feet distant from the freight-house. A dwelling-house, about sixteen hundred feet distant from the station-house, and seven hundred and forty feet from the railroad track, caught fire from sparks wafted through the air by the wind to its roof from this conflagration, and was injured. *Held*, that the railroad corporation was liable for the injury, under the Gen. Sts. c. 63 § 101.

TORT against a railroad corporation for injuries alleged to have been occasioned to the plaintiff's dwelling-house, and his chattels therein, by fire communicated by the defendants' locomotive engine.

At the trial, before *Ames, J.*, it appeared that about quarter past eleven o'clock in the forenoon of April 18, 1868, and about ten minutes after a railroad train of the defendants had passed over their track adjoining their freight-house in Reading, a pile of wooden railroad ties, which was heaped against the northwest end of that building, was found to be on fire. The freight-house was 200 feet long, and was "30 feet northwest of" the defendants' station-house. There was a strong west wind; the fire spread rapidly; and soon the freight-house and its contents were destroyed, and the station-house was partly consumed, by the fire. The wind blew cinders and "burning fragments of shingles, &c.," from this fire, in the direction of the plaintiff's dwelling-house, which was 1590 feet distant from the station-house, and 740 feet distant from the line of the railroad track beyond the station; and it and several other buildings in its neighborhood, and their contents, were injured by fire communicated to them from the burning material thus blown upon them. When the fire caught the plaintiff's house, it was first discovered upon the roof, in a place "about the size of a silver dollar." The plaintiff bought his house-lot and built his house several years after the defendants built their freight-house and station-house. The plaintiff did not contend that the defendants were negligent; and sought to recover solely on their liability under the provisions of the Gen. Sts. c. 63, § 101, that every

railroad corporation "shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible."

"The case was by agreement submitted to the jury to determine whether the fire was communicated to the pile of wooden ties from the defendants' locomotive engines, with instructions, if they should so find, to return a general verdict for the plaintiff without any assessment of damages; a general verdict was found for the plaintiff; and, it being agreed that if, upon said verdict and the facts above stated, the plaintiff was entitled to recover, the blank in the verdict should be filled according to the determination of an assessor to be appointed by the court to inquire and report upon the proper amount of damages, and a written agreement being filed to this effect, otherwise judgment to be entered for the defendants, or a new trial to be ordered, as the court might direct, the case is reported for revision by the whole court."

C. P. Judd, for the defendants. 1. The plaintiff's house was not "upon the route" of the railroad in the sense of the statute. In *Hart v. Western Railroad Co.* 13 Met. 99, 104, the court say that the words of the St. of 1840, c. 85, "along its route," "describe buildings being near and adjacent to the route of the railroad, so as to be exposed to the danger of fire from engines." In *Lyman v. Boston & Worcester Railroad Co.* 4 Cush. 288, 290, 291, the court say, that, "with the use of locomotive engines, greater hazard to contiguous buildings and property owned by the adjacent landowners may arise, than was originally contemplated." But the house now in question cannot fairly be described as either adjacent or near to the route of the railroad; and if it is contended that, merely because it was burned, therefore it was exposed to the danger of fire from engines, then upon the same rule the whole city of Boston would be so exposed, if one of the defendants' locomotive engines should set their Boston station-house on fire, and the fire should spread from house to house throughout the city.

2. If the word "communicated" is used in a sense to hold the

defendants liable in this action, the effect may be to charge railroad corporations to an extent almost illimitable. In *Hart v. Western Railroad Co.* the court substantially say that the word "communicated" should not include all burnings when a fire communicated by the engine directly to one building, and then by natural and ordinary means to others, without the intervention of any other means, spreads into a wide conflagration in a village or city. The right to insure, given by the statute, is of no practical value, unless some limit is set to the liability to be insured against.

3. The destruction of the plaintiff's property was not a necessary or a proximate result of the setting of fire to the railroad ties. In *Perley v. Eastern Railroad Co.* 98 Mass. 414, 417, the jury found "that the fire which destroyed the plaintiff's property proceeded from the defendants' locomotive, and came in a direct line, and without any break, to the plaintiff's property;" and that case rests upon the particular facts found in it. By the Rev. Sts. c. 24, if damage was done to the property of any person by discontinuing a highway, he might recover for it; but in *Smith v. Boston*, 7 Cush. 254, the damage was limited to land abutting upon the discontinued part of the way. So in building railroads the damage is limited to the necessary consequences of making the road. *Dodge v. County Commissioners*, 3 Met. 380, 383. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 10 Cush. 385, 391, 392. The Rev. Sts. c. 25, § 22, the St. of 1850, c. 5, and the Gen. Sts. c. 44, § 22, giving a right of action for damages arising from defects in the highway, are unlimited in terms, but in *Marble v. Worcester*, 4 Gray, 395, and other cases, a limit in the nature of proximate cause and consequence has been set by the court. In *Ryan v. New York Central Railroad Co.* 35 N. Y. 210, 212, the court say "that a building upon which sparks fall should be destroyed or seriously injured, must be expected; but that the fire should spread, and other buildings be consumed, is not a necessary or an usual result." This result "depends upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are

accidental and varying circumstances. The party has no control over them, and is not responsible for their effects."

C. T. Russell & S. Bancroft, for the plaintiff. 1. The plaintiff's house was "upon the route" of the railroad. *Gen. Sta. c. 63, § 101. Hart v. Western Railroad Co.* 13 Met. 99, 104. *Ross v. Boston & Worcester Railroad Co.* 6 Allen, 87. *Perley v. Eastern Railroad Co.* 98 Mass. 414.

2. The verdict settles that the original fire was "communicated" by the defendants' locomotive engine.

3. The fact that it destroyed the freight-house and injured the station-house of the defendants before it spread to the plaintiff's house does not affect the "communication" from the original point to the plaintiff's house, within the meaning of the statute. See cases above cited, and also *Quigley v. Stockbridge & Pittsfield Railroad Co.* 8 Allen, 438; *Trask v. Hartford & New Haven Railroad Co.* 2 Allen, 331; *Hooksett v. Concord Railroad Co.* 38 N. H. 242; *Ayer v. Starkey*, 30 Conn. 304. The purpose and effect of the statute are to secure indemnity to the owner of any property which may be injured by fire at first proceeding from locomotive engines of railroad corporations, and then spreading in any ordinary mode through natural causes to the property, whatever the distance from the original point of communication. No judicial limitation of that protection is possible. "The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." *Quigley v. Stockbridge & Pittsfield Railroad Co.* 8 Allen, 438, 440.

The fact that the plaintiff built his house after the location and construction of the railroad is immaterial. He had a right so to build it, under the protection of the statute. *Lyman v. Boston & Worcester Railroad Co.* 4 Cush. 288. *Ross v. Boston & Worcester Railroad Co.* 6 Allen, 87. *Cook v. Champlain Transportation Co.* 1 Denio, 91, 99.

CHAPMAN, C. J. We cannot distinguish this case from *Hart v. Western Railroad Co.* 13 Met. 99, and *Perley v. Eastern Railroad Co.* 98 Mass. 414.

Judgment for the plaintiff on the verdict.

Moulton v. McOwen.

JOHN L. MOULTON vs. TIMOTHY McOWEN.

TIMOTHY McOWEN vs. JOHN L. MOULTON.

In an action for negligence in the building of a cellar under the plaintiff's house by contract, the measure of damages is the difference, expressed in money, between the value of the work as actually done, and what would have been the value of the work which should have been done; and in computing this difference the jury not only may allow for the plaintiff's expenses in repairing defects in the work, but may also make allowance against the defendant for defects irreparable or not reparable at reasonable expense. A man, who has worked for twenty-five years as a journeyman carpenter, may testify, as an expert, to the injury caused to a house, which he was employed in building, by defects in the construction of a cellar under it. Payment for work done is not, of itself and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work.

THE FIRST CASE was an action of tort by Moulton against McOwen for negligence in building a cellar and cellar wall for the plaintiff. Writ dated August 21, 1868.

The declaration was as follows: "And the plaintiff says that, on December 28, 1867, he was the owner of a house-lot situate on First Street in Lowell, and the defendant made a special verbal contract with him to excavate and stone a cellar in said lot, with a good and sufficient dry and mortar wall, to be two feet thick, and with a trench wall one foot deep, the cellar to be seven feet deep in the clear, the materials to be good and furnished by the defendant, and all the work to be done in a strong and workmanlike manner. And the plaintiff says that the defendant, although he undertook to dig the cellar aforesaid, carelessly and negligently neglected to dig it seven feet deep, but left it only six and a half feet deep, and carelessly and negligently neglected to put in the trench wall; and that the defendant, in building the dry wall, did not do it of good material, nor in a strong and workmanlike manner, nor did he build it two feet wide, but wrongfully and negligently made it a narrow wall, not over a foot and a half wide, so that said wall caved in and fell down; whereby, and by reason of all which, the plaintiff hath been greatly damaged, and hath been put to great cost and expense in the repairing and rebuilding of said wall, and in the furnishing of materials for the same, and hath been otherwise

greatly damaged by reason of the nonfulfilment of the defendant's contract aforesaid."

The defendant answered, denying "that he ever made the contract set out in the declaration, and each and every particular of said contract;" and further as follows: "He admits that he built a mortar wall for the plaintiff, and he says the same was built according to the directions of the plaintiff, and was properly and strongly built, and in a workmanlike manner, and he is ignorant whether the same has caved in and fallen down, and if the plaintiff shall prove the same, then the defendant says that the same resulted from no fault of the defendant and from no want of the proper building of said wall; and he denies that the plaintiff has suffered any damage by reason of any fault of the defendant in said matter of building said wall; and he denies that he was careless and negligent in the building of said wall."

THE SECOND CASE was an action of contract by McOwen against Moulton for a balance of \$69.20 alleged to be due on an account annexed for \$259.20 for labor and materials expended in the work concerning which damages were claimed in the first action. The answer alleged that McOwen did not do the work in a workmanlike manner, and that he had been paid all that his labor and materials were reasonably worth.

The cases were tried together, in the superior court, before *Rockwell, J.*, who, after a verdict for McOwen in both actions allowed the following bill of exceptions:

"At the trial there was evidence tending to show that McOwen undertook, by oral contract, to put in a cellar for Moulton in a workmanlike manner, and undertook to make the cellar wall two feet thick, and of good material, seven feet high from the bottom of the cellar, with a trench wall of cobbles under it, two feet wide and one foot deep, extending below the bottom of the cellar. There was also evidence tending to show that McOwen in doing the work neglected to put in the trench wall, so that thereby Moulton was damaged and was put to considerable expense in constructing a drain in lieu of it; that the materials of the walls were defective, and that McOwen did not build

verdict

them in some places more than a foot or a foot and a half thick, by reason of which the walls under the front as well as under the back part of a wing of the house gave way, and fell down, causing that part of the house to settle about one and a half inches, part way of the length of the sill on one side; and that, when that part of the wall was repaired, the sill was raised about three quarters of an inch, and could not safely be raised more, because the raising of it quite to its former height would make cracks about the chimney and a pipe which went into the chimney."

"The judge instructed the jury as follows: If the contract called for stone good and sufficient in quality, and it was not good and sufficient, and the wall was worth less on that account, the deficiency in quality is an item of damages. If the contract required a wall (a dry wall and mortar wall) seven feet high, and it was not of that height, that defect is an item of damages, if the wall as left by the contractor was not as good as if it had been built seven feet high; and the same in relation to the width of the wall, if the contract was for two feet wide, and the wall worth less on account of being built of less width. If the contract prescribed that the cellar should be dug out seven feet deep, and it was dug and left at a less depth, and that defect made the cellar worth less than a seven feet cellar, that defect is an item of damages. If the contract called for a trench wall under the dry wall, and that trench wall was not put in, that defect in the performance is an item of damages. These are the items of damages. If any or all of these defects existed in the work as done by McOwen, and were supplied by Moulton, he may recover as damages his fair cost of supplying them. Possibly this cost of supplying them may not show the whole damages recoverable; because, if Moulton, after he took the work, chose to let a defect remain unsupplied, he may recover, in regard to that defect, a sum equal to the fair cost of supplying it; and that may be added to the other damages as above stated. But, as Moulton took the work when left by McOwen, and did work and found materials, himself, to supply or remedy the defects; if, finding one side of the building settled, say one

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and a half inches, at the time of building up the defective wall he raised that side, say three quarters of an inch only, preferring so to leave it to running the risk of making cracks in the chimney and pipe, he cannot recover for that depression as an item of damages, it not being such a proximate damage as can be recovered for. Moulton not alleging that he has paid the full contract price, (stated on both sides to be \$220,) the jury will ascertain from the evidence how much of that sum, if any, has been paid by him. They will ascertain the damages, if any, and their amount, upon the principles before stated; and they will also inquire if that amount of damages is equal to, or less or greater than the difference between the amount paid and the \$220. If the damages, thus ascertained, are less than, or only equal to, that difference, the plaintiff Moulton cannot recover; but if they are greater, he may recover the sum by which they are greater, as damages in his action."

"In the case of *Moulton v. McOwen*, the jury returned a verdict for the defendant; and in the case of *McOwen v. Moulton* they found a verdict for the plaintiff, assessing damages at \$77.18. To the foregoing rulings and instructions the said Moulton excepts."

T. Wentworth & R. B. Caverly, for Moulton.

G. Stevens, for McOwen.

AMES, J. The two cases between these parties were tried at the same time, and presented in such a manner that the same question arises in each. The matter which was relied upon as a defence in the case of *McOwen v. Moulton* is put forward as the ground of a substantive claim of damages in the case of *Moulton v. McOwen*. It is obvious, that, if this claim should prove to be well founded in law and in fact, the plaintiff in the last named action can avail himself of it, under the operation of the legal provisions for setting off judgments against each other in cross actions, quite as well as in any other way. It is unnecessary, therefore, to disturb the verdict in the first named case; and the exceptions are to be considered as applying exclusively to the last named of the two.

In that action, the plaintiff's claim is for damages growing

out of, and resulting directly from, the alleged imperfect and defective execution, on the part of the defendant, of a building contract; and the question is, as to the correctness of the rule of damages laid down at the trial. It was of course a question of fact whether the parties ever entered into the contract declared upon; and also whether, if there was such a contract, the defendant deviated from it in any material respect, and if so, whether such deviation was by the direction or consent of the plaintiff. If all these questions should be determined in favor of the plaintiff, then he would be entitled to recover in this action an amount equal to the difference in value between the work actually done by the defendant and the work which by the terms of the contract he ought to have done. The work was done upon the plaintiff's land, and made a part of the house which he built. It was of some benefit and use to him. He could not reject it, or refuse to receive it, as if it had been a strictly personal chattel. The cases are presented in such a shape that the defendant is permitted to charge, and has obtained a verdict for, such a sum of money as, with previous payments, amounts to the entire contract price. In order to protect the plaintiff's rights, he on his part should be allowed to charge such deficiency in the value of what he received, as compared with what by the contract he should have received, as he can show to have resulted from any unauthorized departure from the contract on the defendant's part. It would be a question for the jury how much in dollars and cents did the work done and materials actually furnished by the defendant fall short in value of the value of the work and materials which by the terms of the contract he should have furnished; and that difference or deficiency would ordinarily be the measure of the plaintiff's damages. *Hayward v. Leonard*, 7 Pick. 181. *Smith v. First Congregational Meeting-house*, 8 Pick. 178. *Snow v. Ware*, 13 Met. 42. *Reed v. Scituate*, 5 Allen, 120. *Thompson v. Purcell*, 10 Allen, 426. *Gleason v. Smith*, 9 Cush. 484. *Bassett v. Sanborn*, Ib. 58.

At the trial in the superior court, certain specific deficiencies in the quality of the materials and in the execution of the work,

and in the entire omission of some portions of the work contracted for, were pointed out as items of damage to be considered and allowed for, if made out by the proof. This was correct as far as it went; but the court then proceeded to qualify this general instruction in a manner which had a tendency to mislead the jury. The amount expended in supplying defects is far from being necessarily the measure or limit of the plaintiff's damages. The defect may be of such a nature as not to admit of being supplied by any reasonable expense. A partial repair may still leave the value quite short of the contract standard. To take the case suggested by the presiding judge, the owner may find one side of the building settled to such an extent that he may reasonably, and with good cause, believe that he cannot bring it up to its proper level without cracking the chimney, and rendering it unsafe. It is difficult to see why in that case he should not have some allowance for such a defect, merely because it is substantially irreparable, or in what sense it can be said to be "not such a proximate damage as can be recovered for."

So far as we can judge from the bill of exceptions, the jury were not distinctly instructed to allow the plaintiff for the deficiency in value of the work done as compared with what by the contract should have been done. They may have supposed that no allowance was to be made to him except for the actual cost of supplying deficiencies, and that he could claim no allowance for defects that proved irreparable. In the case of *Moulton v. McOwen*, therefore, the

Exceptions are sustained.

At the new trial of the first case, after this decision, before *Brigham, C. J.*, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions substantially as follows:

"The plaintiff claimed as elements of damage that the cellar was not of the depth agreed upon; that there was no trench drain under the dry wall of the cellar; that the dry wall was not of the agreed thickness, was built of stone of a poor quality, and not built in a workmanlike manner, in consequence of which it fell after the structure was put upon it, injuring the cis-

tern in the cellar, and causing the house to settle so that it could not be restored to a level, but still remains out of level; and that, in consequence of not putting in a trench drain, the plaintiff was obliged to put in other drains, and do other things, to make the cellar dry. Against the defendant's objection, the plaintiff was allowed to put in evidence of the cost of supplying particular defects, such as raising the building which had settled, repairing the cistern, putting drains into the cellar, and rebuilding the dry wall and mortar wall which had fallen; and also to offer evidence of the injury to the value and use of the structure, including the cellar and foundations, by reason of those irreparable injuries which arose from the negligence and carelessness of the defendant.

"Against the defendant's objection, the plaintiff was allowed to ask John Bagley, (who, to qualify himself, testified that his business had for twenty-five years been that of a journeyman carpenter for wages, under the direction and oversight of house-builders and master workmen, never having himself built a house as a master workman, but who had worked on this building in its erection, and was so working when the wall fell, 'what in his opinion was the amount in dollars and cents of the damage to the house above the foundation walls, as affecting its value and uses by reason of the settling of the house;' to which he answered, 'from \$250 to \$300.'

"The defendant contended, and offered evidence to show, that the plaintiff had the oversight of building the cellar and dry wall, and agreed to the quality of the stone, and that the cellar and walls were constructed and built as he directed and under his oversight; that, when the dry wall was completed and before the mortar wall was put on, the structure, under the direction of the plaintiff, was erected upon the dry wall, resting upon blocks which rested directly upon the dry wall; that the plaintiff used jack screws upon the dry wall carelessly; that the whole work, by request of the plaintiff, was done in the winter, when the ground was frozen and freezing; that, when the dry wall was completed, the plaintiff, with full knowledge of the character of the work in all respects, paid the defendant, on account

of the work then done, including the dry wall, \$120, finding no fault, nearly or quite paying for the work then done, proportionally to the whole; and that, when the mortar wall was completed, he, with the full knowledge of the character of the work, paid the further sum of \$70 without finding any fault, on account of the mortar wall, leaving only \$30 more due on the job which the plaintiff retained until the dirt should be removed from the cellar. This claim was denied by the plaintiff, who offered evidence tending to show that he had no oversight or superintendence of the work of building the cellar or the walls of the same; that the house frame was placed upon blocks of timber resting on the wall in a proper manner; that the jack screws were only used to raise up the building after it had settled by reason of the defect in the cellar wall, and were then used in a proper manner, and were not placed upon the wall; and that he had no knowledge of the character of the wall when he paid the \$120, nor when he paid the \$70, at which time the plaintiff owed the defendant money for other work.

“The judge, upon the several points, instructed the jury as follows: General payments on account of the work are not to be construed as waiving defects therein, nor as accepting such defective work, unless such defects were known to the plaintiff at the time such payments were made. On perceiving that the defendant was failing to fulfil his contract, the plaintiff might legally and properly pay him the whole price of \$220, or he might refuse to make further payments altogether, and rely on an action of tort for damages. The paying or not paying would in and of itself not raise a material inference as tending to show any acceptance of the defendant's job. If, as the plaintiff claims, the defendant, by his careless and negligent performance of his undertaking to excavate a cellar, and to furnish materials for and build a cellar wall, has injured the plaintiff so that he has been put to labor and cost in reconstructing or repairing the cellar or the building placed upon it, or so that said cellar and building were as to their value or uses defective beyond reparation, or could not be repaired unless by wholly or partially reconstructing the same at a cost greatly disproportionate to their

value and uses, the plaintiff may recover the value of the labor and the cost of reconstructing and of repairing said cellar and building, made necessary by the defendant's negligence and carelessness, and in addition thereto such an amount of money as will indemnify the plaintiff for any injury to him which may be reasonably imputed to the defendant's careless and negligent performance of said undertaking, in the value and use of said cellar and building, which cannot be remedied by any repair or reconstruction of said cellar and building, unless the same was made at a cost greatly disproportionate to the value and uses of said cellar and building. If, however, as the defendant claims, his undertaking was upon the condition that the plaintiff would supervise, superintend and participate in the excavation, the choice of materials for, or the construction of, the said cellar, and if any defects in the materials and construction of said cellar were caused by a modification of the original undertaking agreed upon by the plaintiff and defendant, required by the plaintiff or acquiesced in by him, or were caused by mistake, errors in judgment, or haste in the construction of said cellar, in which, according to their mutual undertaking, the plaintiff and the defendant participated, the plaintiff cannot recover, nor can he recover for the injury to the cellar and building arising from said defects which is irreparable, or for the labor and cost made necessary to remedy said defects. It was not the plaintiff's duty to supervise, superintend or direct the work which the defendant undertook, in the absence of an agreement to do so; and his failure to do so would not excuse the defendant's negligence or carelessness in the performance of his agreement; but if, at any time, or in reference to any detail of the work, the plaintiff, having his attention directed to it by the defendant or his servants, expressly or impliedly by his silence acquiesced in a modification of the wall, which ultimately caused a defect in the cellar or affecting the building upon it, he cannot impute such defect to the defendant's negligence or carelessness, as a ground for recovering in this action, although it was of such a nature that it might reasonably have been imputed to the defendant's carelessness and neglect. Defects in the cellar and

the building upon it, which may be reasonably imputed to the season of the year in which the work was undertaken and prosecuted, or to the fact that the building was put upon the cellar before the cellar was completed, and the cellar completed while the building was resting upon it, the plaintiff cannot recover indemnity for in this action; nor is the defendant required to afford any explanation of such defects. Evidence of general payments of money by the plaintiff, without direction, to parts of the wall then done, or payments of money specifically applying to such parts of the work now alleged to have been defective by reason of the defendant's negligence and carelessness; as well as residence and employment near the cellar; are circumstances to be considered by the jury, tending to show the plaintiff's acceptance of and acquiescence in the same as well done, if they indicate that such defective condition was apparent or known to the plaintiff, but not otherwise.

"The defendant asked the judge to instruct the jury as follows: If the plaintiff, by the exercise of reasonable and ordinary care, might have known the quality of the materials and character of the work, then he was bound to exercise such care; and, neglecting to do so, and not objecting to the work as it was being done, he cannot now complain of the negligence of the defendant. If the plaintiff knew what was being done, while the work was going on, and saw and understood the quality of the materials and the character of the work, and did not object thereto, then this is such an assent thereto and acceptance thereof as relieves the defendant from liability. If the plaintiff, by agreement, took the oversight of the work of constructing the cellar and walls, and took charge of the men while doing the work, then the plaintiff, and not the defendant, is responsible for any defects in the work. But the judge declined to give said instructions, and instructed as above.

"The plaintiff, against the defendant's objections, was allowed to show the condition of the house in 1869, (the work having been done in the winter of 1867-8,) for the purpose of estimating the damages arising from the defendant's carelessness. The jury found for the plaintiff, and assessed the damages

in the sum of \$242.02; and they also found, specially, that the amount and value of the labor and cost expended in repairing or reconstructing the cellar and building, to remedy defects therein caused by the defendant's negligence and carelessness, were \$92.02; that the cellar and building were affected, in their value and use, by defects which could not be repaired, and which were caused by the defendant's carelessness and negligence, to the amount of \$150; and that the cellar and building, as affected by the defendant's carelessness and negligence in the performance of the contract, had a value, less than their value if there had been no neglect or carelessness of the defendant in the performance of the contract, of \$242.02. The defendant excepts to the above rulings and refusals to rule."

These exceptions were argued at January term 1871, by the same counsel.

AMES, J. We can see no valid objection to the admission of Bagley as an expert upon the subject matter in relation to which he testified. He was not a master builder; but it is difficult to see why a journeyman carpenter of twenty-five years' experience, and who was employed on the building in question, should not be as well qualified to judge of the extent of its deficiencies and imperfections, as compared with the requirements of the contract, as if he had been a master builder.

Upon the question whether the plaintiff directed or consented to the manner in which the work was done, or waived all objection to either the workmanship or materials, the evidence seems to have been conflicting. The facts that the plaintiff lived near the building, that the work was done in the winter, and that payments were made, from time to time, on general account, and without directing them to be applied to certain special items, were all submitted to the jury as circumstances to be taken into consideration and tending to show (if the defective condition of the work was apparent or known to him) his acceptance of and acquiescence in the same as well done; but the court ruled that the mere payment of money, in and of itself, would not raise a material inference as tending to show an acceptance of the work; that is to say, as we understand it, that

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the mere payment of the whole or part of the contract price would not amount to proof of a waiver of objections to the imperfection of the work, unless the circumstances under which such payment was made satisfied the jury that such a waiver was intended or ought to be inferred. The defendant has no ground of complaint against this ruling of the court.

The rule as to the computation of the damages which the plaintiff might recover was also correct. It might perhaps have been stated, with more brevity, as being the amount in dollars and cents in which the value of the cellar and building as left by the defendant fell short of the value which they would have had if they had been finished according to the contract. It was certainly allowable and proper for the plaintiff to make at his own expense such repairs, or furnish such additional labor and materials, as should supply all such deficiencies as could be supplied without disproportionate or unreasonable expense. If, after this was done, there should still remain deficiencies and injuries which could not be repaired except at a cost greatly disproportionate to the value of the building, he would be entitled to have the effect of those deficiencies and injuries in diminishing its value estimated by the jury. They have found that he expended \$92.02 in remedying defects, and that after so doing there still remains a loss upon the building of \$150, caused by the defendant's neglect. These two sums together make up the damages according to the rule given in our previous decision in this case. See also *Hayward v. Leonard*, 7 Pick. 187; *Veazie v. Hosmer*, 11 Gray, 396; *Gleason v. Smith*, 9 Cush. 484; *Cardell v. Bridge*, 9 Allen, 355; *Thompson v. Purcell*, 10 Allen, 426.

Exceptions overruled.

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ABORTION.

On the trial of an indictment for procuring a miscarriage of A., it is competent for the Commonwealth to prove that, before leaving her home and submitting to the operation which caused the miscarriage, A. knew that her mother had had an interview with the defendant in which the mother had said that A. was pregnant and was going somewhere to get rid of her child, and the defendant had replied "Send her to me," and added that he had operated successfully five times on one person. *Commonwealth v. Holmes*, 440.

See EVIDENCE, 9.

ACCIDENT.

See MISTAKE AND ACCIDENT.

ACCORD AND SATISFACTION.

In an action on a *quantum meruit* for board, the payment, "in settlement of the action," of more than the whole amount alleged in the declaration to be due, is good as an accord and satisfaction, and the action cannot afterwards be maintained for the recovery of a balance of the interest since the date of the writ. *Simmons v. Almy*, 33.

See PAUPER, 1.

ACTION.

1. The holders of a bill of sale of a vessel, absolute on its face, though intended as a mortgage, may maintain an action for her conversion against a person claiming under a barratrous sale by the master; although on learning of the barratry they abandoned her to the insurers, and received payment from them as on a total loss. *Clark v. Wilson*, 219.
2. A person who had received goods from the owner, with the right to use them and to become owner of them on fulfilment of certain conditions, among which were that he should not sell or remove them from a certain place without the owner's consent, and that they should not become his till paid for, sold them to a third person, who removed and resold them. Held, that the third person was liable to the owner of the goods for their conversion, although he had acted in good faith, and had parted with them before any demand upon him. *Carter v. Kingman*, 517.

See ACCORD AND SATISFACTION; ATTACHMENT; EXECUTOR AND ADMINISTRATOR, 3; FRAUDULENT REPRESENTATIONS, 1 INFANT; INTOXI-

CATING LIQUORS, 12; LEASE; MASTER AND SERVANT; MONEY HAD AND RECEIVED; NEGLIGENCE, 1; PARTNERSHIP, 2; PAUPER, 1; PLEADING, 1; PLEDGE, 2; PRINCIPAL AND AGENT; RAILROAD, 8; SALE, 2; SCHOOL, 3; TRESPASS, 1; USURY, 5.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVANCEMENT.

A written agreement of children, among themselves, in the lifetime of their father, never known to or approved by him, that sums owing by some of them to him shall be treated as advancements in the settlement of his estate when he shall die, is not an acknowledgment of the debts as advancements within the Gen. Sta. c. 91, § 8. *Fitts v. Morse*, 164.

See DEVISE AND LEGACY, 2.

AGENT.

See PRINCIPAL AND AGENT.

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See LIMITATIONS, STATUTE OF.

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See BRIDGE, 6, 7; TRUSTEE PROCESS, 2; WRIT OF ENTRY, 1 &

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See SCHOOL, 2.

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See DUTY; RENT; TRUST, 1, 2.

AQUEDUCT.

See WATERWORKS.

ARBITRAMENT AND AWARD.

See COSTS, 1; PARTITION.

ARREST.

See INDICTMENT, 1; POOR DEBTOR.

ASSAULT AND BATTERY.

1. In an action for assault and battery, since the practice act, (Gen. Sts c. 129,) as before, if the plaintiff alleges acts which, if proved and not justified, will sustain his action, and the defendant seeks to justify them, the burden is on him to prove his justification. *Blake v. Damon*, 199.
2. On the trial of an action for assault and battery by blows struck on an occasion when the plaintiff met the defendant to adjust a money account, evidence is competent of how much he owed the defendant and how much the defendant afterwards paid him on the account. *Ib.*
3. On the trial of an action for assault and battery of the plaintiff by blows struck in the defendant's shop, evidence is competent that, shortly before the striking of the blows, and when the plaintiff was entering the shop, the defendant was talking with some customers about Calvinists and Methodists, and, as the plaintiff approached, remarked, "Here's a fellow who believes in hell." *Ib.*

See EVIDENCE, 7, 8; HUSBAND AND WIFE, 1; NAME, 2.

ASSESSORS.

See TAX, 4.

ASSIGNEE OF BANKRUPT.

See ATTACHMENT.

ATTACHMENT.

Personal property, exempt from liability to attachment, was attached on mesne process in an action against the owner, who then agreed in writing with the plaintiff that it might be sold by auction on a certain day, but by reason of a second attachment the sale was postponed for several months, and until, the owner having meanwhile taken the benefit of the bankrupt act, it was prevented altogether by the claiming and taking of the property, by the assignee in bankruptcy, from the officer, in whose custody it had remained without any notice from the owner that he claimed it as exempt from attachment. *Held*, that the owner must be deemed to have waived his privilege of exemption, and could not maintain an action against the officer for a conversion of the property. *Dow v. Cheney*, 181.

See BANKRUPT; CONTRACT, 5; DAMAGES, 1; PLEDGE, 2, 4.

ATTORNEY AND COUNSEL.

1. An attorney retained in a suit is entitled to a reasonable retainer without any special contract therefor. *Aldrich v. Brown*, 527.
2. If by their client's authority attorneys have retained counsel and promised to pay him out of the proceeds of the suit, and he holds them responsible under this agreement, and the proceeds of the suit have come to their hands, it is too late for the client to forbid them to pay the counsel. *Ib.*

3. On an issue between attorney and client of the value of the former's services in a suit in which the latter was plaintiff and which was settled without a trial, the opinion of the counsel of the defendant in such suit that the plaintiff therein had no case is competent evidence. *Id.*
4. An attorney has no such lien in a cause before judgment as to prevent his client from settling the action with the opposite party without his consent or knowledge. *Simmons v. Almy*, 33.

See EVIDENCE, 20; POOR DEBTOR, 1; WITNESS, 4.

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See ACTION, 2; HUSBAND AND WIFE, 3.

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See HUSBAND AND WIFE, 2, 3; MONEY HAD AND RECEIVED; TRUSTEE PROCESS, 1.

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By an adjudication of bankruptcy under the bankrupt act, (U. S. St. 1867, c. 176,) even when the proceedings were begun on the debtor's voluntary petition, his property becomes exempt from subsequent attachment on mesne process. *Williams v. Merritt*, 184.

See ATTACHMENT; INSOLVENT DEBTOR; LIEN, 7; MORTGAGE, 4.

BARRATRY.

See ACTION, 1.

BASTARDY PROCESS.

1. On the trial of a complaint under the bastardy act, (Gen. Sta. c. 72,) which the defendant had answered denying every allegation of the complaint and charging a conspiracy to defraud, the complainant, in introducing her case, was permitted, against the defendant's objection, to put in evidence, "as

tending to show the character of the intimacy between herself and the defendant," a letter written by him to her between seven and eight months before the time when she alleged and had testified that he begot the child. *Held*, that he had no ground of exception. *Bears v. Jackman*, 192.

7. In a bastardy process, the fact that the defendant was the father of the child may be established by a fair preponderance of evidence. *Young v. Makepeace*, 50.
8. In a bastardy process, declarations of J. S. that he himself was the father of the child, and acts of J. S. relative to procuring an abortion on the complainant, if not made or done in the presence or with the knowledge of the complainant, are inadmissible to prove a conspiracy between the complainant and J. S., after said declarations, to charge the defendant with being the child's father. *Ib.*
4. Whether a child was a "full time child" may be testified to by any physician of ordinary experience who attended at its birth. *Ib.*
5. In a bastardy process, testimony as to the dissimilarity in personal appearance between the child and J. S. is inadmissible to rebut evidence introduced by the defendant to show that J. S. and not himself was the father. *Ib.*
6. After a verdict of guilty in a bastardy process, the court may, under the Gen. Sts. c. 72, § 7, pass the order of affiliation in the absence of the defendant. *Ib.*
7. An order of court in a bastardy process, after the defendant has been adjudged the father of the child, that he "stand committed" until he gives a bond conditioned to pay to the mother a certain gross sum, to pay a further amount quarterly "until the further order of the court," and to save harmless the parents of the mother and the town of her settlement against all charges for the maintenance of the child; and that the complainant shall recover the costs of suit; is valid under the Gen. Sts. c. 72, § 7. *Ib.*

See EVIDENCE, 9.

BILL OF EXCHANGE.

See MONEY; USURY; WITNESS, 2, 3.

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See SPECIFIC PERFORMANCE.

BOND.

The liability of sureties on a bail bond under the Gen. Sts. c. 125, is limited by the penalty of the bond, with interest from the time return of *non est inventus* is made on execution. *Heustis v. Rivers*, 398.

See BASTARDY PROCESS, 7; CONSTABLE; POOR DEBTOR, 2.

BONDS.

See PARTNERSHIP, 1.

BRIDGE.

1. The legislature, in exercising the right of eminent domain, may (as by the St. of 1868, c. 309, § 8) require county commissioners to take and lay out a bridge as a highway, and to determine and apportion between the county and the benefited towns and cities the damages to be paid therefor. *Harer-hill Bridge Proprietors v. County Commissioners*, 120.
2. The right of the Commonwealth to widen the draw in a bridge belonging to it over a navigable stream is not impaired by the fact that the widening will temporarily interrupt the use of the street railway of a corporation to which it has granted a right to run cars over the bridge. *Middlesex Railroad Co. v. Wakefield*, 261.
3. The St. of 1854, c. 451, provided for the imposition of tolls on two bridges belonging to the Commonwealth, between two cities, for the purpose of raising a fund to be applied to their future maintenance and repair. The St. of 1868, c. 322, provided in § 1 that the supreme judicial court should appoint three commissioners for the purposes in said statute named; and in §§ 2-5, that they should be sworn to the faithful and impartial discharge of their duties, and should, after due public notice and hearing of all parties in interest, proceed to award what counties, cities or towns received particular and special benefit from the maintenance of the bridges, and apportion and assess the expense of maintaining the same upon such of said counties, cities or towns, and in such manner and amount as they should deem equitable and just, and that the award, when returned into and accepted by the court, should be a final and conclusive adjudication and binding upon all parties, and the bridges should thereupon become highways. The court appointed commissioners "for the purposes named" in said statute. After the commissioners had appointed a time and place for hearing all parties and given notice accordingly, the legislature passed the St. of 1869, c. 272, which in terms repealed the St. of 1868, c. 322, §§ 2-5, and provided in §§ 1-6 that the said commissioners should cause to be made new draws in the bridges, should apply so much as might be necessary of the bridge fund to the construction of the draws, should apportion and assess, in such manner and amount as they should deem just and equitable, upon the two cities at the extremities of the bridges, the expense of maintaining and keeping in repair said bridges and draws, and should assign and divide between the cities any surplus of the fund, and, if the fund should prove insufficient, assess and apportion such deficiency upon said cities, and that upon the acceptance of this award by the court the bridges should become highways. On a bill in equity then filed by inhabitants and taxpayers of the cities to restrain the commissioners from making the new draw in one of the bridges, *Held*, 1. that the bridge fund could be lawfully employed in needful alterations of the bridge, and that of the question whether the making of a new draw was a needful

- alteration the legislature was the sole judge; 2. that the provision of the St. of 1869, c. 272, requiring the commissioners to apportion and assess the expense of maintaining the bridge on the two cities was not unconstitutional, either as limiting the judicial discretion granted to them by the St. of 1868, c. 322, or as imposing a disproportionate and unreasonable assessment; 3. that the St. of 1869, c. 272, was not unconstitutional as imposing legislative and executive functions on judicial officers; and 4. that the commissioners, having been sworn under the St. of 1868, c. 322, need not be sworn anew under the St. of 1869, c. 272. *Dow v. Wakefield*, 267.
4. After this decision, the commissioners made the new draw in that bridge, and were proceeding to make a new draw in the other bridge, when the legislature passed the St. of 1870, c. 303, which directed the said commissioners to put the bridges forthwith into good repair for travel, and in terms repealed the St. of 1869, c. 272, §§ 1-6, but substantially reenacted all its provisions relating to making an award apportioning in such manner and amount as they should deem just and equitable the future maintenance of the bridges, and the surplus of the fund, between the two cities, and to constituting the bridges highways upon the acceptance of the award by the court. The commissioners thereupon put the bridges into good repair for travel, and, after due notice to and hearing of the cities, returned into the court an award apportioning in equal parts between the two cities the surplus of the fund and the future maintenance of the bridges. On objections made by one city to the acceptance of the award, *Held*, 1. that no new decree of appointment was necessary to authorize the commissioners to make it, other than the decree passed originally under the St. of 1868, c. 322; and 2. that the fact that there was a great disproportion between the numbers of inhabitants, areas of territory, and total valuations of property, in the two cities, did not necessarily render the award unjust or inequitable. *Attorney General v. Charlestown*, 267.
 5. In the laying out of a bridge as a highway, by county commissioners, under the St. of 1868, c. 309, § 8, and according to the provisions of the St. of 1867, c. 296, § 4, that they should "determine and fix the relative proportions of expense for maintaining" the bridge, "to be borne by said county, and any of the cities or towns lying near to or contiguous to" the bridge, "as in their judgment may be just and equitable, which said proportion of expense so determined" "shall become obligatory upon said county and upon said cities and towns as aforesaid, to pay in the manner and at the times prescribed by said county commissioners," the commissioners were authorized, but not required, to impose part of the expense for maintaining the bridge upon the county, or upon the cities and towns lying near but not contiguous to the bridge; and might lawfully impose the whole maintenance of the bridge on the several towns or cities within which it was situated, and determine and fix the relative proportions in which they should respectively bear the expense thereof, by assigning to each a specific part of the bridge to be maintained by it exclusively. *Commonwealth v. Newburyport*, 129.

6. Under the St. of 1868, c. 309, § 8, which required county commissioners to lay out certain bridges as highways "in the manner now provided by law for the laying out of highways, and according to the provisions of" the St. of 1867, c. 296, "so far as the same are applicable," and to determine and decree what proportion of the damages sustained by the bridge proprietors should be paid respectively by the county and the several cities and towns benefited, all the damages are to be paid, in the first instance, from the county treasury, and an adjudication by the commissioners, which leaves the bridge proprietors to enforce against the cities or towns their liability for the proportion on them assessed, is erroneous ; but the whole proceedings of the commissioners are not necessarily avoided by such error, but may be amended by the judgment of this court on *certiorari*, under the Gen. Sts. c. 145, § 9. *Haverhill Bridge Proprietors v. County Commissioners*, 120.
7. In awarding, after due notice, what proportion of the damages sustained by the proprietors of a bridge laid out as a highway under the St. of 1868, c. 309, § 8, should be paid respectively by the county and a city thereby benefited, the county commissioners specified the sums payable by each, but omitted to provide that both sums should be paid in the first instance from the county treasury. The proprietors demanded such total payment from the county, and, upon its refusal to pay more than the sum apportioned to it, sued out a writ of *certiorari* against the commissioners. *Held*, that, in correcting the error, under the Gen. Sts. c. 145, § 9, the court might charge the county with payment to the petitioners of interest on the sum apportioned to the city from the time of said demand, and charge the city with reimbursement of such interest to the county. *Ib.*

See COUNTY COMMISSIONERS.

BROKER.

1. The order of a customer to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, does not authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission ; and a usage of brokers to do so is bad ; nor is the exchange of bought and sold notes between the broker and his customer, nor the giving of his note by the customer in payment for the stock, in ignorance of the broker's conduct, a ratification of his acts. *Day v. Holmes*, 306.
2. Brokers, having been ordered by a person to buy stock for him, bought and paid for it, took the certificate in their own name, offered to transfer the certificate to him, and demanded payment, but he neglected to pay. *Held*, that they could recover from him the price paid by them, and not merely the difference between that price and the market value of the stock on the day of their demand. *Giddings v. Sears*, 311.
3. A broker, employed to purchase stock, contracted for it in his own name with J. S., who owned it at the time but had made a prior contract for its sale. The employer, for groundless reasons, repudiated the contract ; but

the broker, having no knowledge of or reason to suspect the prior sale by J. S., paid for the stock when tendered to him. *Held*, that the Gen. Sta. c. 105, § 6, making void contracts for the sale of stocks not owned by the seller, did not debar the broker from recovering from his employer the amount so paid. *Brown v. Phelps*, 313.

See PLEDGE, 1.

BURDEN OF PROOF.

See ASSAULT AND BATTERY, 1; INTOXICATING LIQUORS, 11; REPLEVIN, 1.

BURIAL GROUND.

1. The record of an adjudication of the county commissioners, on the application of the selectmen of a town, under the St. of 1866, c. 112, that it is necessary to take adjoining land to enlarge a burial ground, need not set forth the facts which the statute requires in order to entitle the selectmen to make the application; but it is sufficient if such facts are alleged in the application itself. *Balch v. County Commissioners*, 106.
2. The incapacity of a landowner to sell his land is a sufficient refusal to sell it, within the meaning of the provision of the St. of 1866, c. 112, that, in order to entitle the selectmen of the town to apply to the county commissioners for an adjudication of the necessity of taking the land to enlarge a burial ground, he must refuse to sell it, or demand for it a price which they deem unreasonable. *Ib.*
3. The right of a town to take adjoining land to enlarge a burial ground, by proceedings under the St. of 1866, c. 112, is not affected by the manner in which the title to the land is limited among its owners, whether in possession or expectancy. *Ib.*
4. Whether the actual occupation, by private proprietors, for the uses of burial, of land adjoining and needed for the enlargement of a burial ground existing in and belonging to the town, can, in any case, be held to exclude the right of the town to take it for that purpose by proceedings under the St. of 1866, c. 112, *quære*. *Ib.*
5. On application of the selectmen of a town, under the St. of 1866, c. 112, to the county commissioners, for an adjudication of the necessity of enlarging a burial ground existing in and belonging to the town, by taking two adjoining parcels of land, the first of which was conveyed, more than a hundred years before, to a parish in the town, "for the use of a burying place," and ever since used by the inhabitants of the parish for purposes of burial, and the second was and for thirty years had been held in trust and on condition to be by the original grantees and their associates "laid out and allotted or assigned for public or private use as they shall find most convenient for improving, preserving and using the same for an addition to" the first parcel, "and to be used by them, their associates and assigns, for that purpose only forever," the commissioners laid out and declared both parcels "to be a part of the public burial ground of the town, and to be forever kept as such," "re-

serving to the proprietors of lots, and also to the families of the parish, all of the rights that they now possess." *Held*, that this judgment of the commissioners was valid. *Id.*

6. To an adjudication in good faith of county commissioners, under the St. of 1866, c. 112, of the necessity of enlarging a burial ground by taking a parcel of adjoining land, it is no objection that there is no purpose on the part of the town to make burials in the parcel, but that it is to be left open as part of a passageway giving access to the burial ground from a public street. *Id.*

See TOWN.

CAPITAL AND INCOME.

See DEVISE AND LEGACY, 3; DUTY; RENT; TRUST, 1, 2.

CARRIER.

See NEGLIGENCE, 2; RAILROAD, 9.

CARRYING DANGEROUS WEAPONS.

See INDICTMENT, 1.

CERTIORARI.

See BRIDGE, 6, 7.

CHALLENGING JURORS.

See JURY.

CHARITY.

See SCHOOL, 1, 2.

CHECK.

See INDICTMENT, 3; MONEY HAD AND RECEIVED.

CITY.

See TOWN.

COLLATERAL SECURITY.

See ACTION, 1; CONTRACT, 5; DAMAGES, 1; EXECUTOR AND ADMINISTRATOR, 3; LIEN, 1, 5, 6; MORTGAGE; PLEDGE; TRESPASS; USURY, 4.

COMMISSIONERS.

See BRIDGE, 1, 3-7; EXCEPTIONS, 10; RAILROAD, 1.

COMPLAINT.

1. A complaint "in behalf of the Commonwealth of Massachusetts" "to the justices of the municipal court of the city of Boston, holden at said Boston

for the transaction of criminal business, within and for the county of Suffolk," that J. S., on July 17, 1869, "at Boston aforesaid, did keep intoxicating liquor with intent to sell the same in this Commonwealth, not being authorized to sell the same in said Commonwealth for any purpose under the provisions of chapter 415 of the acts of the year 1869 of this Commonwealth, or by any legal authority whatever, against the peace of said Commonwealth and the form of the statute in such case made and provided," and certified by the signature of "A. B., Clerk," under the caption of "Suffolk, to wit," as having been sworn to "before said court," is not void, on appeal to the superior court, for want of sufficient averments of venue or jurisdiction, or for defect in the certificate of the complainant's oath. *Commonwealth v. Desmond*, 445.

- 2 The omission of the complainant's name from the body of a complaint signed by him does not affect the jurisdiction of the court, and cannot, therefore, under the St. of 1864, c. 250, § 3, be taken advantage of in arrest of judgment. *Commonwealth v. Eagan*, 71.
3. A record of proceedings in a police court upon a complaint on the St. of 1869, c. 415, § 44, which sets forth the complaint as subscribed by the two complainants and indorsed with a certificate of the clerk of the court as "received and sworn to;" and which, in the preamble of the searchwarrant, sets forth that the complaint was made "on oath" by said two complainants, and that they were both of full age and competent to testify; sufficiently shows that the complainants both signed the complaint and were both sworn. *Commonwealth v. Intoxicating Liquors*, 448.
4. A record of proceedings upon a criminal complaint which sets forth that the defendant on his arraignment was "asked by the court whether he guilty or not guilty of the offence charged upon him;" sufficiently shows that the defendant was asked to plead to the charge. *Commonwealth v. Harvey*, 451.

See INDICTMENT; INTOXICATING LIQUORS, 6.

CONDITION.

See ACTION, 2; EXECUTOR AND ADMINISTRATOR, 8; INSURANCE, 1; INTOXICATING LIQUORS, 12; SPECIFIC PERFORMANCE; TRUST, 2.

CONFESSION.

See WITNESS, 1.

CONFLICT OF LAWS.

See EXECUTOR AND ADMINISTRATOR, 2.

CONFUSION OF GOODS.

See HUSBAND AND WIFE, 2.

CONSIDERATION.

See CONTRACT, I

CONSPIRACY.

See BASTARDY PROCESS, 1, 3; PLEADING, 1.

CONSTABLE

1. An action cannot be maintained upon a constable's official bond, on proof of a judgment against him in a suit for official misconduct, without evidence of a demand upon him to pay the amount of the judgment. *Tracy v. Merrill*, 280.
2. To an action against a constable for breach of his official bond, a judgment in his favor in a former action on the bond for the same breach is not a bar, if it appears from the record that it may have been rendered for want of a sufficient demand upon him, which has since been made. *Ib.*
3. A person injured by the breach of the condition of a bond, given by a constable to the treasurer of Boston under St. 1860, c. 147, may sue thereon in the name of the treasurer. *Ib.*

CONSTITUTIONAL LAW.

See BRIDGE, 1, 3; DIVORCE, 1; FISHERY; GAMING, 1; INTOXICATING LIQUORS, 4; JURISDICTION; JURY; LIEN, 1, 7; RAILROAD, 1; RECORD; SCHOOL, 1, 2.

CONTRACT.

I. *Consideration.*

1. The agreement of a member of a firm with his partner, to be responsible for the price of goods furnished by the firm to A., is a sufficient consideration for an assignment to him by A. of a debt due to A. less in amount than the price of the goods so furnished, as against one who afterwards attaches such debt on trustee process in a suit against A. *Carroll v. Sullivan*, 31.
- See CONTRACT, 2; DEED, 2; HUSBAND AND WIFE, 4; INSOLVENT DEBTOR, 1; PROMISSORY NOTE, 1; SALE, 4; SCHOOL, 3; TRUST, 5; USURY.

II. *Parties.*

See DEED, 2.

III. *Delivery.*

See DEED, 2; INSURANCE, 4.

IV. *Validity.*

2. A covenant, made by the patentee of a process of manufacture in a business not local in its character, for the purpose of selling the patent to better advantage, and as a part of the transaction of sale, and for one and the same consideration received by him for the patent, to use his best efforts to invent improvements in the process and to transfer them to the buyer, to do no act

which may injure the buyer or the business, and "at no time to aid, assist or encourage in any manner any competition against the same," is not necessarily void as in restraint of trade. *Morse Twist Drill & Machine Co. v. Morse*, 73.

See BROKER, 3; CONTRACT, 5; FRAUDS, STATUTE OF; INTOXICATING LIQUORS, 4, 10-12; LORD'S DAY; PROMISSORY NOTE, 1; SALE, 4; SCHOOL, 3; STAMP; USURY.

V. *Construction.*

3. Under an agreement to sell and convey land with a good title, the purchaser is not entitled to a warranty deed. *Kyle v. Kavanagh*, 356.
4. A., owning land in a city, signed and delivered to B. a writing of which the following is the material part: "I hereby agree to let to B." the land; "he agrees to pay \$400 per year, payable monthly," and do certain repairs; "I am to do all outside repairs, and at present to fence the yard, repair the cellar and lay a water pipe; and I will make a lease to B. of the premises for three, with a privilege of five years from date." B. entered into possession immediately, and paid the rent named till ejected. The city afterwards, but within the term first named, took part of the land to widen a street. *Held*, that the writing was not a lease; and that B. could not maintain a bill in equity against the city to recover any portion of the damages assessed for the taking. *McGrath v. Boston*, 369.
5. Personal property bought and held by A., although bought with money furnished by and for which he has given his promissory notes to B., and held under an unrecorded agreement which provides that he shall hold the property in trust to secure payment of the notes, employ it in his business, and apply half of the proceeds of the business to pay the notes, and that on such payment the property shall belong three quarters to A. and one quarter to B., is subject to attachment as A.'s individual property. *Huntington v. Clemence*, 482.

See FRAUDS, STATUTE OF; INSOLVENT DEBTOR, 2; INSURANCE, 6, 8, 9; LEASE; PARTNERSHIP; SALE, 1-3; SHIPPING; SPECIFIC PERFORMANCE; TRUSTEE PROCESS, 1.

VI. *Breach.*

See DAMAGES, 2; INTOXICATING LIQUORS, 10; SALE, 2, 3; SPECIFIC PERFORMANCE.

VII. *Rescission.*

See ATTORNEY AND COUNSEL, 2; FRAUDULENT REPRESENTATIONS, 3.

CORPORATION.

See BRIDGE, 2; INSURANCE, 7; MANUFACTURING CORPORATION; RAILROAD, 1.

COSTS.

1. If the award of arbitrators, to whom a case is referred by rule of court, is silent on the subject of costs, the prevailing party is entitled to recover them. *Woolson v. Boston & Worcester Railroad Co.* 580.
2. On a bill in equity by an administrator for instructions whether, on a correct construction of the statute of distributions, a quarter of his intestate's estate should be divided among all the defendants or among some of them only, the costs of all parties as between solicitor and client are to be paid out of that quarter. *Bigelow v. Morong*, 287.

See **BASTARDY PROCESS**, 7; **TRUST**, 1.

COUNSELLOR AT LAW.

See **ATTORNEY AND COUNSEL**.

COUNTY.

See **BRIDGE**, 1, 3-7.

COUNTY COMMISSIONERS.

- If one of the board of county commissioners, who were required by the St. of 1868, c. 309, § 8, to lay out certain bridges as highways, resided in a town or city in which one of the bridges was situated in whole or in part, such a residence disqualified him to act in the case of that bridge, unless the board could not otherwise be organized; and the other members might substitute for him a special commissioner, under the Gen. Sts. c. 17, § 12. *Haverhill Bridge Proprietors v. County Commissioners*, 120.

See **BRIDGE**, 1, 5-7; **BURIAL GROUND**.

COURT.

See **EXCEPTIONS**, 5.

COVENANT.

See **CONTRACT**, 2; **DEED**, 2.

CUSTOM.

See **USAGE**.

DAMAGES.

1. An officer who had paid freight due on property attached by him, afterwards, on the demand of a person who had a lien on the property for advances, refused either to pay the amount of the lien or to release the attachment. *Held*, that, in estimating damages, in an action by such person against the officer for conversion of the property, the sum paid for the freight must be deducted from the value of the property. *Clark v. Dearborn*, 335.
2. In an action for negligence in the building of a cellar under the plaintiff's

house by contract, the measure of damages is the difference, expressed in money, between the value of the work as actually done, and what would have been the value of the work which should have been done; and in computing this difference the jury not only may allow for the plaintiff's expenses in repairing defects in the work, but may also make allowances against the defendant for defects irreparable or not reparable at reasonable expense. *Moulton v. McOwen*, 587.

See ACCORD AND SATISFACTION; BOND; BRIDGE, 6, 7; BROKER, 2; FRAUDULENT REPRESENTATIONS, 4; MONEY; RAILROAD, 2-7; TRESPASS, 2; WRIT OF ENTRY, 3, 4.

DECEIT.

See FRAUD.

DECLARATION.

See PLEADING, II.

DEED.

1. If the owner of a mill and dam with a water privilege conveys the same by a deed referring to his grantor's deed for a specification of the privilege, the privilege which he conveys must be measured by his grantor's deed, and not by the use he is actually making of the water at the time of his conveyance. *Perry v. Binney*, 156.
2. After signing and acknowledging a deed of land, containing a covenant that the grantor or his executors or administrators should pay a sum of money to the grantee, the grantor delivered it to a third person for the grantee, and this person so received it from the grantor, and kept it till delivered by him to the grantee after the grantor's death, which occurred two days after said execution of the deed. *Held*, that the estate vested in the grantee, and the covenant became binding on the grantor, upon the delivery of the deed to the third person, although he was not employed by the grantee to receive it for him; and that the consideration of it was not open to inquiry. *Mather v. Cortiss*, 568.
3. Under the Gen. Sta. c. 89, § 3, an unrecorded deed is not valid after the death of the grantor, as against one holding by a recorded deed from the grantor's heir, without notice of the former deed. *Earle v. Fiske*, 491.

See CONTRACT, 3; SALE, 4.

DEMAND.

See ACTION, 2; CONSTABLE, 1, 2; PLEDGE, 2, 4; REPLEVIN, 2

DEMURRER.

See EQUITY, 6.

DEPOSITION.

1. By virtue of the Gen. Sts. c. 131, § 37, and notwithstanding § 34, the admission in evidence of a deposition taken in another state, under a commission, by a magistrate whose certificate states that the deponent swore to the truth of the deposition, but does not state that he was sworn before he was examined, is within the discretion of the court. *Burt v. Allen*, 41.
2. The refusal of a deponent to answer an impertinent cross-interrogatory is not sufficient reason for rejecting the deposition. *Akers v. Demond*, 318.
3. A party to a suit who has taken the deposition of a witness may take a second deposition of the same witness. *Ib.*
4. An objection that interrogatories in a deposition are leading cannot be first taken when the deposition is offered in court. *Ib.*

DESERTION.

See DIVORCE, 4.

DEVISE AND LEGACY.

1. A testator directed his executors to procure a residence for a married daughter, at an expense not exceeding a certain sum, and hold the same in trust for her and her son "during their lives," and "upon the decease of both" gave the property over. The daughter died, and the testator made a codicil reciting her death, and increasing a bequest made to her husband, but expressly confirming the will. *Held*, that the gift did not lapse by the daughter's death, but went to her son for life. *Dow v. Doyle*, 489.
2. A testator, having eight children, and three grandchildren, A., B. and C., children of a deceased daughter, and another grandchild, child of another deceased daughter, by his will divided his estate into ten equal parts, six of which he gave to six of his children by name, two to trustees for his other two children, one to A., B. and C. by name, and the tenth to the other grandchild. As to each of the shares given in trust, in event of the *cestui que trust* dying without issue, he directed that it should be divided among all his children and grandchildren, the issue of such of his children as should then have deceased taking by representation their parents' share, and, "to do equal and exact justice to all my children and grandchildren," he directed any advancements made to be deducted from the share of each child or grandchild. B. died before the testator. *Held*, that B.'s share did not lapse, but went to A. and C. *Stedman v. Priest*, 293.
3. A testator gave "the improvement" of a lot of land to his wife, "so long as she shall occupy the same, free of rent, she remaining my widow." "But should my wife marry again, and improve and occupy the estate above mentioned, she shall do so, so long as she shall annually pay to my sister \$300; and should my wife at any time abandon the occupancy of the estate aforesaid, then I give and devise the same" to trustees in trust "to dispose of said estate, and invest the moneys received from the sale of the same in stocks, or place the same securely at interest, and annually, or more frequently, if

the dividends or interest accrue and be paid more frequently, pay the same to my wife and my sister in equal proportions." After other gifts, he gave the residue of all his estate to his wife, sister and brother in equal shares. The wife abandoned the occupancy, and the trustees sold the land and invested the proceeds. *Held*, that, on the wife's death, the trust terminated, and the principal of the fund, with all after accrued income, went under the residuary clause; and that, the interest under that clause being vested, the wife's share passed under her will. *Mayhew v. Godfrey*, 290.

See DUTY; TRUST, 1-3.

DISTRIBUTIONS, STATUTE OF.

Under the provisions of the Gen. Sts. c. 91, § 1, *cl.* 3, and c. 94, § 16, that the estate of an intestate who leaves no issue nor father shall go "in equal shares to his mother, brothers and sisters, and to the children of any deceased brother or sister by right of representation," the children of a deceased child of a deceased sister are not entitled to share in the distribution. *Bigelow v. Morong*, 287.

See COSTS, 2.

DIVORCE.

1. A special statute of the state of Maine, authorizing the supreme judicial court of that state, in its discretion, to decree a divorce between individuals named, is unconstitutional, as granting a special indulgence by way of exemption from the general law. *Simonds v. Simonds*, 572.
2. Proof that a husband and his wife lived at the same time in this Commonwealth, but without cohabiting or having any communication with each other, is not proof that they "lived together as husband and wife" here, within the meaning of the Gen. Sts. c. 107, § 12, specifying requirements of residence to give jurisdiction of libels for divorce. *Schrow v. Schrow*, 574.
3. The requirement of the Gen. Sts. c. 107, § 12, that, to give jurisdiction in certain cases of application for divorce the parties must have "lived together as husband and wife" in this Commonwealth, means that they must have had a domicile here. *Ross v. Ross*, 575.
4. Proof that a husband, intentionally and against his wife's consent, has for five consecutive years abandoned all matrimonial intercourse and companionship with her, and denied her the protection of his home, will sustain her libel for a divorce from the bond of matrimony on the ground of his desertion; and it is immaterial that during the period he has regularly contributed money, and from time to time necessities, towards supporting the wife and their children. *Magrath v. Magrath*, 577.

See DOMICIL.

DOMICIL.

An inhabitant of another state does not acquire a domicile in this Common-

wealth by merely coming here to seek employment with the intention of residing here only if he shall find it. *Ross v. Ross*, 575.

See DIVORCE, 2, 3.

DOWER.

See PARTITION.

DUNNAGE.

See INSURANCE, 3.

DUTY.

Succession and legacy duties payable under the U. S. St. of 1864, c. 173, in respect to the interest of the *cestui que trust* in a gift by a will, made before the passage of that statute, of a fund to trustees, "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to said *cestui que trust* during her life, are a charge upon the income of the fund. *Sohier v. Eldredge*, 345.

See STAMP.

ELECTION.

See TRUST, 3.

ELECTIONS.

See TAX, 4.

EQUITY.

1. The attorney general cannot maintain a bill in equity to prevent or redress a private wrong. *Attorney General v. Salem*, 138.
2. The Gen. Sts. c. 18, § 79, give no right to ten or more taxable inhabitants of a town or city to maintain a suit or petition in equity to enjoin it or its officers against doing or omitting to do acts with the purpose of voting in the future to raise money by illegal taxation to defray expenses or meet liabilities to be incurred by such doing or omission. *Carlton v. Salem*, 141.
3. Except under the Gen. Sts. c. 18, § 79, the equity jurisdiction of this court does not extend to compelling the performance of a duty by a municipal corporation or its officers upon the suit of individual inhabitants. *Ib.*
4. B., a tenant in common of land, agreed with the other tenants, that, if they would join in a sale of the land, he would pay them certain amounts out of the proceeds, and retain only the surplus. A purchaser at the sale, who had made an overpayment, brought a bill in equity against B. to recover the amount thereof. *Held*, that if such amount, by increasing the surplus, inured only to the benefit of B., the other tenants in common were not necessary parties. *Turkell v. Bowman*, 341.

5. Land belonging to an insolvent estate, was sold by the assignees, by auction, in May 1859, in lots, each of which was bid for and sold by the square foot, and the purchasers signed a memorandum referring to a plan and giving the number of square feet in each lot, and the price per foot. The plaintiff purchased one of these lots at the auction, and in September 1859 paid for the same and received a deed which described the lot by metes and bounds, referred to the plan, purported to give the exact length of the four sides, and stated the consideration in one sum ascertained by the price paid for the supposed number of feet. In January 1860, having then for the first time ascertained that the length of one of the sides of the lot was incorrectly given in the deed and upon the plan, and so that the number of square feet was considerably less than he had supposed and had paid for, he made a demand on the assignees, who then had sufficient assets of the estate in their hands, to return the amount overpaid; but the assignees refused, and distributed the assets among the creditors. On a bill in equity filed by him in 1865 against the assignees, *Held*, 1. that he had a right to recover from them the amount paid by mistake; 2. that there had been no such laches on his part as to bar that right; and 3. that it was not open to them, after filing a general answer, to object that he had an adequate remedy at law. *Id.*
6. On a bill in equity to restrain the construction of a permanent causeway across the plaintiff's land, the objection that the plaintiff has an adequate remedy at law must be raised by demurrer or at least be specially relied on in the answer, and cannot be raised for the first time at the hearing; and if it appears that the defendants have been, through mistake of boundaries, constructing such causeway on the plaintiff's land, they will be decreed to discontinue its use and restore the plaintiff's land to its former condition. *Creely v. Bay State Brick Co.* 514.

See CONTRACT, 4; COSTS, 2; EXCEPTIONS, 1; EXECUTOR AND ADMINISTRATOR, 3; LIMITATIONS, STATUTE OF; MANUFACTURING CORPORATION; PARTNERSHIP, 2; SPECIFIC PERFORMANCE; TOWN; WATERWORKS; WITNESS, 4.

ESTATES OF DECEASED PERSONS.

See COSTS, 2; DISTRIBUTIONS, STATUTE OF; EXECUTOR AND ADMINISTRATOR.

ESTOPPEL.

See WRIT OF ENTRY, 4.

EVIDENCE.

1. Oral testimony will not legitimately establish a proposition of fact which cannot, by any mode of interpretation, be deduced from the words themselves when written; whatever may have been the appearance, look, manner, mode of answering, emphasis, accents and gesticulations of the witnesses *Markey v. Mutual Benefit Insurance Co.* 78.

2. On the trial of an indictment for murder, testimony of persons, not experts, is admissible, that hairs on a club appeared to the naked eye to be human hairs and resembled the hair of the deceased; and evidence offered by the defendant that five months after the alleged homicide there was hair on wood-piles in the yard where it occurred, and that the yard had remained substantially in the same condition during the interval, is inadmissible. *Commonwealth v. Dorsey*, 412.
3. On the trial of an indictment for larceny of "a certain paper writing, called and being a 'discharge' from the military service of the United States, of the value of one hundred dollars" of the property of J. S., evidence that J. S. had been a soldier in a regiment of Massachusetts volunteers, that the defendant stole the "discharge paper" of J. S., and that this "discharge paper" was "a discharge from the military service of the United States," is sufficient to warrant a finding that what the defendant stole was of some value, without the production of the paper or further evidence of its contents. *Commonwealth v. Lawless*, 425.
4. On the trial of a shopkeeper for receiving stolen goods, evidence of what kind of business he carried on at his shop is admissible, although it does not appear that the goods were ever in the shop. *Commonwealth v. Campbell*, 436.
5. Whenever evidence of the condition of clothes is competent and material, their condition may be described by witnesses, without producing the articles themselves. *Commonwealth v. Pope*, 440.
6. The correspondence between boots and footprints is a subject to which any one who has seen both may testify. *Ib.*
7. On the trial of an action for assault and battery, the plaintiff was a witness in his own behalf, and on cross-examination testified that before the alleged assault he never complained to anybody, and in particular, not to S., a blacksmith, or to O., of such an injury as he then received. S. and O. then testified, for the defendant, that the plaintiff did so complain, in their presence, at a certain prior time, when he brought a colt to S. to be shod; and S. further testified that it was a colt called the Danvers colt, and that he broke the colt in order to shoe it, the plaintiff asking him to do so because on account of the injury he was unable to do so himself. *Held*, that as tending to show that S. and O. were mistaken in time, it was competent for the plaintiff then further to testify that he broke, himself, the Danvers colt, which he took to S. to be shod at said prior time, but that at a certain other time, after the alleged assault, he did take another colt to S. and ask him to break it; although he further testified, also, that O. was not present at this subsequent time. *Blake v. Damon*, 199.
8. On the trial of an action for assault and battery, at which the defendant testifies as a witness in his own behalf, it is competent for the plaintiff to examine him as to insulting remarks made by him, after the alleged assault, concerning the injuries inflicted on the plaintiff. *Ib.*

- A The defendant in a bastardy process contended at the trial that J. S. and not himself was the father of the child ; proved that J. S. sent to the complainant a package made up like "doctor's powders ;" and then offered evidence to show that, three or four days before sending this package, J. S. received a package of like size, shape and appearance, which contained drugs to produce an abortion. *Held*, that the evidence was admissible, and the question of the identity of the packages was for the jury. *Young v. Makepeace*, 50.
10. In an action on a bond reciting that the defendant was the father of the plaintiff's bastard child, and conditioned to support it, but alleged by the defendant to have been obtained by fraud and duress and to be without consideration, the plaintiff testified that she never had intercourse with any man other than the defendant. *Held*, that the exclusion of evidence of the contents of letters of a vulgar or indecent character from the plaintiff, offered to contradict the plaintiff and to prove her, intercourse with other men, afforded the defendant no ground of exception, if it did not appear that they contained admissions or statements of her intercourse with other men at or near the time of the probable inception of her pregnancy. *Bowen v. Reed*, 46.
11. At the trial of an action on a bond, given out of court, reciting that the defendant was the father of the plaintiff's bastard child, and conditioned to support it, but alleged by the defendant to have been obtained by fraud and duress and to be without consideration, declarations of the plaintiff in the time of her travail, that the defendant was the father of her child, are not admissible in her behalf. *Id.*
12. In an action for an injury alleged to have been caused to a traveller by a defect in a highway which the defendant town was bound to keep in repair, the answer denied each and every allegation of the declaration. At the trial, the only defect contended for by the plaintiff was the absence of a railing by the side of the way at the time of the accident ; and the town did not deny that there was no such railing at that time, but only that the absence of it was a defect, and conceded that the way had been in substantially the same condition for the five years previous, and that its condition was known to every town officer. *Held*, that the plaintiff was not bound to accept these concessions, and might prove both that the defect had existed more than twenty-four hours, and that the town had notice of it. *Priest v. Groton*, 530.
13. At the trial of an action for an injury alleged to have been caused to the plaintiff by a defect in a highway which the defendant town was bound to keep in repair, and on which the plaintiff was travelling, in a vehicle, with a companion, who was driving at the time of the accident, a witness for the town, who came to the place of the accident immediately after its occurrence, testified that he then asked the plaintiff's companion how it happened, and she replied that she did not know unless the horse was frightened or she pulled the wrong rein. *Held*, that evidence was inadmissible, in the plaintiff's behalf, for the purpose of contradicting the witness, that the witness

- being himself asked, later on the same day, how the accident happened, replied that the horse shied. *Id.*
14. In an action on a promissory note, in which a discharge in insolvency is pleaded, and no replication is ordered by the court, the plaintiff may prove a new promise without having alleged it. *Cook v. Shearman*, 21.
 15. To prove how high the water has been raised in a mill pond, it is competent to refer to marks not only in the channel, but on the bank or any other place to which the water has flowed. *Perry v. Binney*, 156.
 16. On a trial of the issue of the value, at the time of the sale, of pigs sold by the plaintiff to the defendant, some of which soon afterwards died of a contagious disease, the plaintiff, for the purpose of showing that they were exposed to the contagion before the sale, proved "that several other pigs, sold out of the same drove" two days earlier, "were then sick, and some of them died." *Held*, that the plaintiff might thereupon prove how many pigs there were in the drove, and that certain of them were unaffected by the disease. *Bradley v. Rea*, 188.
 17. On an issue of the value of a lot of lowland and flats on an island in Boston harbor, it is no ground of exception that evidence was admitted of the price of lands sold at different times, from eight years to one year before, on islands and headlands in the harbor, from half a mile to six miles distant; in the absence of evidence of more recent sales, or of any great difference of the uses to which these islands and headlands were appropriated; although the island on which the lot in question was situated was much larger than the others, and had readier means of communication with the city, and the lot had a deposit of sand thereon. *Benham v. Dunbar*, 365.
 18. A mechanic, who has worked for twenty-five years as a journeyman carpenter, may testify, as an expert, to the injury caused to a house, which he was employed in building, by defects in the construction of a cellar under it. *Moulton v. McOwen*, 587.
 19. At the trial of an action for the price of Manila sugar sold and delivered, it was admitted that the article delivered contained four per cent. of sand. A witness who had testified that he had no knowledge of refining, but was agent for a sugar refinery, and had bought sugar for it, was allowed, against the defendants' objection, to testify that a lot he had bought contained three per cent. of sand and was superior Manila sugar; and on cross-examination he testified that he did not test this lot, but that it was reported to him. The question submitted to the jury was, whether the four per cent. of sand was such an adulteration as to prevent the article delivered from being called in commerce Manila sugar. *Held*, that allowing the witness to testify as an expert was not a good ground of exception. *Gossler v. Eagle Sugar Refinery*, 331.
 20. In an action by the indorsee against the makers of a promissory note, an attorney at law, called as a witness by the defendants, was allowed, against the objection of the plaintiff and of himself, to testify that he received a letter from the payee of the note, containing a claim for intoxicating liquors

against the defendants; that he advised his correspondent to get a promissory note on time signed by the defendants, and to indorse it, for value, before it was due, to an innocent third person; and that he afterwards received the note in suit from the plaintiff. The plaintiff also produced at the request of the defendants, but against his own objection, the letter to the attorney, which stated that the defendants owed the payee a running account for intoxicating liquors furnished to them in Wisconsin. *Held*, that the admission of the attorney's testimony and of the letter was a violation of the rule excluding privileged communications between attorney and client. *Higbee v. Dresser*, 523.

See ABORTION; ASSAULT AND BATTERY; ATTORNEY AND COUNSEL, 3; BASTARDY PROCESS, 1-5; BROKER, 1; BURIAL GROUND, 1; DEPOSITION; EXCEPTIONS, 2, 3, 5, 6; FRAUDULENT REPRESENTATIONS, 2, 3, 5-7; INDICTMENT, 2-5; INSOLVENT DEBTOR, 2; INSURANCE, 3, 4; INTOXICATING LIQUORS, 11; LARCENY, 1, 2; LORD'S DAY; NAME; NEGLIGENCE, 2; PARTITION; PLEADING, 3; RAILROAD, 7; RECORD; REPLEVIN, 1; SHIPPING; STAMP; TRUST, 4, 5; USURY, 2, 3; WAIVER; WAY, 3; WITNESS.

EXCEPTIONS.

1. Exceptions do not lie to the refusal of the judge in a suit in equity to reform issues framed for a jury. *Brooks v. Tarbell*, 496.
2. When the wife of one of the parties is offered under the St. of 1865, c. 207, § 2, as a witness on a trial, the determination by the judge, preliminary to her admission or exclusion, of the fact whether the cause in issue was transacted with her in her husband's absence, is not a subject of exceptions. *O'Connor v. Hallinan*, 547.
3. On the trial of an action for physical injuries sustained by the plaintiff, the physician who attended her, being called as a witness in reference to the nature of the injuries, was asked and answered questions objectionable as calling for his judgment on the credibility of information given him concerning them, and on the truth of controverted facts. But before his examination was finished, on the suggestion of the judge, hypothetical questions upon the same points were put to and answered by him in a manner avoiding such objections; and the judge thereupon instructed the jury that they should exclude from their consideration the previous questions and answers. *Held*, that the defendant had no ground of exception without some evidence that he was prejudiced by this course of examination of the witness. *Priest v. Groton*, 530.
4. In an action on the Gen. Sts. c. 137, exceptions to the refusal of the judge to give instructions requested as to the existence of the relation of landlord and tenant between the parties, cannot be sustained, if they show that, although the judge declined to give the instructions in the form asked for, yet he stated fully to the jury the different ways by which said relation could be created and its existence proved, to which statements no exception was taken. *Springall v. Whittier*, 375.

6. An instruction to the jury, in a criminal trial, "that the evidence is sufficient on which to convict of the charge," is not a charge with respect to matters of fact, within the Gen. Sta. c. 115, § 5; if it is given in response to a request of the defendant for a ruling "that the evidence does not sustain the charge," and may fairly be understood to apply only to the sufficiency in law of the evidence to sustain the indictment provided that the jury shall be satisfied with its weight. *Commonwealth v. Lawless*, 425.
8. On a trial for receiving stolen goods, a witness for the Commonwealth testified, irresponsively to a question by the district attorney, that the defendant "had fighting dogs;" the defendant asked for no ruling upon this testimony, and the judge gave no special instructions upon it. *Held*, that the defendant had no ground of exception. *Commonwealth v. Campbell*, 436.
7. At a term of the superior court at which verdict was rendered in a case, exceptions were filed by agreement, and no judgment was entered, but the case continued to the next term, on the last day of which the exceptions were allowed and returned to the files by the judge, and they were entered on the proper docket of this court twenty-seven days afterwards and more than a month before the next law term, at which in the usual course they would be argued. *Held*, that they were duly allowed in the superior court, and seasonably entered in this court. *Priest v. Groton*, 530.
8. A petition to establish the truth of exceptions to be argued in the law term of this court for the Commonwealth must be entered on the docket of said court within a reasonable time after they are taken, and at the same term at which they would by law be entered if duly signed and allowed. *Ib.*
9. This court, at its term for a county, questions of law arising in which are to be argued in the law term for the Commonwealth, has no jurisdiction of a petition to establish the truth of exceptions arising in that county. *Ib.*
10. After a commissioner has been appointed to take the evidence upon a petition to establish the truth of exceptions disallowed by the judge presiding at a trial, a motion filed before such appointment, to dismiss the petition on the ground that it was not seasonably presented, cannot be entertained. *Al-drich v. Brown*, 527.

See DEPOSITION, 1; INTOXICATING LIQUORS, 9; JUDGMENT; WITNESS, 6;
WRIT OF ENTRY, 2.

EXECUTION.

An officer, in executing a writ of possession, is justified in removing without force from the premises the wife of the person against whom the judgment was rendered on which the writ was issued, although she claims title in her own right, if her claim is invalid. *Fiske v. Chamberlin*, 495.

See POOR DEBTOR; WRIT OF ENTRY, 1, 2.

EXECUTOR AND ADMINISTRATOR.

1. An administrator may be allowed in his account for inventoried property which he has spent or consumed in carrying on in good faith, by the request

of all parties interested in the estate, the business of the intestate after his death. *Poole v. Munday*, '74.

- 2 Under the wills of A. and B. income of their estates was payable to C. during her life. D., as executor of both wills, settled in the probate court, before C.'s death, accounts indorsed with her written approval. C. died, leaving a will of which D. and E. were joint executors. From the allowance by the probate court of an account which they rendered as such, F., a residuary legatee under the will, appealed, on the ground that there was income of the estates of A. and B. which fell due to C. and was not accounted for. After a hearing and dismissal of that appeal by this court, F. petitioned the probate court to reopen said accounts settled by D. as executor of the wills of A. and B., for revision and correction as to said income, and to require D. to account further for any amount of said income which fell due to C. between the dates of those accounts and her death; but the probate court decreed that the petition be dismissed. *Held*, that, even if F. had such an interest in the estates of A. and B. as to entitle him to appeal from this decree, yet, as between F. and D., in the absence of any fraud or mistake, C.'s approval of the accounts was conclusive as to income due to her from the estates of A. and B. before the dates of the accounts, and the judgment on the former appeal was in like manner conclusive as to any such income due after said dates. *Bassett v. Granger*, 177.
3. A resident of another state, having insured his life with an insurance company chartered here, by a policy payable to himself, his representatives or assigns, and conditioned to be void if assigned without consent of the insurers, delivered it to a creditor here residing, as a pledge for the debt, and died, leaving the debt unpaid. An administrator of his estate was appointed in the state of his residence; and afterwards the creditor was appointed ancillary administrator here. The principal administrator then sued the insurers on the policy in the place of the domicile of the assured, and their agent duly accepted service of the summons in the suit, and of an injunction not to pay the policy to the creditor, under a statute requiring such acceptance of service. The creditor, as ancillary administrator, afterwards brought a suit on the policy against the insurers here, in which they admitted their liability and willingness to pay the policy to the person entitled. *Held*, that the right of the plaintiff in the second suit, representing the equitable interest and right of immediate possession and control of the pledgee as well as the legal capacity to sue, was superior to that of the principal administrator, and that the pendency of the first suit was no bar to the maintenance of the second suit. *Merrill v. New England Insurance Co.* 245.

See COSTS, 2; LIMITATIONS, STATUTE OF; TRUST, 1.

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS.

FIRE.

See INSURANCE, II; RAILROAD, 8.

FISHERY.

The right of taking clams from the flats under tide waters in any town in this Commonwealth is a public right, unless restricted by acts of the legislature or the town, or by prescription; and is not impaired by a grant of the flats, from the legislature to the town, or from the town to individuals; nor by the St. of 1841, c. 64, for the protection of the shell fishery in Ipswich. *Proctor v. Wells*, 216.

FIXTURES.

See TRESPASS, 2.

FOREIGN LAW.

See DIVORCE, 1; EXECUTOR AND ADMINISTRATOR, 3; USURY, 4.

FORGERY.

See LARCENY, 2; PROMISSORY NOTE, 2.

FRAUD.

See BROKER, 1; FRAUDULENT REPRESENTATIONS; INSANE PERSON; JURISDICTION; MORTGAGE, 4; PLEADING, 1; PLEDGE, 1; PROMISSORY NOTE; SALE, 2; USURY; WITNESS, 3, 4.

FRAUDS, STATUTE OF.

An oral promise to make a will of all the testator's property, real and personal, in favor of a person who in consideration thereof agrees to make a similar will in favor of the first testator and makes one accordingly, is a contract for the sale of lands, within the statute of frauds, Gen. Sts. c. 105, § 1. *Gould v. Mansfield*, 408.

See BROKER, 3; TRUST, 4.

FRAUDULENT REPRESENTATIONS.

1. An action may be maintained by the buyer of a patent right on false representations of the seller, which induced the purchase, as to what was covered by the patent, or what was not covered by an earlier patent; although by searching the records of the patent office the buyer might have discovered the fraud. *David v. Park*, 501.
2. In an action for deceit, the declaration alleged that the defendant represented that he was the owner of certain stock, and induced the plaintiff by false representations as to its value to purchase it. *Held*, that the plaintiff need not prove that the defendant was actually the owner of the stock. *Fisher v. Mellen*, 503.
3. In an action for false representations as to the condition of land, the plaintiff contended that the representations were false in fact and made as of the defendant's own knowledge, but did not contend that the defendant had

personal knowledge of the condition of the land. *Held*, that the fact that the defendant had not such personal knowledge, but derived his information from others, was no defence to the action; and that, on the issue thus presented, evidence of such fact was immaterial. *Ib.*

4. Under an allegation, in an action of tort, that the defendant sold a vessel to the plaintiff, and the plaintiff was induced to buy her by the false representations of the defendant, the plaintiff may recover for the whole damages occasioned to him by the false representation, although the record title stood in the names of and was conveyed by others besides the defendant. *Springer v. Crowell*, 65.
5. In an action for deceit, an allegation that the defendant sold half of a vessel to the plaintiff is supported by evidence of a written agreement to sell the vessel to the plaintiff and H., followed by delivery, and of an agreement between the plaintiff and H. that each should take half. *Ib.*
6. In an action on a lease which the defendants allege that they were induced to execute by fraudulent representations of the plaintiff, evidence of the conversation of the parties at the time of its execution is admissible. *Milliken v. Thorndike*, 382.
7. Evidence that a lessee of a store was induced to sign the lease by a statement of the lessor, that "it was built according to the plans in every particular," made after a question by the lessee, whether "the drains were where they were to be according to the plans;" and that the drains were not built according to the plans, and the store was materially damaged in consequence; warrants a finding that the lessee was induced to sign the lease by a false representation, made by the lessor, of a material fact, which he either knew was false when he made it, or positively affirmed as of his own knowledge. *Ib.*
8. To an action on a lease for rent, the fact that the defendant was induced to execute the lease by fraudulent representations of the plaintiff, as to a material point in the construction of the demised premises, is a good defence, although the defendant entered under the lease and remained in possession a week, if he left as soon as the fraud was discovered. *Ib.*

See JURISDICTION; SALE, 2.

FREIGHT.

See DAMAGES, 1; INSURANCE, 8; PLEDGE, 2.

GAMING.

1. A court of competent jurisdiction, to which is returned a searchwarrant under the Gen. Sts. c. 170, §§ 1-5, and St. of 1869, c. 364, on which gaming apparatus and implements have been seized in a gaming-house, cannot lawfully cause them to be destroyed without first causing such notice to be given as is reasonable and likely to inform the parties interested, and affording to them an opportunity to be heard; and furniture, fixtures or personal property seized on the warrant cannot lawfully be forfeited and sold, except on
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written application, describing the things, and when, where and wherefore they were seized, and sufficient generally to inform any claimant what it is to which he must answer, in order to defend his right, and upon a judicial hearing with reasonable notice to claimants and opportunity for them to have their rights determined by jury trial. *Attorney General v. Justices of the Municipal Court of Boston*, 456.

2. It seems, that money, seized in a gaming-house on a searchwarrant under the Gen. Sta. c. 170, §§ 1-5, and St. of 1869, c. 364, is not subject to forfeiture. *Id.*

See MUNICIPAL COURT OF BOSTON, 3.

GIFT.

See HUSBAND AND WIFE, 2.

GOODS SOLD AND DELIVERED.

See PLEADING, 1.

GRANT.

See FISHERY.

GUARANTY.

See CONTRACT, 1.

GUARDIAN AND WARD.

See NEGLIGENCE, 1; PARTITION.

HOMESTEAD.

See WRIT OF ENTRY, 3.

HUSBAND AND WIFE.

1. At the trial of a married woman for an assault committed in the immediate presence of her husband, the defendant asked the judge to instruct the jury that she was presumed to act under her husband's control; but the judge refused, and instructed them that, if they were satisfied that she did the acts proved, of her own free will, free from the coercion or influence of her husband, they would be warranted in convicting her. *Held*, that the refusal to give the instruction asked for was erroneous. *Commonwealth v. Egan*, 71.
2. In an action by a widow against a savings bank for money deposited by her therein in her own name, proof that it did not belong to her, and was so deposited, in her husband's lifetime, at his request and for his benefit, and that the administrator of his estate has demanded it from the bank, rebuts any presumption that it was a gift to her from her husband. *McCluskey v. Provident Institution for Savings*, 300.
3. Money earned by a married woman, if not earned in a business carried on upon her sole and separate account, nor given to her by her husband, can-

not be held by her as against her husband's representatives after his death ; and if she has mixed it with her own separate funds so that the amount of it cannot be ascertained, and deposited the whole in a savings bank, from which her husband's representatives have demanded the deposit, she cannot maintain an action against the bank for the amount thereof. *Ib.*

4. A promissory note, given by a wife to the builder, for the price of a barn already built on her land, is invalid in his hands, for want of a sufficient consideration, if the barn was built by the order and on the account and credit of her husband ; but valid, if in the transaction the husband was acting as her agent, and the credit was given to her. *Morse v. Mason*, 569.

See DIVORCE ; EXCEPTIONS, 2 ; EXECUTION ; INDICTMENT, 2 ; LANDLORD AND TENANT ; WITNESS, 5.

INDICTMENT.

1. An indictment on the Gen. Sts. c. 164, § 10, for being armed with a dangerous weapon when arrested by a police officer on a warrant from a magistrate for a criminal offence, which does not aver that the arrest was lawful, or that the officer was authorized to make it, is bad. *Commonwealth v. Doherty*, 443.
2. An indictment charging larceny of property of a wife may be sustained under the Gen. Sts. c. 172, § 12, by proof of larceny of property of her husband in her possession. *Commonwealth v. McLaughlin*, 435.
3. A check payable to A.'s order, stolen from B.'s custody, may, under the Gen. Sts. c. 172, § 12, be properly described as A.'s property, in an indictment for the larceny, if B. held it only for transmission to A., without having, himself, any interest in it or right to retain it. *Commonwealth v. Lawless*, 425.
4. An indictment for receiving as stolen goods "thirty yards of cloth," and "one coat," sufficiently describes the nature of the goods ; and is sustained by proof that they consisted of "one piece of cassimere" and "one blue pilot cloth coat." *Commonwealth v. Campbell*, 436.
5. An indictment which avers that the defendant received on a specified day goods "before then" stolen may be sustained by proof of his receiving after the theft goods stolen on a later day. *Ib.*
6. The omission in an indictment containing two counts of an averment that they are different descriptions of the same offence is cured by a verdict of not guilty on one of the counts and the entry of a *nolle prosequi* on that count. *Commonwealth v. Holmes*, 440.
7. On the trial of an indictment charging distinct offences in separate counts, it is the duty of the jury to pass upon each count separately, applying to it the evidence bearing on the question of the defendant's guilt of the offence therein charged. *Commonwealth v. Carey*, 214.
8. If, on the trial of an indictment charging distinct offences in separate counts, the jury return a general verdict of guilty, and, in answer to an inquiry of the court, reply that they did not pass upon the counts separately, and the

verdict is thereupon ordered to be affirmed and recorded, the defendant has good ground of exception, even if the case was submitted to the jury with suitable instructions as to the several counts. *Id.*

See COMPLAINT; INTOXICATING LIQUORS, 1-3; NAME, 1.

INFANT.

Money belonging to an infant, and received from him by his brother, with directions to use it for the support of their parents, if necessary, and so used by the brother before any revocation of the directions, cannot be recovered by the infant upon his coming of full age. *Welch v. Welch*, 562.

INFORMATION.

An information in the nature of a *quo warranto* will not lie against a municipal corporation to enforce performance of a duty imposed on it by law. *Attorney General v. Salem*, 138.

INSANE PERSON.

On an issue whether a deed for the benefit of B., signed by A., was executed while A. was insane and under the undue influence of B., a witness testified that, shortly before the time when the deed was executed, an attorney, whom B. had asked to make a deed in his favor for A. to sign, after talking with A. in the presence of B. and the witness, told B. that A. was not competent to execute any paper, that B. gave the attorney a nudge, and told him to go ahead and it would be all right, and that the attorney refused. *Held*, that the evidence was admissible. *Brooks v. Tarbell*, 496.

See WITNESS, 4.

INSOLVENT DEBTOR.

1. A new promise to pay a debt, made after the commencement of proceedings in insolvency, is equally valid, whether made before or after the certificate of discharge. *Cook v. Shearman*, 21.
2. In an action on a debt barred by a discharge in insolvency, statements in letters from the defendant to the plaintiff that he expects and hopes to pay the plaintiff all that is due to him; that he shall certainly do so as soon as possible; that he hopes to be so situated that he can send him the full amount of his bill with interest; and that he will see that the plaintiff is no loser by him; amount, in law, to a new promise to pay the debt, which cannot be controlled by testimony of the defendant as to his meaning. *Id.*

See BANKRUPT; PROMISSORY NOTE, 1; STAMP.

INSURANCE.

I. Life and Accident Insurance.

1. A policy of life insurance which provides that it shall not be in force until countersigned by "A. B., agent," is invalid till so countersigned, although

- A. B. is himself the assured and the policy has been received and retained by him. *Badger v. American Popular Insurance Co.* 244.
2. Power to make contracts or declarations to bind generally a foreign mutual life insurance company is not within the apparent scope of the authority of a sub-agent employed by the general agent of the company in this Commonwealth to solicit and receive applications for insurance and forward them to the company, and to deliver policies issued by the company and collect premiums thereon; nor is it to be inferred by virtue of the St. of 1861, c. 170, or the St. of 1864, c. 114. *Markey v. Mutual Benefit Insurance Co.* 78.
 3. On an issue of the binding force on a foreign mutual life insurance company, of transactions had by agents of the company in this Commonwealth with a woman and her husband, in reference to a policy of insurance on his life for her benefit, for which he had applied to the company, instructions and rules of the company, not referred to in the application or the policy, nor notified to him or to her, are inadmissible to prove limitations of the agent's authority. *Id.*
 4. At an interview with an applicant for a policy of insurance on his own life for his wife's benefit, an agent of the insurance company said that he had brought the policy, and the applicant replied that he was glad of it and that he had been expecting it for some time, took it from the agent, looked at it, passed it to his wife, saying, "Here, wife, here is your policy," and she then took it and looked it over. The applicant then said to the agent, that he was not well enough to attend to the business that day, but had made arrangements with J. S. to "do it" for him, or to "take the policy;" and to his wife, that there was money due to him in the shop where he worked, and J. S. would "pay it for him" or "make arrangements to get it for him." After some more words between the applicant and the agent, the latter arose to leave, saying that he should go to J. S.; and the wife, saying that he might want the policy if he was going to J. S., passed the policy to him, and he took it, withdrew with it, and, without applying to J. S. in relation to it, returned it to the general agent of the insurers, through whom he had received it from them, and on whom the next day the applicant made a demand for it, with a tender of the premium, which was refused. *Held*, that evidence of these facts would not warrant a finding of a delivery of the policy, either actual or constructive, and a waiver or postponement of payment of the premium; or of an open and continuing proposal to contract with the applicant by means of that policy, accepted by his tender and demand. *Id.*
 5. A certificate given by a life insurance company, since the passage of the St. of 1861, c. 186, acknowledging the receipt of an annual premium on a policy issued before said passage, does not make the policy subject to the provisions of that statute regarding nonforfeiture. *Shaw v. Berkshire Insurance Co.* 254.
 6. Under a policy of insurance in the sum of \$2000 against loss of life from accidental injuries occasioning death within ninety days from the accident,

and in the sum of \$10 a week for a period not exceeding twenty-six weeks against personal injury "for any single accident by which the assured shall sustain any personal injury which shall not be fatal," the weekly sum is due for injury by an accident which does not occasion death within ninety days, although it is finally fatal. *Perry v. Provident Insurance Co.* 242.

See EXECUTOR AND ADMINISTRATOR 3.

II. Fire Insurance.

7. The directors of a mutual fire insurance company are not personally liable under the Gen. Sts. c. 58, § 48, for neglecting to make an assessment upon subsequent policy holders to satisfy a judgment on a note given for a loss upon a policy in a class the business of which has been closed and all its policies cancelled. *Upton v. Pratt*, 551.

III. Marine Insurance.

8. In a policy of insurance on a ship, a warranty "not to load more than her registered tonnage" with either or all of certain articles, including coal, applies only to articles laden as cargo; and is not broken by taking on board, besides that amount of the prohibited articles as cargo, a quantity of coal for dunnage, when a suitable material, actually and in good faith used, and no more than is reasonably necessary for that purpose, even if freight is received for its carriage. *Thwing v. Great Western Insurance Co.* 401.
9. A vessel insured for a year by a policy which provided that, if she was "on a passage at the end of the term," the risk should continue until arrival at "port of destination," sailed from the Chincha Islands on a voyage to Europe, and put into Callao on the mainland, one hundred and twenty miles from the islands, but which is the port of entry for the islands, and where vessels bound from the islands obtain the necessary clearance, water and crew for the further voyage. While there, the year expired. *Held*, that the vessel was not "on a passage" within the meaning of the policy; and that the risk ended with the year. *Washington Insurance Co. v. White*, 238.

See ACTION, 1.

INTEREST.

See ACCORD AND SATISFACTION; BOND; BRIDGE, 7; USURY; WITNESS, 2.

INTERNAL REVENUE.

See DUTY; STAMP.

INTOXICATING LIQUORS.

1. An indictment on the St. of 1868, c. 141, for keeping intoxicating liquors for sale at a certain time and place, the defendant "not being then and there authorized by law to sell the same in any manner, and not having then and there any license, appointment or authority so to keep for sale or sell said

- liquors," sufficiently negatives that the keeping was within the provisos of § 1. *Commonwealth v. Chisholm*, 213.
2. An indictment on the St. of 1868, c. 141, for keeping intoxicating liquors for sale, may charge such keeping with a *continuando*. *Ib.*
 3. An indictment on the St. of 1868, c. 141, for selling intoxicating liquors at a certain time and place, the defendant "not having then and there any license, authority or appointment according to law, to make such sale," sufficiently negatives that the sale was within the provisos of § 1. *Ib.*
 4. The St. of 1869, c. 191, declaring that no license for the sale of intoxicating liquors shall have any validity after April 30, 1869, gives an unlicensed person no right to sell, and is constitutional. *Commonwealth v. Brennan*, 70.
 5. In the provisions of the St. of 1869, c. 415, § 44, for the making to "a justice of the peace or police court" of a complaint of the keeping of intoxicating liquors for unlawful sale; and for the issue of a searchwarrant by "such justice or court" upon proof of probable truth of the complaint; the phrase "police court" designates the tribunal by its character and jurisdiction, without regard to its style. *Commonwealth v. Intoxicating Liquors*, 448.
 6. The adjudication of a police court, to which a complaint is made on the St. of 1869, c. 415, § 44, preliminary to the issue of a searchwarrant, that there is probable cause to believe the complaint to be true, is conclusive and final *Ib.*
 7. When proceedings on a complaint under the St. of 1869, c. 415, § 44, are quashed for defects in matters of form, the owner of the intoxicating liquors seized upon the warrant is entitled under § 53 to an order for their return. *Commonwealth v. Intoxicating Liquors*, 454.
 8. To a complaint on the St. of 1869, c. 415, for making an unlawful sale of intoxicating liquor, it is no defence that the seller believed that what he sold was a medicine or was not intoxicating. *Commonwealth v. Hallett*, 452.
 9. A defendant who has been convicted of making an unlawful sale of intoxicating liquor under the St. of 1869, c. 415, cannot for the first time at the argument of exceptions in this court set up that the liquor which he sold was cider. *Ib.*
 10. A lessor may, by an action under the Gen. Sta. c. 137, recover possession of the demised premises, without entry or notice to quit, against his lessee who has knowingly underlet them for the remainder of his term to be used for the illegal sale of intoxicating liquors, and allows such use thereof. *Prescott v. Kyle*, 381.
 11. In an action for the rent of a tenement alleged by the defendant to have been knowingly let for the illegal sale of intoxicating liquors, the plaintiff is entitled to have the jury instructed that the presumption of law is that sales of liquor made on the premises were legal, although they have been previously instructed that the burden of proof is on the defendant to show that the sales were unlawful. *Jones v. McLeod*, 58.
 12. If a person to whom intoxicating liquors have been delivered for examination, under an agreement that he shall pay cash for them if they suit him

and return them if they do not, and that they shall not become his property till paid for, refuses, on demand, to pay for them or to return them, and conceals them, he is liable to an action for their conversion, notwithstanding the statutes forbidding the sale of intoxicating liquors. *Booraem v. Crane*, 522.
 See COMPLAINT, 1-3; EVIDENCE, 20; MUNICIPAL COURT OF BOSTON, 1, 2

IPSWICH, TOWN OF.

See FISHERY.

JUDGE.

See BRIDGE, 3; COUNTY COMMISSIONERS; EXCEPTIONS, 5; JUSTICE OF THE PEACE; RAILROAD, 1.

JUDGMENT.

At the term of the superior court held next after judgment rendered for A. on an *audita querela* to reverse a judgment in his favor, the court has discretionary power, on A.'s motion, to bring forward the original action on the docket and enter judgment therein as of said term. *Marshall v. Merritt*, 45.
 See BRIDGE, 4-7; BURIAL GROUND, 1, 5, 6; CONSTABLE, 1, 2; EXECUTOR AND ADMINISTRATOR, 2; INSURANCE, 7; INTOXICATING LIQUORS, 6; LARCENY, 3; MANUFACTURING CORPORATION; MORTGAGE, 2, 4; RECORD; WITNESS, 4.

JURISDICTION.

An action for deceit in the sale of patent rights may be maintained in a state court, although its determination involves collaterally the construction and validity of the letters patent. *David v. Park*, 501.
 See COMPLAINT, 1, 2; DIVORCE, 1-3; EQUITY, 3; EXCEPTIONS, 9; EXECUTOR AND ADMINISTRATOR, 3; LIEN, 1, 7; MUNICIPAL COURT OF BOSTON; TOWN; WATERWORKS, 2.

JURY.

The St. of 1869, c. 151, giving the Commonwealth a right of peremptorily challenging jurors in criminal cases, is constitutional. *Commonwealth v. Dorsey*, 412.

See GAMING, 1; INDICTMENT, 7, 8; WAY, 1, 2.

JUSTICE OF THE PEACE.

A justice of the peace may fix the day when a writ shall be returned before himself, by altering the return day of the writ in the hands of the officer before service. *Lapham v. Locke*, 555.

LACHES.

See EQUITY, 5; LIMITATIONS, STATUTE OF.

LANDLORD AND TENANT.

The service of a notice under the Gen. Sts. c. 90, § 31, to determine an estate at will in a shop occupied by the tenant with a partner, is sufficient, if on the day of its date the notice is delivered at the shop to and read by the partner, whom the tenant has left in charge of his business while he and his wife (constituting his whole family) are out of the Commonwealth. *Walker v. Sharpe*, 154.

See CONTRACT, 4; EXCEPTIONS, 4; EXECUTION; INTOXICATING LIQUORS, 10, 11; LEASE; PLEADING, 2.

LARCENY.

1. Evidence that a man, by falsely personating a discharged soldier with intent to steal his bounty money, received from an officer, by whom the bounty was payable, a discharge paper which was incident to and inseparable from the bounty, and converted it to his own use or deprived the owner of it, will warrant his conviction of larceny of that paper. *Commonwealth v. Lawless*, 425.
2. On the trial of an indictment for larceny, evidence is competent that the signature of a receipt for the stolen goods, made by a person who, by falsely personating their owner and giving the receipt, obtained possession of them, is the handwriting of the defendant. *Ib.*
3. If, on the trial of an indictment on the Gen. Sts. c. 161, § 18, for larceny of several articles worth together more than one hundred dollars, but each worth less than that sum, the jury return a general verdict of guilty under instructions which render it possible that they may have found the defendant guilty of larceny of one article only, this court, in disposing of the case under the Gen. Sts. c. 112, § 35, and c. 114, § 12, "as law and justice require," may affirm the verdict if the attorney for the Commonwealth shall move for judgment and sentence as upon conviction of larceny of property not exceeding one hundred dollars in value. *Ib.*

See EVIDENCE, 3; INDICTMENT, 2, 3.

LAW AND FACT.

See EXCEPTIONS, 5.

LEASE.

On a promise by a lessor to pay, towards repairs made by the lessee on the demised premises, a certain sum, to be retained by the lessee from the rent "as the same shall have been expended by him in such repairs; the lessee to exhibit bills as vouchers, satisfactory to the lessor;" the lessor is not liable for the amount of any bills for repairs, outstanding and unpaid. *Burnham v. Roberts*, 379.

See CONTRACT, 4; FRAUDULENT REPRESENTATIONS, 6-8; INTOXICATING LIQUORS, 10; PLEADING, 2; RENT; SPECIFIC PERFORMANCE.

LEGACY.

See DEVISE AND LEGACY.

LIBEL.

See SLANDER.

LIEN.

1. The courts of the Commonwealth have jurisdiction to enforce a lien, under the Gen. Sts. c. 151, for repairs done to a vessel lying in a port of the Commonwealth, if the general owner, who has the exclusive possession and control of her, resides in such port, although she has been registered in the port of another state in the name, as owner, of a person there residing, to whom the builder's certificate has been made, but whose real interest in her is that of mortgagee. *Donnell v. The Starlight*, 227.
2. The order of notice on a petition under the Gen. Sts. c. 151, to enforce a lien on a vessel, may be made returnable at the same term of the court at which the petition has been filed. *Ib.*
3. The order of notice on a petition to the superior court, under the Gen. Sts. c. 151, to enforce a lien on a vessel, may be issued after the attachment at any time before the hearing; and it is within the discretion of the court to allow it to be served on respondents out of the state by handing to them attested copies of the petition and order. *Ib.*
4. Labor and materials furnished in the alteration of a vessel to fit her for new uses are furnished in her "construction and repairs" within the meaning of the Gen. Sts. c. 151, § 12, giving materialmen a lien. *Ib.*
5. A mortgage on a vessel is postponed to the lien given to materialmen by the Gen. Sts. c. 151, § 12. *Ib.*
6. A mechanics' lien under the Gen. Sts. c. 150, has priority over a mortgage executed after the making of the contract under which the lien is claimed. *Dunklee v. Crane*, 470.
7. A mechanics' lien, under the Gen. Sts. c. 150, on a building, is not dissolved by the bankruptcy of the owner of the building, although the statement required by § 5 is not filed till after the commencement of the proceedings in bankruptcy; and the petition to enforce the lien may be entered in the superior court, and ordered to stand continued to await the result of those proceedings. *Clifton v. Foster*, 233.

See ATTORNEY AND COUNSEL, 4; PLEDGE, 2-4.

LIFE INSURANCE.

See INSURANCE, I.

LIMITATIONS, STATUTE OF.

A creditor cannot maintain a bill in equity under the St. of 1861, c. 174, § 2, against the administrators of his debtor, to recover a debt barred by the

special statute of limitations, Gen. Sta. c. 97, § 5, on the ground that he is an alien, residing in a foreign country, and never knew of the decease of the debtor or the appointment of the administrators until more than two years after the latter had given bond. *Sykes v. Meacham*, 285.

LIS PENDENS.

See EXECUTOR AND ADMINISTRATOR, 3.

LORD'S DAY.

To support an action on a common count for the price of goods sold to the defendant, who set up in defence a special warranty by the plaintiff of their quality, and a breach thereof, and that the sale was made on the Lord's day, the plaintiff introduced evidence, on the trial, which tended to prove that the goods were delivered by himself and accepted by the defendant on Monday, with the purpose that they should be sold and paid for, though without mention of a price. The defendant's evidence tended to prove that the plaintiff made an express contract with him on the Lord's day next previous, for the sale of the goods to him at a stipulated price and under a special warranty of their quality, and that the delivery and acceptance on Monday were in performance of this contract. *Held*, that the defendant had no ground of exception to the submission of the case to the jury under instructions "that, laying out of the case all that took place on Sunday as evidence of a valid contract, they might consider the delivery and acceptance on Monday as evidence tending to prove a sale on Monday, but whether it was sufficient to prove such sale was a question for them to determine," and that if they were satisfied that there was a sale on Monday, the law would imply a promise to pay the actual market value of the goods, whatever that was, without regard to any warranty made on the day previous. *Bradley v. Rea*, 188.

MANUFACTURING CORPORATION.

The recovery of judgment in *scire facias*, against a manufacturing corporation charged in the original suit as trustee on a debt owing by it and for which its officers are personally liable by reason of their failure to make the certificates required by law, is a sufficient recovery of judgment against it, within the St. of 1862, c. 213, § 3, to render the officers liable on a bill in equity filed under § 4 by the original creditor and the plaintiffs in the *scire facias*, to enforce such personal liability, after demand made on execution as provided in § 3, neglect of the corporation for thirty days to comply therewith, and the return of the execution unsatisfied. *Norfolk v. American Steam Gas Co.* 160.

MARINE INSURANCE.

See INSURANCE, III.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

The fact that a person, who, being in charge of a horse with the assent of its owner and engaged on his business, caused an injury by negligent riding, was in the general employment of a third person, does not exempt the owner of the horse from liability for the injury, unless the relation of the third person to the business was such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor. *Kimball v. Cushman*, 194.

See LANDLORD AND TENANT.

MECHANICS' LIEN.

See LIEN.

MILK.

The provisions of the St. of 1864, c. 122, § 4, prescribing penalties for the selling of adulterated milk, were not repealed by the enactment of the St. of 1868, c. 263, prescribing in § 1 penalties for the selling of such milk with knowledge of the adulteration. *Commonwealth v. Smith*, 444.

MILL AND MILL PRIVILEGE.

See DEED, 1; EVIDENCE, 15.

MINOR.

See INFANT.

MISTAKE AND ACCIDENT.

See EQUITY, 5, 6; PROMISSORY NOTE, 2; SALE, 4.

MONEY.

The acceptance, payable here, of a bill of exchange for £100 drawn in England, may be paid at the rate of \$4.84 per pound in treasury notes. *Cary v. Courtenay*, 316.

See GAMING, 2; PARTNERSHIP, 1.

MONEY HAD AND RECEIVED.

A. in Boston sent to a bank in Maine a check for \$200, drawn on the bank by one who had funds therein, in a letter, saying "Please send me a check on some Boston bank for the inclosed check." The bank thereupon mailed to him a letter inclosing \$4.28 in currency and the check of C. on a Boston bank for \$195.72. This letter was never received. A. endeavored in vain to obtain a duplicate check from C., who subsequently became bankrupt. The usage of the bank, and of banks generally in Maine, was to charge one quarter of one per cent. for drafts on Boston. *Held*, that the bank should have sent the whole amount in one of their own checks on Boston, and that

A. could recover it in an action against the bank for money had and received. *Ames v. York National Bank*, 326.

See PRINCIPAL AND AGENT.

MORTGAGE.

I. Of Real Estate.

1. A mortgage is not discharged by its assignment to one of two tenants in common of the equity of redemption, and may be foreclosed by the assignee. *Barker v. Flood*, 474.
2. An entry to foreclose a mortgage is not waived by the mortgagee's bringing a writ of entry against a tenant at will of the mortgagor, and obtaining judgment for possession, but not seeking conditional judgment, nor causing the writ of possession to be served until after three years have elapsed from the recording of the certificate of entry. *Fletcher v. Cary*, 475.

See LIEN, 6; TRESPASS.

II. Of Personal Property.

3. The mortgagee of a chattel is entitled to possession of it as against a collector of taxes who has distrained it, after the mortgage, for a tax due from the mortgagor. *Fuller v. Day*, 481.
4. A debtor gave a mortgage of his household furniture, fraudulent as against his creditors, but good between the parties; and then went into bankruptcy. The portion of the furniture exempt under the bankrupt act of 1867, c. 176, § 14, from being taken by the creditors was separated from the rest of it under an agreement to which the mortgagee was a party, and duly set off to the bankrupt by the assignee; the mortgage was decreed by the district court of the United States invalid as against the creditors; and the proceeds of all the rest of the furniture (which was sold under said agreement) were realized by the assignee. In the bankruptcy proceedings, the mortgagee never proved his debt, and the mortgagor received his discharge. Held, that the mortgagee might replevy from the mortgagor the furniture set off to him. *Tuesley v. Robinson*, 558.

See CONTRACT, 5; DAMAGES, 1; LIEN, 1, 5; PLEDGE, 4.

MUNICIPAL COURT OF THE CITY OF BOSTON.

- 1 The municipal court of the city of Boston is a police court within the meaning of the St. of 1869, c. 415, § 44. *Commonwealth v. Intoxicating Liquors*, 448.
- 2 By the St. of 1869, c. 17, § 2, the municipal court of the city of Boston has concurrent jurisdiction with the municipal court for the southern district of the city of Boston of complaints on the St. of 1869, c. 415, § 44, for causes arising in said southern district. *Id.*
- 3 The municipal court of the city of Boston has jurisdiction to enforce the destruction of gaming apparatus and implements seized in a gaming-house

on a searchwarrant issued from and returned to that court, under the Gen. Sta. c. 170, §§ 1-5, and St. of 1869, c. 364 ; and also the forfeiture and sale of furniture, fixtures or personal property seized, on the warrant, in such a house at a time when persons were there found playing at an unlawful game. *Attorney Genera. v. Justices of the Municipal Court of Boston*, 456.

See COMPLAINT, 1.

NAME.

1. In a criminal trial, it is sufficient to sustain an averment of a name charged, if the jury find that the name proved, though differently spelled, is "substantially identical" in pronunciation. *Commonwealth v. Stone*, 421.
2. On the trial of an indictment charging the defendant with fighting with Joseph Wormald, the defendant contended that there was no evidence as to the name of the person with whom he fought otherwise than by testimony describing it as "Wormald," except that one witness had testified that the defendant spoke of the person as "Jo;" the judge's minutes of the testimony contained no memorandum of any further evidence of it, and his memory corresponded with his minutes; but the attorney for the Commonwealth contended that some of the Commonwealth's witnesses had described the person as Joseph Wormald. The judge refused the defendant's request for a ruling that evidence that a man named "Wormald" or "Jo" fought with the defendant was insufficient to warrant a conviction, but instructed them that they must be satisfied on the whole evidence that the Wormald with whom the fight occurred was Joseph Wormald; and also declined to direct the jury "to find specially upon the proof as to the Christian name of Wormald." *Held*, that the defendant had no ground of exception. *Commonwealth v. O'Baldwin*, 210.

See TRUSTEE PROCESS, 2.

NEGLIGENCE.

1. A boy bought some gunpowder, and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while the parents were away; a week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off and was injured by the explosion. *Held*, that the injury was not the direct or proximate, natural or probable, result of the sale of the powder, and the seller was therefore not liable to the child for the injury. *Carter v. Towne*, 507.
2. At the trial of an action by a woman against common carriers of passengers to recover for personal injuries resulting from her falling from their coach, there was evidence tending to show that the driver stopped the coach to receive her as a passenger; that the coach was crowded and all the seats in it were occupied; and that, immediately after she had got in, and when she was standing within the door, she was thrown out of the coach by its violent

jerk at starting. *Held*, that there was some evidence in favor of the plaintiff to go to the jury. *Geddes v. Metropolitan Railroad Co.* 391.

See DAMAGES, 2; DEED, 3; EQUITY, 5; INSURANCE, 7; LIMITATIONS, STATUTE OF; MASTER AND SERVANT; RAILROAD, 9; WAIVER; WAY, 3.

NOLLE PROSEQUI.

See INDICTMENT, 6.

NONSUIT.

See QUIETING TITLE.

NOTICE.

See ADVANCEMENT; ATTACHMENT; ATTORNEY AND COUNSEL, 4; BROKER, 1, 3; DEED, 3; GAMING, 1; INSURANCE, 3; INTOXICATING LIQUORS, 10; LANDLORD AND TENANT; LIEN, 2, 3; LIMITATIONS, STATUTE OF PAUPER, 2, 3; POOR DEBTOR, 1; TRUST, 3.

NUISANCE.

See EQUITY, 6; INTOXICATING LIQUORS, 10.

OATH.

See BRIDGE, 3; COMPLAINT, 1, 2; DEPOSITION, 1.

OFFICER.

See CONSTABLE; DAMAGES, 1; EXECUTION; INDICTMENT, 1; JUSTICE OF THE PEACE; TAX, 4.

PARENT AND CHILD.

See ADVANCEMENT; NEGLIGENCE, 1.

PARTIES TO ACTIONS.

See PLEADING, I.

PARTIES TO BILL IN EQUITY

See EQUITY, 4.

PARTIES TO CONTRACT.

See CONTRACT, II.

PARTITION.

A. died intestate, leaving his widow administratrix of his estate, and as his heirs four children and the minor children of a deceased child B. The widow, as widow and as administratrix, the four children, and the guardian of B.'s children, agreed in writing to refer to an arbitrator "to determine

how said estate shall be settled" and "to divide the real estate belonging to said parties, including the setting off of dower," with authority "to divide so much of said estate as shall remain after setting off dower," into equal portions and allow the parties to bid for a choice, and to charge debts due from the estate "upon the several heirs respectively;" and agreed further to execute the award by such conveyances as the arbitrator should order, and that the decrees necessary to carry it into effect might be made in the probate court. The written award first set off the widow's dower, and settled on her an annuity in full of her claims against the estate. "As to the remainder of said estate," it set off certain lands to B.'s children, "as and for one fifth part of the said real estate which would be remaining after payment of debts and charges," and "as and for their share of the real estate of the said A.," free of incumbrances, and with no charge on account of debts or charges against the estate; "and as to the remainder of said real estate, not set off as dower nor included in the part set off to B.'s children," it divided that into four shares, (not including any part of the dower lands, nor naming the reversion thereof,) provided for bids by A.'s four children for the choice of them, and the application of the money to be received from the bids, and then charged on these four shares equally the annuity and the balance of the liabilities of the estate. By an indenture, executed in pursuance of this award, by and between the widow, the four children, and the guardian of B.'s children "as he is guardian" of them, said parties, after reciting that the widow and heirs of A. had agreed to make partition among themselves "first assigning dower lands to said widow," released the same to her to hold for her life, "the reversion to be in the heirs at law of said A., their heirs, executors, administrators and assigns, who are parties hereto;" then described the five shares assigned to B.'s children and A.'s four children respectively, and released them severally to said assignees; and "covenanted and agreed that the partition hereinbefore set forth shall be deemed to be a full and complete division and partition of the lands herein described, by and among the parties hereto, except the reversionary interest of the heirs at law of the said A., who are parties hereto, in the dower lands of said widow, as is hereinbefore provided." *Held*, that the reversion of the dower lands on the death of the widow was not included in this partition; and that parol evidence was inadmissible to show that the arbitrator intended to include it in the award and did in fact include it in the estimate on which he set off the share to B.'s children. *Parker v. Parker*, 167.

PARTNERSHIP.

1. Authorizing a firm to apply for its benefit, and as part of its capital, United States bonds payable to bearer, deposited specially in the custody of a bank which has no notice of the giving of the authority, is not "an actual cash payment as capital," by the person giving the authority, within the meaning of the Gen. Sts. c. 53, § 2, so as to exempt him, as a special partner, from liability for the debts of the firm; although, after the making and recording

of the certificate required by § 3, the bonds are applied for the benefit of the firm and realize more than the necessary amount of cash. *Haggerty v. Foster*, 17.

1. An agreement between W. W. and H. R., dated October 2, 1865, provide 1 that W. W. should enter into and carry on, for three years from April 17, 1865, the business of manufacturing oils and candles, "under the name, style and firm" of the X. Company, furnish the necessary capital to a limited amount, let the company have the use of his coal land and mining apparatus, with the right to take coal, for which he was to be paid by the company a certain sum per ton, and be allowed interest "on the capital stock invested in said company;" that H. R. should be employed as the general agent and manager of said business, devote himself wholly thereto, receive "in payment for his said services" a certain sum per year and one half of the net profits of the business, let to the company his oil works, tools and apparatus at a certain rent, and allow to the company free of charge the benefit of all trade marks and patents used by him; that annual settlements should be made, and all sums due thereon to H. R. should be paid, or, if not paid, credited to him and interest allowed thereon; that "all the operations of the late limited partnership of H. R. since April 17, 1865, are to be considered as done and performed under this agreement, so far as the business of the company is concerned, and this agreement relates back" to said April 17. H. R., in 1867, brought an action of contract against W. W., the declaration in which set forth the agreement and alleged that the defendant excluded the plaintiff from the management and profits of the business, refused to make annual settlements and payments, and, although continuing the business on the premises and with the tools of the plaintiff, and making large profits, refused to recognize that the plaintiff had any rights under the agreement. *Held*, on demurrer, that the parties were partners, and the action was not maintainable. *Ryder v. Wilcox*, 24.

See CONTRACT, 1; LANDLORD AND TENANT; PLEADING, 1.

PASSENGER.

See NEGLIGENCE, 2; RAILROAD, 9.

PATENT.

See CONTRACT, 2; FRAUDULENT REPRESENTATIONS, 1; JURISDICTION.

PAUPER.

1. If the action of one town against another, on the Gen. Sta. c. 70, to recover the expenses of supporting a pauper, is settled by the payment by the defendants of the claim and costs and nonentry of the writ by the plaintiffs, that is not, under § 13, "a recovery" by the plaintiffs which will bar the defendants from disputing with them the settlement of the pauper in a future action for his support. *Wenham v. Essex*, 117.
2. Overseers of the poor, in answering in writing under the Gen. Sta. c. 70,

- § 18, a written notice of the overseers of another town, under § 17, for the removal of a pauper, need not expressly refer to the notice. *Ib.*
3. An assertion by the overseers of the poor of one town, in answering under the Gen. Sts. c. 70, § 18, a notice given by such overseers of another town, under § 17, for the removal of a pauper, that he has not any legal settlement with them and therefore they shall not remove or support him, is a sufficient statement of their objections to his removal to authorize their town to contest the question of his settlement in an action thereupon brought by the second town for his support. *Ib.*

PAYMENT.

See PARTNERSHIP, 1; WAIVER.

PILOT.

A pilot offering his services to an inward bound vessel, which he has boarded, not from a pilot boat, but from a tug on which he is returning from piloting an outward bound vessel, is entitled, under the St. of 1862, c. 176, to pilotage fees, if he has received the consent of the master of the station boat, although such boat is not then in sight. *Josselyn v. Gleason*, 237.

PLEADING.

I. Parties to Actions.

1. In an action by three plaintiffs, who had been partners, to recover for partnership goods which, after the dissolution of the firm, had been delivered to the defendant by one of the plaintiffs, without the knowledge of the others, in payment of his private debt, the declaration contained a count in tort for the conversion of the goods, and a count in contract for goods sold and delivered. The answer to the first count denied the conversion, and to the second alleged payment. *Held*, that the plaintiffs could not maintain the action, although the defendant had conspired with the plaintiff who delivered to him the goods to defraud the other plaintiffs. *Farley v. Lovell*, 387.

See ACTION, 1; CONSTABLE, 3; EQUITY, 4; EXECUTOR AND ADMINISTRATOR, 3; PLEDGE, 2; WATERWORKS.

II. Declaration.

2. Rent due upon an indenture of lease cannot be recovered under a declaration for "the rent" of the premises, not alleging it to be due under a written instrument. *Burnham v. Roberts*, 379.
3. In an action on a promissory note, alleged to have been made payable to B. or order and duly indorsed to the plaintiff, the proof was of a note corresponding with the copy annexed to the declaration, save that it bore the indorsement of B., a revenue stamp, and a memorandum of protest. *Held*, no variance. *Clury v. Thomas*, 44.

See EVIDENCE, 12, 14; FRAUDULENT REPRESENTATIONS 2, 4; MONEY HAD AND RECEIVED; PLEADING, 1; PRINCIPAL AND AGENT; SLANTER TRESPASS.

III. *Answer.*

See EQUITY, 6; EVIDENCE, 12, 14.

IV. *Replication.*

See EVIDENCE, 14.

PLEDGE.

1. A person to whom certificates of mining stock with blank assignments had been pledged filled up the assignments, had new certificates made out to himself, and afterwards had some of the stock transferred to J. S., as trustee, and the rest by assignments, absolute on their face, to other persons. *Held*, that it was competent for him to prove, in defence to an action by the pledgor against him for the conversion of the stock, that he made these transfers because he thought that it would injure his credit to have so many mining stocks standing in his name; that no consideration was paid for any of these transfers; that he took blank assignments from all the transferees except J. S.; and that all the stocks remained in his control and ready for delivery to the owner on the payment of the amount for which they were pledged. *Held, also*, that these facts, if proved, were a good defence to the action. *Holmes v. Day*, 306.
2. One to whom the pledgee of goods has, with the pledgor's consent, consigned them for sale, can in his own name make demand, under the Gen. Sts. c. 123, §§ 62, 63, for payment of the amount for which they were pledged, upon an officer who has attached them on a writ against the pledgor; and, on refusal of the officer to pay the amount or release the attachment, can in his own name maintain an action against him for their conversion. *Clark v. Dearborn*, 335.
3. The lien of a pledgee covers freight paid by him on the goods pledged. *Id.*
4. A demand, under the Gen. Sts. c. 123, §§ 62, 63, by one having a lien on property attached, is good, though made for an amount larger than is due, if the amount due exceeds the value of the property. *Id.*

See CONTRACT, 5; DAMAGES, 1; EXECUTOR AND ADMINISTRATOR, 3.

POLICE COURT.

See INTOXICATING LIQUORS, 5, 6; MUNICIPAL COURT OF BOSTON, 1.

POLICE OFFICER.

See INDICTMENT, 1.

POOR DEBTOR.

1. A person arrested on execution may, under the Gen. Sts. c. 124, §§ 12, 13, serve the notice of his desire to take the poor debtor's oath on the attorney who made the writ in the action; although he was not arrested on *mens* process, and his attorney has been told that another attorney is acting for the creditor. *Willard v. Gage*, 354.

2. A recognizance under the Gen. Sta. c. 124, § 10, is avoided by the discharge of the debtor by a qualified magistrate after due proceedings begun within thirty days after the arrest; notwithstanding another application made seven days previously, during the thirty days, to another magistrate, by the debtor, and his failure to appear at the time and place thereupon fixed for his examination. *Sweeney v. Gillooly*, 549.

POWER

See ATTORNEY AND COUNSEL, 2; INFANT; INSURANCE, 2, 3; PLEDGE, 1; TRUST, 2.

PRACTICE.

See ACCORD AND SATISFACTION; ASSAULT AND BATTERY, 1; ATTORNEY AND COUNSEL; BANKRUPT; BASTARDY PROCESS, 2, 6, 7; BRIDGE, 3, 4, 6, 7; BURIAL GROUND, 1; COMPLAINT; COSTS; COUNTY COMMISSIONERS; DEPOSITION; EQUITY, 4-6; EVIDENCE; EXCEPTIONS; EXECUTION; GAMING; INDICTMENT; INFORMATION; INTOXICATING LIQUORS, 1-3, 6, 7, 9-11; JUDGMENT; JURY; JUSTICE OF THE PEACE; LANDLORD AND TENANT; LARCENY, 3; LIEN, 2, 3, 7; NAME; PAUPER; PLEADING; PLEDGE, 2, 4; POOR DEBTOR; PROMISSORY NOTE, 2; QUIETING TITLE; RAILROAD, 2-7; RECORD; REPLEVIN; SLANDER; STAMP; TRESPASS; TRUST, 1, 3; TRUSTEE PROCESS; WAY, 2; WITNESS; WRIT OF ENTRY, 1, 2.

PRESUMPTION.

See HUSBAND AND WIFE, 1, 2; INTOXICATING LIQUORS, 11.

PRINCIPAL AND AGENT.

An agent who has settled with his principal an account in which he has credited himself with the amount of a debt, owed by the principal, as having been paid by himself to the creditor, is liable therefor to the creditor on a count for money had and received. *Putnam v. Field*, 556.

See ATTORNEY AND COUNSEL; BROKER; DEED, 2; HUSBAND AND WIFE, 4; INFANT; INSURANCE, 1-4; LANDLORD AND TENANT; MASTER AND SERVANT.

PRINCIPAL AND SURETY.

See BOND.

PRIVILEGED COMMUNICATION.

See EVIDENCE, 20.

PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR, 1, 2.

PROMISSORY NOTE.

1. Promissory notes given by a debtor to his creditor for twice the amount really due, for the purpose of enabling that creditor to obtain a larger dividend under a composition deed between the debtor and all his creditors, are void as between the parties to them. *Sternburg v. Bosman*, 325.
2. On the trial of an action on a promissory note in which all the evidence was addressed to the issue whether the note was a forgery, and no other issue was directly raised or investigated, the judge refused as inapplicable a request of the defendant for instructions to the jury on the measure of damages in event that they should be satisfied that the note was genuine but given for too large a sum by fraud or mistake. *Held*, that the defendant had no ground of exception. *Wetherbee v. Norris*, 565.

See EVIDENCE, 20; HUSBAND AND WIFE, 4; PLEADING, 3; STAMP;
USURY; WITNESS, 2, 3.

PROXIMATE CAUSE.

See NEGLIGENCE, 1; RAILROAD, 8.

PUNCHARD FREE SCHOOL.

See SCHOOL, 2.

QUIETING TITLE.

On a petition under the Gen. Sta. c. 134, §§ 49, 50, to quiet the title to land, the respondents answered, claiming title, and a decree was made for them to bring an action in the superior court "to try their title" to the premises, "and that the same be duly prosecuted to final judgment." They thereupon brought such an action; but, when it came on for trial, they produced no evidence, the superior court ordered a nonsuit, and they alleged no exceptions. *Held*, that the respondents had disobeyed the lawful order of the court, and the petitioners were entitled to a further decree that the respondents "be forever debarred and estopped from having or claiming any right or title, adverse to the petitioners," in the land. *Silbee v. Salem*, 144.

QUO WARRANTO.

See INFORMATION; WATERWORKS, 1.

RAILROAD.

1. A statute requiring a railroad corporation, whose charter, under the Rev. Sta. c. 44, § 23, (Gen. Sta. c. 68, § 41,) is subject to amendment, alteration or repeal at the pleasure of the legislature, to erect a station-house at a place on its road and cause trains to stop there, is not in violation of the Constitution of the United States, as impairing the obligation of a contract; and may require the station-house to be reasonably commodious in the judgment of commissioners to be appointed by this court. *Commonwealth v. Keere v Eastern Railroad Co.* 254.

1. In estimating, under the Gen. Sta. c. 63, § 21, the damages occasioned to the owner of a messuage by taking part of his land for a railroad, depreciation in value of his estate, arising from the proximity of the road and running of the trains, is to be considered so far, and only so far, as it is due to proximity caused by, and would not have resulted but for, such taking *Walker v. Old Colony & Newport Railway Co.* 10.
2. The turning of surface water upon land by a railroad embankment is a proper element in the estimation, under the Gen. Sta. c. 63, § 21, of damages occasioned to the landowner by the construction of the railroad. *Ib.*
4. A road across one's own land is not a "private way" within the meaning of the Gen. Sta. c. 63, § 28, requiring application to be made within a year for damages for the obstruction of a private way by a railroad corporation. *Presbrey v. Old Colony & Newport Railway Co.* 1.
5. In assessing, under the Gen. Sta. c. 63, § 21, the damages occasioned to land by the location of a railroad across it, they are to be assessed on the basis that the landowner has no right to cross the railroad; unless the railroad corporation has secured him such a right under §§ 40, 64-66. *Ib.*
6. In assessing, under the Gen. Sta. c. 63, § 21, the damages occasioned to a vacant tract of land by the location of a railroad which cuts off a corner of it, the depreciation of the land in value by reason of the proximity of the railroad, such as by "frightening horses and the like causes," does not constitute, of itself, a ground for recovery. *Ib.*
7. At a hearing by a sheriff's jury to assess the damages caused to a vacant tract of land by the location of a railroad across it, evidence is not admissible to show the sum paid by the railroad corporation to the owners of an adjoining estate, when it appears that it was paid as a gross sum, not only for land taken, but also for damages to the entire estate, on which was a dwelling-house near the railroad and a well within the location of the railroad, and through which the railroad was carried on a high embankment. *Ib.*
8. A fire, set by sparks from a locomotive engine of a railroad corporation to wood piled against a freight-house at the railroad station in a village, consumed the freight-house, and spread to and injured the station-house, which was thirty feet distant from the freight-house. A dwelling-house, about sixteen hundred feet distant from the station-house, and seven hundred and forty feet from the railroad track, caught fire from sparks wafted through the air by the wind to its roof from this conflagration, and was injured. *Held*, that the railroad corporation was liable for the injury, under the Gen. Sta. c. 63, § 101. *Safford v. Boston & Maine Railroad*, 583.
9. In an action against a railroad corporation for a personal injury, it appeared that the plaintiff was a passenger on the defendants' cars, and alighted from the cars at night, at a station of the defendants, on one of two platforms extending along each side of the track to a highway, (which, as the plaintiff knew, crossed the railroad,) and having a step at the end next the highway; that, instead of walking along the platform, he voluntarily stepped from it,

with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle-guard dug across the track, and was injured; that the night was so dark that he felt with his feet to find the edge of the platform; and that he did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover. *Forsyth v. Boston & Albany Railroad Co.* 510.

See BRIDGE, 2.

RATIFICATION.

See BROKER, 1.

RECEIVING STOLEN GOODS.

See EVIDENCE, 4; EXCEPTIONS, 6; INDICTMENT, 4, 5.

RECOGNIZANCE.

See BOND; POOR DEBTOR, 2.

RECORD.

1. The mode of authenticating records of the courts of other states prescribed by the U. S. Sts. of 1790, c. 11, and 1804, c. 56, is not exclusive; and, under the Gen. Sta. c. 131, § 61, a copy of the record of the court of a territory may be introduced in evidence, although it does not bear the certificate of the judge that the clerk's attestation thereto is in due form. *Kingman v. Cowles*, 283.

2. Under the Gen. Sta. c. 131, § 61, a copy of the record of a court of a territory, bearing the seal of the court and the certificate of the clerk, is admissible in evidence, although the certificate does not state that the clerk has custody of the records. *Id.*

See BURIAL GROUND, 1; COMPLAINT, 4; DEED, 3.

RENT.

If the owner of land leased for a rent payable quarterly dies between two quarter-days and devises the land to trustees "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to A. during her life, and on A.'s death the capital to B., the rent which falls due on the quarter-day next after the death is not apportionable between the income and capital of the fund, but goes to the life tenant. *Sohier v. Eldredge*, 345.

See PLEADING, 2; WRIT OF ENTRY, 3, 4.

REPAIRS.

See LIEN, 4; TRUST, 2.

REPEAL.

See INTOXICATING LIQUORS, 4; MILE.

REPLEVIN.

1. When the verdict in replevin is for the defendant upon an issue of the right of possession, the burden of proof is on the plaintiff to show that a return should not be ordered. *Barry v. O'Brien*, 520.
2. At the trial of an action of replevin the plaintiff contended that he owned the goods replevied, had allowed the defendant to keep them until demanded, and had demanded them. The defendant contended that he himself was the owner. The jury found for the defendant on the ground that the plaintiff had made no demand, but did not pass upon the question of title *Held*, that the defendant was entitled to a return. *Id.*

See MORTGAGE, 4.

REPLICATION.

See PLEADING, IV.

RESCISSION.

See CONTRACT, VII.

RESTRAINT OF TRADE.

See CONTRACT, 2.

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See ATTORNEY AND COUNSEL, 1.

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SALE.

1. An engine was built by A. for B. under a contract which provided that it should be paid for as the work on it progressed, reserving a margin of twenty per cent. until it should be "started in a satisfactory manner;" that it should be delivered at B.'s dock, and transported at B.'s expense to his works; that B. should prepare a foundation for it, and add to it materials and work of his own; and that A. should be required to furnish at B.'s works only the skilled labor required to set it up and start it. The engine was delivered at the wharf, transported to the works, and the whole price paid except the twenty per cent., when it was attached as the property of A. *Held*, that the title to it had passed to B. as against A. and his creditors *Mount Hope Iron Co. v. Buffinton*, 62.

2. One who agreed to sell "Manila sugar" to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation or warranty, recover the agreed price, though the article delivered contained more impurities than sugar known under that name usually does. *Gossler v. Eagle Sugar Refinery*, 331.
 3. The plaintiff in New York wrote to the defendants in Boston, offering to sell them coal, and stating that he had a vessel of 375 tons which he could load "on Monday." The defendants telegraphed in reply, on the Monday next after the date of the letter, "Ship that cargo 375 tons immediately." The plaintiff did not begin to load till nine days afterwards, and then shipped a cargo of 392 tons. *Held*, that the defendants were not bound to take it. *Rommel v. Wingate*, 327.
 4. In an action for the price of land, in which the defendant set up as a defence that the land conveyed to him was not that which he agreed to purchase, the judge instructed the jury that "if the defendant was negotiating for one thing and the plaintiff was selling another, and their minds did not agree as to the subject matter, they could not be said to have agreed and made a contract, although there was no fraud on the part of the plaintiff," and that "mistake alone, if proved, was a good defence." *Held*, that the plaintiff had no ground of exception. *Kyle v. Kavanagh*, 356.
- See ACTION; BROKER; CONTRACT, 2, 3, 5; EQUITY, 4, 5; EVIDENCE, 16, 17; FRAUDULENT REPRESENTATIONS, 1, 2, 4, 5; GAMING, 1; INTOXICATING LIQUORS, 3, 4, 8-12; JURISDICTION; LORD'S DAY; PLEADING, 1; TRUST, 3.

SALEM, CITY OF.

See WATERWORKS.

SCHOOL.

1. A town has no authority independently of statute law; nor, under the eighteenth article of amendment of the Constitution of the Commonwealth, can take authority by statute; to raise by taxation and appropriate money to support a school, as a public school, which is founded by a charitable bequest that vests the order and superintendence of it in trustees, who, though a majority of them are to be chosen by the inhabitants of the town, yet are limited to be members of certain religious societies. *Jenkins v. Andover*, 94.
2. The St. of 1869, c. 396, is unconstitutional and invalid, so far as it purports to authorize the town of Andover to raise by taxation and appropriate money to aid the trustees of the Punchard Free School to build a school-house "to be used and occupied in place of a high school for said town," and to aid in defraying the annual expenses of said school. *Id.*
3. Towns and cities are not authorized by law to open their schools to children whose parents or guardians reside in another state; and, if they do so, no promise, expressed or implied, of the parents or guardians, to pay for the tuition, can be enforced. *Haverhill v. Gale*, 104.
4. The provisions of the Gen. Sta. c. 41, § 1, that, with the consent of the school committee first obtained, children between certain ages may attend

school in towns or cities other than those where their parents or guardians reside, apply only to children whose parents or guardians reside in Massachusetts. *Id.*

SCIRE FACIAS.

See MANUFACTURING CORPORATION.

SEAMAN.

See SHIPPING.

SEARCHWARRANT.

See COMPLAINT, 3; GAMING; INTOXICATING LIQUORS, 5, 6; MUNICIPAL COURT OF BOSTON, 3.

SENTENCE.

See LARCENY, 3.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

See LANDLORD AND TENANT; LIEN, 3; POOR DEBTOR, 1.

SHIPPING.

A provision, in shipping articles for a whaling voyage, that if any officer or seaman shall be judged by the master incompetent or indisposed to the proper discharge of the duties of his station, the master may "displace him and substitute another in his stead," and that a corresponding reduction of the lay of such officer or seaman, with reference to the duty which he may afterwards perform, shall thenceforth take effect, does not authorize the master to discharge from the vessel one who has shipped under these articles as second mate; and the effect of such a provision cannot be varied by evidence of a usage in the whaling trade never to disrate an officer to a seaman, but, when the necessity for displacing him occurs, to discharge him from the vessel. *Potter v. Smith*, 68.

See ACTION, 1; FRAUDULENT REPRESENTATIONS, 4, 5; INSURANCE, 8, 9; LIEN, 1-5; PILOT.

SLANDER.

A count in a declaration for slander alleged that B., the plaintiff, owned a certain building and the goods therein; that the building and goods were insured and burned; and that, after the burning, the defendant, "speaking with reference thereto," and knowing of the insurance, accused the plaintiff of the crime of wilfully burning the building and goods with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: "B. burned the store." Another count alleged that the plaintiff petitioned to be and was adjudged a bankrupt; and that the defendant accused the plaintiff of the crime of disposing, otherwise than in *bond fide* transactions, within

three months before his petition, and for the purpose of defrauding his creditors, of goods bought by him and unpaid for, attempting to account for them by fictitious losses, and doing acts in violation of the bankrupt act, by words spoken of the plaintiff during the pendency of the bankruptcy proceedings, substantially as follows: "B. burned the store;" "the defendant thereby referring" to the burning "referred to in the preceding count," whereby certain accounts and papers relating to the plaintiff's business were destroyed. *Held*, that both counts were bad, because they did not sufficiently show that any crime was imputed to the plaintiff by the words spoken. *Brettun v. Anthony*, 37.

SPECIFIC PERFORMANCE.

Specific performance will not be decreed of an agreement to renew a lease which provides that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," if the assignee of the lease has allowed the premises to be used as a boarding-house, although the lessor has consented to his using them for sleeping-rooms in connection with a girls' school. *Gannett v. Albree*, 372.

SPIRITUOUS AND INTOXICATING LIQUORS.

See INTOXICATING LIQUORS.

STAMP.

In an action on a promissory note, duly stamped, which is barred by a discharge in insolvency, letters from the defendant may be put in evidence as containing new promises to pay the note, although they are unstamped. *Cook v. Shearman*, 21.

See PLEADING, 3.

STATUTE.

See BRIDGE, 1, 3-6; DIVORCE, 1; FISHERY: INTOXICATING LIQUORS, 4, 5; MILK; RAILROAD, 1; RECORD, 1; SCHOOL, 2; USURY, 1, 5

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STOCKJOBING.

See **BROKER, 3.**

SUNDAY.

See **LORD'S DAY.**

SURETY.

See **BOND.**

TAX.

1. Income derived from dealings in merchandise is not "derived from property subject to taxation," within the meaning of the Gen. Sts. c. 11, § 4. *Wilcox v. County Commissioners*, 544.
2. A merchant's income from his business is taxable under the Gen. Sts. c. 11, § 4, though he is taxed also on his stock in trade. *Ib.*
3. Persons not residing in a town, and having therein no store, shop or wharf, are not subject to taxation there by reason of there hiring a yard in which they keep and sometimes sell lumber and have put up a small building for the convenience of men employed by them. *Loud v. Charlestown*, 278.
4. In defence to an action by a town for a tax assessed on the defendant by persons chosen, sworn and acting as the plaintiffs' assessors, it is not open to the defendant to impeach the validity of their election on the ground of an omission to use the check-list in the balloting. *Sudbury v. Heard*, 543.

See **DUTY; MORTGAGE, 3; SCHOOL, 1, 2; WATERWORKS.**

TENANT IN COMMON.

See **EQUITY, 4; MORTGAGE, 1; TRUST, 5.**

TIME.

See **BASTARDY PROCESS, 1; BROKER, 1; EQUITY, 5; EVIDENCE, 9, 10, 12; EXCEPTIONS, 7, 8; FRAUDULENT REPRESENTATIONS, 8; INDICTMENT, 5; INSOLVENT DEBTOR, 1; INSURANCE, 6, 9; INTOXICATING LIQUORS, 2, 3; JUDGMENT; LIEN, 2, 6; LIMITATIONS, STATUTE OF; LORD'S DAY; MORTGAGE, 2.**

TOWN.

This court has not jurisdiction to restrain or regulate the proceedings of towns in granting and voting, under the Gen. Sta. c. 18, § 10, such sums as they judge necessary for burial grounds. *Jenkins v. Andover*, 94.

See BRIDGE, 1, 3-7; BURIAL GROUND; COUNTY COMMISSIONERS; EQUITY, 2, 3; EVIDENCE, 12, 13; FISHERY; INFORMATION; PAUPER; SCHOOL; TAX; WATERWORKS; WAY.

TRAVELLER.

See EVIDENCE, 12, 13; WAY, 3.

TRESPASS.

1. A mortgagee, out of possession and without a right to possession, cannot maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger for breaking and entering the mortgaged premises. *Gooding v. Shea*, 360.
2. In an action of tort, the declaration alleged that the plaintiff was third mortgagee of a house; that the defendant forcibly entered the house and removed fixtures; and that by reason thereof the plaintiff's security was impaired. At the trial, it appeared that the plaintiff was out of possession, and had not the right of possession, and there had never been a breach of the condition of his mortgage; and that, since the alleged tort, he had bought in the second mortgage; and it did not appear that the first mortgagee had ever made any demand on the defendant, or authorized him to resist the plaintiff's suit. *Held*, that the plaintiff could recover the full amount of the damages caused to the estate by the removal of the fixtures, without regard to the sufficiency of his security, and although the mortgagor had sued the defendant for the same acts. *Id.*

See WITNESS, 5.

TROVER.

See ACTION; ATTACHMENT; DAMAGES, 1; INTOXICATING LIQUORS, 13; PLEADING, 1; PLEDGE, 2.

TRUST.

1. A testator, who died in June 1867, by his will directed that certain United States bonds in his possession should be sold, as soon as might be after his decease, and the avails paid over to a trustee, in trust to pay the interest thereof to L. during her life, and the principal at her death to her children. Attached to the bonds were coupons for interest, payable semiannually in May and November. The executor collected and retained the amount of the coupons which fell due in November 1867, May and November 1868 and May 1869; and in October 1869 sold the bonds with the coupons then not fully due attached, and paid the avails to the trustee. The delay in the sale was caused by adverse claims, and not by any fault of the executor or bene-

- fiduciaries. On a bill in equity by the executor, for instructions, against L. and the children, *Held*, that the amount of the four coupons collected by the executor was payable as income to L., after deducting therefrom the costs of all parties as between solicitor and client. *Sargent v. Sargent*, 297.
3. A fund, consisting partly of two wharves out of repair, was devised to trustees "to receive and collect the income and produce thereof, and after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to A. during her life, and on A.'s death the capital to B.; with "full power and authority" to the trustees "to invest, reinvest and change any and all property of which the trust premises shall be at any time composed, in such manner as they may deem most beneficial for the parties interested in the fund." *Held*, that the trustees had power to invest capital of the fund in repairing and reconstructing the wharves in such a manner as to increase their value to the full extent of the amount expended. *Sohier v. Eldredge*, 345.
 3. A testator gave all his estate to a trustee and his heirs, in trust to pay annually, out of the rents and profits, \$250 to the testator's wife, and, on the happening of a contingency, to convey the estate to the testator's son, for his use during his life, and after his death to his heirs in fee, the said son or his heirs securing to the testator's wife the \$250 a year during her life. On the petition of the widow, under the Gen. Sta. c. 100, and the St. of 1864, c. 168, for a sale of the real estate devised, filed after the contingency had happened, *Held*, that the son was entitled to elect whether he would take the estate on the condition imposed; that if he did take it, the court had no authority to order a sale; that if he did not take it, the court had authority to order the sale, but notice of the petition must be given to the trustee. *Hidden v. Hidden*, 59.
 4. A letter from A. to B., saying "I intend to settle up our affairs and give up your deeds that you intrusted me with," is not sufficient to establish a trust in B.'s favor in land which had been conveyed to A. by B. and others. *Blodgett v. Hildreth*, 484.
 5. Oral evidence that a conveyance of land by a quitclaim deed in the usual form from A., B. and C., tenants in common thereof, to D., the other tenant in common, was made in pursuance of an agreement between the parties, that, in consideration of certain payments made and to be made by A., the land should be held by D. in trust for A., is admissible and sufficient, even after the death of all the tenants in common, to establish an implied trust in A.'s favor in the shares conveyed by B. and C., but not in the share conveyed by A. himself, nor in the share of D. *Id.*
- See CONTRACT, 5; DEVISE AND LEGACY; DUTY; RENT; WITNESS, 4.

TRUSTEE PROCESS.

1. A debtor, who has deposited the amount of his debt in a bank, subject to his own order, may be summoned and charged as trustee of his creditors.

although he made the deposit at their request, and on their agreement that he should incur no responsibility therefor. *Hancock v. Colyer*, 896.

2. A person having funds of L. R. in his hands may be charged as trustee in an action brought originally against S. R., but after the trustee's answer, changed by amendment into an action against "S. R., otherwise called L. R.;" and the liability of the trustee is not affected by an assignment made by the defendant since the service of the writ and before such amendment. *Vermilyea v. Roberts*, 410.

UNITED STATES BONDS.

See PARTNERSHIP, 1.

USAGE.

See BROKER, 1; MONEY HAD AND RECEIVED; SHIPPING.

USURY.

1. The St. of 1863, c. 242, does not preclude the defence of usury in an action on a bill of exchange, if the holder was a party to the usury. *Akers v. De-mond*, 818.
2. In an action on a bill of exchange, in which the defence of usury is set up, conversations between the drawer and first indorser are competent evidence, so far as they relate to and form part of the transactions of indorsing and negotiating the bill and disposing of the proceeds. *Ib.*
3. In an action on a bill of exchange, the admission of the holder that he discounted it at a usurious rate is competent evidence, although made at an interview had for the purpose of an adjustment. *Ib.*
4. Bills of exchange, drawn in New York and payable in this Commonwealth, accepted and indorsed for the accommodation of the drawer, were, at the request of the indorser, discounted in New York by the plaintiffs at a rate of interest greater than was at the time lawful by the laws of New York or of this Commonwealth. Part of the proceeds was paid to the drawer, and the rest was lent by him to the indorser. *Held*, that as by the law of New York the bills were void in the hands of the plaintiffs, they could not recover against the acceptor, even if he held property of the drawer as collateral security. *Ib.*
5. If interest at a greater annual rate than six per cent., in accordance with the terms of a contract made before the repeal of the usury laws by the St. of 1867, c. 56, is voluntarily paid after such repeal, no action can be maintained on the Gen. Sta. c. 53, §§ 4, 5, to recover threefold the amount paid, or the amount itself, although the St. of 1867 provides that such repeal "shall not affect any existing contract, or action pending, or existing right of action." *Seavey v. Moors*, 817.

See WITNESS, 3.

VARIANCE.

See FRAUDULENT REPRESENTATIONS, 2; INDICTMENT, 2-5; NAME;
PLEADING, 3.

VENDOR AND PURCHASER.

See CONTRACT, 3; SALE, 4.

VENUE.

See COMPLAINT, 1; EXCEPTIONS, 9; LIEN, 1.

VERDICT.

See INDICTMENT, 6-8; LARCENY, 3; WAY, 1, 2; WRIT OF ENTRY, 2.

VESTED INTEREST.

See DEED, 2; DEVISE AND LEGACY, 3.

WAIVER.

Payment for work done is not, of itself and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work. *Moulton v. McOwen*, 587.

See ATTACHMENT; EXCEPTIONS, 10; INSURANCE, 4, 5; MORTGAGE, 2.

WARD.

See GUARDIAN AND WARD.

WARRANT.

See SEARCHWARRANT.

WARRANTY.

See CONTRACT, 3; INSURANCE, 8; LORD'S DAY; SALE, 2.

WATER AND WATERCOURSE.

See BRIDGE, 2; DEED, 1; EVIDENCE, 15; RAILROAD, 3; WATERWORKS.

WATERWORKS.

1. In disregard of the provision of the St. of 1864, c. 268, § 13, that the city council of Salem should establish such rates for the use of water introduced into the city under that statute "as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest and not less than one per cent. of the principal of" the debt contracted by the city in building the waterworks, the city council, with intent to distribute the water free, and tax the property and polls of the inhabitants to maintain the waterworks and pay said interest and percentage, established water rates merely nominal. *Held*, that this was not a grievance remediable upon an information in the nature of a *quo warranto*, or upon a bill in equity filed in the name of the attorney general. *Attorney General v. Salem*, 138.
2. In disregard of the provisions of the St. of 1864, c. 268, § 13, that the city council of Salem should establish such rates for the use of water introduced into the city under that statute as to provide annually, if practicable, from

the net income thereof, for paying the interest and part of the principal of the water loan; and with the purpose of distributing the water free, and raising by illegal taxation money to maintain the waterworks and meet the liabilities above named; the city council established water rates merely nominal, and the water commissioners made contracts to supply the water at nominal prices. *Held*, that this court had no jurisdiction in equity to remedy this grievance upon the suit or petition of individual inhabitants of the city *Carlton v. Salem*, 141.

WAY.

1. It is no objection to the verdict of a jury summoned under the Gen. Sts. c. 43, § 73, on the petition of the owner of land taken for a town way praying for an alteration of the way on his land, that the alteration prayed for and granted will lessen the width of the way. *Wilson v. Beverly*, 136.
2. In construing the verdict of a jury summoned on petition under the Gen. Sts. c. 43, § 73, reference may be had to the petition and to the legal limitations of the authority of the jury. *Ib.*
3. In an action against a town for an injury from a defect in the highway, the plaintiff testified that she was driving a steady and gentle horse, which she was accustomed to drive, over a road with which she was acquainted, and down a hill about a quarter of a mile long, on which there were several water-bars, over which she knew that the horse could not trot in safety; that, thinking that she had passed them all, she allowed the horse to trot, having a rein in each of her hands, looking at the horse, keeping control of him, and having the wheels of her carriage in the regular ruts; but that she was mistaken in supposing that she had passed all the bars, and came upon a bar, which she did not see, and which overturned the carriage and caused the injury. *Held*, that this was some evidence for the jury that she was in the exercise of due care. *Blood v. Tyngsborough*, 509.

See BRIDGE; BURIAL GROUND, 6; CONTRACT, 4; COUNTY COMMISSIONERS; EVIDENCE, 12, 13; RAILROAD, 4, 5.

WIDOW.

See HUSBAND AND WIFE, 2, 3; WRIT OF ENTRY, 3.

WIFE.

See HUSBAND AND WIFE.

WILL.

See DEVISE AND LEGACY; FRAUDS, STATUTE OF.

WITNESS.

1. The Commonwealth is not barred from prosecuting a person for a crime, by the fact that he has confessed his guilt while testifying as a witness, without express promise of protection by any one, on the prosecution of another person for participation in the same crime or some other growing out of or connected with it, before some magistrate whose court was not attended by

- a public prosecutor, or before the grand jury without request of the district attorney. *Commonwealth v. Brown*, 422.
2. In an action by an indorsee against the maker of a promissory note, the payee of which is dead, the defendant is incompetent to testify in his own favor, under the Gen. Sts. c. 131, § 14. *Whited v. Wood*, 563.
 3. In an action on a bill of exchange, the drawer and indorser are competent witnesses to show usury to which the holder was a party. *Akers v. Demond*, 318.
 4. A conveyed land to a trustee, to hold in trust for A. during his life, then for B during his life, and on B.'s death to convey to B.'s heirs. After A.'s death, his heirs brought writs of entry for the land against the trustee, who was defaulted, and the demandants had judgment and execution for possession. Held, in a suit in equity brought, after B.'s death, by his heirs, against the trustee, that, on an issue whether the judgment was procured by the collusion of the trustee, he was a competent witness, under the St. of 1864, c. 304, § 1, to prove statements made by himself and by B. to the counsel whom he retained in the writs of entry, to the effect that A. made the conveyance while insane and under the undue influence of B., and also to prove that the counsel advised him that he had no defence. *Brooks v. Tarbell*, 496.
 5. In an action for breaking and entering the plaintiff's dwelling-house and using abusive language and insulting his wife in his absence, she is not a competent witness under the St. of 1865, c. 207, § 2, to the defendants' acts. *Bunker v. Bennett*, 516.
 6. When on a trial the credibility of a witness is sought to be impeached by evidence of his reputation for truth and veracity, it is within the discretion of the presiding judge to require the impeaching witnesses to be first asked whether they know the reputation of the witness in that respect. *Weatherbee v. Norris*, 565.

See ATTORNEY AND COUNSEL, 3; BASTARDY PROCESS, 4; DEPOSITION, 1, 3
EVIDENCE, 1, 2, 5, 6, 8, 18, 19; EXCEPTIONS, 2, 3.

WORDS.

- "Actual cash payment." See *Haggerty v. Foster*, 19.
- "Adjoining land." See *Balch v. County Commissioners*, 116.
- "Agree to let." See *McGrath v. Boston*, 371.
- "At sea." See *Washington Insurance Co. v. White*, 241.
- "Boarding-house." See *Gannett v. Albee*, 374.
- "Burial ground." See *Jenkins v. Andover*, 104.
- "Cargo." See *Thwing v. Great Western Insurance Co.* 406.
- "Cemetery." See *Jenkins v. Andover*, 104.
- "Children." See *Bigelow v. Morong*, 289.
- "Clear annual value." See *Marsh v. Hammond*, 145.
- "Common schools." See *Jenkins v. Andover*, 98.
- "Communicated." See *Safford v. Boston & Maine Railroad*, 584-586.
- "Company." See *Ryder v. Wilcox*, 28.

- "Construction or repairs." See *Donnell v. The Starlight*, 232.
- "Containing by estimation." See *Tarbell v. Bowman*, 344.
- "Culpable neglect." See *Sykes v. Meacham*, 287.
- "Default." See *Sweeney v. Gillooly*, 550.
- "Displace." See *Potter v. Smith*, 69.
- "Disproportionate and unreasonable." See *Dow v. Wakefield*, 272.
- "Dunnage." See *Thwing v. Great Western Insurance Co.* 406.
- "During their lives." See *Dow v. Doyle*, 491.
- "Exposed to the danger of fire." See *Safford v. Boston & Maine Railroad*, 584.
- "Full time child." See *Young v. Makepeace*, 53.
- "Good title." See *Kyle v. Kavanagh*, 358, 359.
- "Grammar schools." See *Jenkins v. Andover*, 97.
- "Income and produce." See *Sohier v. Eldredge*, 350.
- "Issue." See *Bigelow v. Morong*, 289.
- "Load." See *Thwing v. Great Western Insurance Co.* 405.
- "Located." See *Middlesex Railroad Co. v. Wakefield*, 263.
- "More or less." See *Tarbell v. Bowman*, 344.
- "On a passage." See *Washington Insurance Co. v. White*, 241, 242.
- "Parties." See *Parker v. Parker*, 172, 173.
- "Port of destination." See *Washington Insurance Co. v. White*, 241.
- "Prevailing party." See *Woolson v. Boston & Worcester Railroad Co.* 581.
- "Private dwelling." See *Gannett v. Albree*, 374.
- "Private way." See *Presbrey v. Old Colony & Newport Railway Co.* 4.
- "Profession, trade or employment." See *Wilcox v. County Commissioners*, 545.
- "Property subject to taxation." See *Wilcox v. County Commissioners*, 545.
- "Public or objectionable purpose." See *Gannett v. Albree*, 374.
- "Public schools." See *Jenkins v. Andover*, 97, 99, 100.
- "Recovery." See *Wenham v. Essex*, 117.
- "Relative proportion." See *Commonwealth v. Newburyport*, 124.
- "Report to the court." See *Attorney General v. Charlestown*, 277.
- "Stand committed." See *Young v. Makepeace*, 57.
- "Stock in trade." See *Wilcox v. County Commissioners*, 545.
- "Substantially identical." See *Commonwealth v. Stone*, 421.
- "Sufficient." See *Commonwealth v. Lawless*, 431.
- "Tonnage." See *Thwing v. Great Western Insurance Co.* 405.
- "Town schools." See *Jenkins v. Andover*, 98, 99.
- "Up on its route." See *Safford v. Boston & Maine Railroad*, 584, 586.

WRIT.

See JUSTICE OF THE PEACE.

WRIT OF ENTRY.

1. On a writ of entry under the Gen. Sta. c. 103, § 48, to recover an undivided portion of a parcel of land, set off to the demandant by levy of an execution

thereon under § 10, it is discretionary with the court to permit an amendment of the return of the levy so as to recite that the parcel could not be divided without damage to the whole, which was more than sufficient to satisfy the execution. *McCormick v. Carroll*, 151.

2. On the trial of a writ of entry brought in the superior court under the Gen. Sts. c. 103, § 48, to recover an undivided portion of a parcel of land, set off to the demandant by levy of an execution thereon under § 10, the return of which omitted to recite that the parcel could not be divided without damage to the whole, the judge ruled that the levy was invalid by reason of the omission, directed a verdict for the tenant, and reported the ruling to this court, together with a motion of the demandant, made after the verdict, for an amendment of the levy. *Held*, that the questions whether the verdict should be set aside, and the levy amended, should be heard and decided in the superior court before a decision in this court on the ruling made at the trial. *Ib.*
3. If a message recovered on a writ of entry was, at and after the time when the demandant's title accrued, subject to a right of homestead in the demandant's grantor and his family, and occupied in part by such grantor's wife under a claim of the homestead right without the same being set off, the rentable value of that part during her said occupation is not to be included in estimating, under the Gen. Sts. c. 134, § 15, "the clear annual value of the premises" for which the tenant in the action is liable as rents and profits. *Marsh v. Hammond*, 146.
4. Land demanded on a writ of entry was subject to a lease and a mortgage when the demandant's title accrued. The demandant forbade the lessee to pay rent to the tenant in the action; and the lessee refused to do so. The mortgagee entered for the purpose of foreclosure and advertised the land for sale under a power in his deed. The demandant and the lessee thereupon agreed with him that if he would not proceed with the sale the rents should be paid to him; and he withdrew the advertisement. The lessee remained in occupation, but paid no rent to any one; and the demandant, after recovering judgment, sold the land to him, subject to the mortgage, for a sum which he paid "in full for all rent or other claims upon him for the occupation" of the land. *Held*, that the demandant was estopped to recover damages for the rents and profits of the land from the tenant in the action. *Ib.*

See EXECUTION; MORTGAGE, 2; QUITTING TITLE.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. CL.

Page 110, 14th line from top. Substitute "published" for "pupliated."

VOL. CIL.

- Page 186, 1st line of headnote. }
" 643, 1st line of PROBATE COURT, 1. } Substitute "amount" for "averment."
" 192, 17th line from the bottom. } Substitute "Massachusetts" for "our courts."
" 533, 6th line from bottom. }
" 542, top line. } Substitute "Gen. Sta. c. 181, § 14" for "St.
" 656, 2d and 3d lines of WICKHAM, 1. } of 1863, c. 207, § 2."

MASSACHUSETTS REPORTS

104

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

JANUARY — SEPTEMBER 1870

ALBERT G. BROWNE, JR.
REPORTER



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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.

HON. HORACE GRAY, JR.

HON. JOHN WELLS.

HON. JAMES D. COLT.

HON. SETH AMES.

HON. MARCUS MORTON.

ATTORNEY GENERAL,
HON. CHARLES ALLEN.

**The Reporter was assisted by Mr. JOHN C. GRAY, JR., of the
Suffolk Bar, in the preparation of this volume.**

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,

JANUARY TERM 1870, AT BOSTON.

[CONTINUED FROM VOL. CIII.]

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE. HON. HORACE GRAY, JR., HON. JOHN WELLS, HON. JAMES D. COLT, HON. SETH AMES, HON. MARCUS MORTON,	}	JUSTICES.
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MIDDLESEX COUNTY.

PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER vs.
NASHUA AND LOWELL RAILROAD COMPANY.

A specification of nontenure and disclaimer, pleaded with the general issue, to a writ of entry, is falsified by proof of occupation of the demanded premises by the tenant with a permanent building, although such occupation is by a mistake of boundary and without intention to disseise.

The misappropriation by a railroad corporation of land taken by right of eminent domain for the location of the railroad cannot be set up as working a forfeiture of the franchise on a writ of entry brought by the owner of the fee; but the demandant may maintain the writ to establish his right in the land and recover damages or mesne profits for the unauthorized use of it.

The surrender by a railroad corporation into the exclusive use and occupation of private traders or manufacturers for their trade or manufactures, as tenants for rent, of land taken by right of eminent domain for the location of the railroad, and buildings erected thereon

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by the corporation as freight-houses or engine-houses, is a misappropriation of the land, which entitles the owner of the fee to maintain a writ of entry to establish his right therein and recover damages or mesne profits for the unauthorized use of it; although the corporation derives advantages in its freighting business from the carriage of merchandise for the tenants and the receipt and delivery of it at these buildings instead of at the regular station-houses, and the buildings remain adapted to the purposes for which they were erected, and the corporation does not intend to permanently abandon the use of the premises for the railroad.

WRIT OF ENTRY dated June 28, 1869, to recover two lots of and in Lowell, marked respectively A and C on a plan of a large tract of land, which was made part of the agreed facts on which the case was submitted to the determination of the full court, substantially as follows :

The demandants were seised in fee simple of the tract of land, and except as hereinafter stated have not been disseised or dispossessed of any part of it. In 1838, the tenants, by authority of their charter, St. 1836, c. 249, and the general laws relating to railroads, and without the consent of the demandants, filed their location over and took a part of the tract, including the whole of both lots A and C, except a narrow strip forming part of lot A and marked B on the plan, and paid to the demandants damages regularly assessed for the taking, as in such case required by law. No question is made as to the regularity of their proceedings in this location and taking. Across the land thus taken they constructed and have ever since maintained their railroad; but no portion of their road-bed was ever built, or of their tracks ever laid, in either of the lots A and C.

In 1838, the same year in which they took the land, they built upon it a wooden freight-house, which they placed partly on lot A; and they continued to use the building as a freight-house until 1846, when, having established a freight depot elsewhere in Lowell, they ceased to use it in that manner. In 1851 they entered into an agreement with the firm of Blanchard & Coggin, flour and produce dealers, to fit it and lease it to them for a warehouse for that business. Accordingly they changed its position, moving it so that its principal doors, which formerly faced towards the railroad track, were made to face towards a public street, and built an addition to it, and made certain alter

ations in its interior; but "the building, thus altered, was not rendered unfit for a freight-house, but could be used as well for that purpose now as before the alteration." As thus changed in position, the building covered lot A. "In making said alterations, a portion of the building and of the addition thereto was placed outside of the location of the railroad, on other land of the demandants, which is that portion of lot A marked B on the plan; and said building has without consent or license of the demandants continued thereon ever since. When the alterations were completed, in 1851, the railroad corporation leased the building and the land under the same, and necessary to the enjoyment thereof, including the whole of lot A, to Blanchard & Coggin for their private and exclusive use and occupation, for the carrying on therein of their said private business, and have ever since continued and still continue to lease the premises to them and others, persons who have succeeded to the business of Blanchard & Coggin, for their exclusive use and occupation for their said business and trade, and receiving rent of them therefor. And Blanchard & Coggin, and the other persons who succeeded them in their said business, ever since 1851 have under lease thereof from the railroad corporation had and held the exclusive use and occupation of the premises for the carrying on therein of said private business, paying rent therefor to the lessors. And the premises are not, and since 1851 have not been, otherwise used for railroad purposes. Said lease to Blanchard & Coggin and their successors was not in writing." The flour and produce, which Blanchard & Coggin and their successors stored on the premises, were "all brought over the railroad, and a large portion of them unloaded directly from the cars into the building, rendering it unnecessary for the railroad corporation to deposit them in its own freight-house, but the portion not so unloaded is deposited in the freight-house of the railroad corporation." "At the time of the commencement of this action, and for several years before, the premises have been in the exclusive use and occupation of the firm of Page, Kidder & Co., who succeeded Blanchard & Coggin as tenants at will of the railroad corporation and paying as rent therefor \$400 per

year. Before the commencement of this action the demandants demanded of Page, Kidder & Co. the possession of the premises, and they refused to surrender the same." Under date of August 19, 1867, the demandants' agent sent a letter to the railroad corporation, calling attention to the premises as occupied by Page, Kidder & Co., asserting that such use was for a purpose to which the demandants had a right to object, but adding that "they have, however, no desire to interfere with the present use, if their rights can be protected and they can receive a fair share of the income;" to which the agent of the railroad corporation replied that he was instructed by the directors to say that the use to which the premises were put did not seem to them inconsistent with or an infringement on the rights of either party, and that they declined to pay to the demandants any part of the income of the premises, and he added: "In order that it may distinctly appear that your rights are not to be prejudiced by the action of the railroad corporation, I am further instructed to say that the premises in question are held in reserve for railroad use only, it being the intention of the railroad corporation to occupy them for such purposes exclusively; and they hereby disclaim any intention or expectation of acquiring by use and possession any rights therein not secured them either by location or purchase." No notice was ever given to the railroad corporation, before the commencement of this action, that any part of the building was on land outside of the location of the railroad, "and the railroad corporation did not know that fact until after the commencement of the action, the said building, when moved, having been, by mistake and without intending so to do, placed outside of the location, on B; and at the term at which the action was entered the tenants in the action specified nontenure and disclaimer as to said B."

In 1847, nine years after their taking of the demandants' land the tenants built a brick engine-house for their locomotive engines, which covered the whole of lot C, and extended beyond it upon land owned by the tenants and not embraced in the plan. Inside of this building they dug ash-pits and walled them up with brick and mortar, laid a brick floor, built turn

tables, and laid tracks which extended outside of the building and connected with the main tracks of the railroad. In 1860, having previously ceased to use the building as an engine-house, they entered into an agreement with the firm of Cole, Nichols & Wilson, iron-founders, to fit it and lease it to them for a foundry. Accordingly they removed the walls of the ash-pits and filled up the pits, removed the brick floor and the turn-tables and "other fixtures adapting said building to be used as an engine-house," and built an addition to the building for the purpose of adapting it to the use, occupation and business of Cole, Nichols & Wilson; and on April 1, 1861, they gave Cole, Nichols & Wilson a written lease of the premises for five years, at an annual rent of \$400, which stipulated that "said lessees may make alterations at their own expense in the buildings and grounds embraced in this lease, as may be necessary to convert the premises into a foundry." Under this lease, Cole, Nichols & Wilson "took possession of the premises, erected thereon large furnaces for melting iron, and set up other fixtures and machinery therein, usual in iron foundries, and they, the survivors of them, (Wilson being dead,) continued in the exclusive use and possession thereof, as a general iron foundry, for the carrying on therein of their private business and trade of making iron castings, during the whole of the term of said lease; and ever since the expiration of said term the railroad corporation has continued to let by parol the same premises and the exclusive use thereof to said Cole & Nichols, and the latter have, as lessees of the railroad corporation, continued in the exclusive use and occupation of the same for the purpose of their private business aforesaid, paying to their lessors rent therefor; and since 1860 lot C has not otherwise been used or occupied for railroad purposes." "No part of the building which is situated on lot C was altered when leased, or since it was leased, the ash-pits and turn-tables being in that part of the building situated on land owned in fee by the lessors; and no erections or changes have been made in that part of the building situated on the demanded premises, nor is said part of the building used by the lessees for any machinery or other erections. A larg

portion of the materials used by the lessees in their business is brought to them over the railroad and delivered to them at said building without being stored by the railroad corporation; and a small part of the manufactures of the lessees is transported over the railroad, being taken directly from the building without having been stored in any other part of the premises of the railroad corporation before being loaded on the cars. The building could be adapted for railroad purposes at a small expenditure. Before the commencement of this action the demandants demanded of Cole & Nichols possession of said second demanded lot, and Cole & Nichols refused to surrender the same."

It was further agreed that the directors of the railroad corporation "would all testify, if competent for them so to do, that they never intended to permanently abandon the use of the demanded premises for railroad purposes, should the future exigencies of the railroad corporation require the same for such use;" and that "there is nothing to control this testimony except the facts herein stated."

"If upon the above statement of facts the demandants have any cause of action against the railroad corporation or their lessees, or either of them, such judgment is to be rendered in this action against the tenants as the demandants would be entitled to recover upon said facts in any form of action against the tenants or either of their lessees, and the case referred to an auditor to assess the mesne profits or damages; otherwise judgment to be for the tenants."

A. P. Bonney, for the demandants.

J. G. Abbott, for the tenants.

WELLS, J. Under this agreed statement, the form of action and the pleadings become immaterial. But the principles which govern proceedings under a writ of entry are well adapted to test the relations and rights of the parties, in respect to the matters in controversy in this suit.

In regard to that part of the lot first described which is designated as parcel B, the title of the demandants, and their right of immediate possession are admitted. The only question is whether the action may be defeated by the specification of non-

tenure and disclaimer in defence. The defendant corporation has been in the occupation of this parcel, since 1851, by means of a permanent structure placed thereon. That occupation is, in its nature, adverse, and indicates a claim of title. That it was unintentional, and by mistake as to the true line of boundary, does not affect its legal character as a disseisin. When the suit was brought, the demandants were dispossessed; and there has been no restoration of the possession. These facts falsify the plea, and entitle the demandants to a judgment. *Allen v. Holton*, 20 Pick. 458. *Johnson v. Boardman*, 6 Allen, 28.

The other parcels sued for are included within the limits of the location of the railroad. The buildings thereon, which had been previously adapted to the uses of the railroad, were changed so as to adapt them to the purposes of private business, and the trade of merchants. They have been so occupied from that time; being let for rent to tenants "for their exclusive use and occupation for their said business and trade." Although the railroad corporation may derive some advantages in its freighting business, from the carriage of goods for its tenants, and from the receipt and delivery of their goods at these buildings, instead of its own freight-houses, yet we think it would be a distortion of the agreed statement to regard these circumstances as sufficient to qualify the character of the occupation of the buildings, so as to bring it within the range of any purpose for which the corporate franchises were granted.

The demandants contend that this continued appropriation of the buildings is an abandonment of its legal rights by the corporation; and that it has become a mere disseisor; so that the demandants are entitled to resume their title and possession, freed from the servitude.

That property, once taken and held by right of eminent domain, may be abandoned, so as to restore the original owner to his former rights, we are not disposed to question. But the facts here show no such abandonment. On the contrary. the tenant has been in the constant use and control of the property. The erection of the buildings was consistent with a proper enjoyment of the easement. *Worcester v. Western Railroad Co*

4 Met. 564. It did not destroy the easement, nor defeat its exercise, nor indicate an intent to abandon it. *Dyer v. Sanford*, 9 Met. 395, 402. *Hayford v. Spokesfield*, 100 Mass. 491. A misuse, however great the perversion, is not an abandonment. The subsequent unauthorized appropriation of the buildings did not therefore put an end to the right of use for the legitimate purposes of the franchise granted. *Sprague v. Waite*, 17 Pick. 309, 319. An easement does not become merged, or lost, by a disseisin, or a wrongful claim of title against the owner of the servient tenement. *Tyler v. Hammond*, 11 Pick. 193, 220. Besides, the corporation has continued the legitimate exercise of its franchise over so much of the location as is required for the present use and accommodation of its tracks. Its location has not been abandoned; and the right, derived by law from that location, to use any part of the land within its limits, is not such a mere license as will become void *ab initio* by reason of abuse or excess in its exercise. This position of the demandants is therefore not maintained, even if the testimony of the directors of the railroad, offered to negative the intent to abandon, be rejected.

If the misappropriation worked a forfeiture, *pro tanto*, of the franchise originally authorized, or was a sufficient ground for decreeing a forfeiture, that could not be set up collaterally in a suit by a private party. Even in a direct suit for the purpose, a private party cannot obtain a decree of forfeiture, vacating, in whole or in part, a franchise or right held under lawful public authority. Proceedings of that nature are applicable only to an attempt to exercise privileges without lawful authority; and the exclusion thereby obtained extends only to such unlawfully assumed franchise. A public franchise can be forfeited only to the public. *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.* 2 Gray, 1. *Fall River Iron Works Co. v. Old Colony & Fall River Railroad Co.* 5 Allen, 221. *Heard v. Tui-bot*, 7 Gray, 113.

So far, then, as the demandants seek to recover possession and control of the property, as of their former right, their suit must fail. If they can recover any judgment for the land cov-

ered by the location, it must be rendered subject to all the lawful rights of the tenant under the franchises conferred by its charter and the location of its road.

It does not follow that the action cannot be maintained at all. The fee of the land remains in the original owners, notwithstanding the location of the road. It is true that the nature of the use for which the land is taken is such as may require, and therefore authorize, complete possession and control by the railroad corporation. The occupation and use of land which it is entitled to enjoy is declared to be "permanent in its nature, and practically exclusive," in *Hazen v. Boston & Maine Railroad*, 2 Gray, 577, 580. The mode of occupation, and the degree of exclusiveness, necessary or proper for the convenient exercise of its franchises, are within the absolute discretion of the managers of the corporate functions. They are the sole judges of what is proper or convenient as means for attaining the end and performing the service for which the corporate franchises were granted. *Brainard v. Clapp*, 10 Cush. 6. *Boston Gas Light Co. v. Old Colony & Newport Railway Co.* 14 Allen, 444. *Ham v. Salem*, 100 Mass. 350.

But however extensive the right which the corporation thus takes by its location, it is not a fee, nor a freehold estate, but an easement only; not a corporeal interest, but an incorporeal right. Its right of occupation, however exclusive, is incidental only, and as a means of exercising the privileges and performing the functions defined by its charter. See *Boston Water Power Co. v. Boston & Worcester Railroad Co.* 16 Pick. 512, 522; *Weston v. Foster*, 7 Met. 297; *Tucker v. Tower*, 9 Pick. 109; *Harback v. Boston*, 10 Cush. 295. The owner of the fee in land thus subjected to a public easement may maintain an action of trespass or a writ of entry against any one whose entry or acts upon the premises would support the action, unless he can justify under the authority of the party having the easement. Per Sedgwick, J., in *Commonwealth v. Peters*, 2 Mass. 125. *Perley v. Chandler*, 6 Mass. 454. *Robbins v. Borman*, 1 Pick. 122. *Hancock v. Wentworth*, 5 Met. 446.

The title and right of the plaintiffs in this action are therefore sufficient to enable them to maintain their writ of entry. In what manner and to what extent will the rights of the tenant serve to defeat the action, or modify the judgment?

It is manifest that, if the general issue were pleaded, and nothing more, the title to the freehold being thus alone put in issue, the demandants must prevail. But suppose the defendant corporation should disclaim title, and specify the rights and authority under which it held the occupation. This would in effect be equivalent to a plea of special nontenure or special disclaimer. Such a plea, if according to the truth of the case, would be a complete defence to the action. But the demandants may falsify that plea, that is, may show that the party impleaded is, nevertheless, tenant of the freehold. Jackson on Real Actions, 96, 101. *Prescott v. Hutchinson*, 13 Mass. 439. *Creighton v. Proctor*, 12 Cush. 433, 438. *Dolby v. Miller*, 2 Gray, 135. *Johnson v. Phillips*, 13 Gray, 198. Whenever, upon issue joined on such a plea, it is made to appear that the tenant in the action has in fact asserted rights in, or done acts upon, the premises, which are not justified by the special interest or authority relied on, and which from their character imply a claim of title, or require title to the estate itself for their justification, the plea fails. In this respect, the only difference between a general and a special disclaimer or nontenure is in the evidence requisite to falsify the plea and establish a disseisin. Where there is a right which authorizes the party defendant, for certain purposes, to disturb the soil or occupy the land, acts done in apparent conformity therewith, or even of an equivocal nature, will be referred to that special right; although in the absence of such authority the demandant would be entitled to regard the acts as an assertion of title and a disseisin of himself. It is immaterial how great or how limited may be the special interest or authority set up in justification, except as it affects the degree and kind of proof required to show that it has been exceeded, or that it does not apply to or justify the acts done.

In respect to lands taken by railroad corporations, although the discretion of the directors is unlimited, as to the mode and extent of the use or occupation, for the purposes for which the corporation was created, yet it is definitely limited by those purposes. Any uses of the land confessedly for other purposes, or not apparently for purposes permitted by its charter, are not protected by its authority. For such uses the owner may have his redress by any appropriate action.

A turnpike corporation may remove the earth, within the limits of its road, for the purposes of construction or repair, and may erect permanent buildings for a toll-house, with cellar and well. *Tucker v. Tower*, 9 Pick. 109. But it may not even take the herbage for purposes not connected with the exercise of its franchise. *Adams v. Emerson*, 6 Pick. 57. See also *Appleton v. Fullerton*, 1 Gray, 186; *Codman v. Evans*, 1 Allen, 443. A similar distinction, founded on the purpose of the use of a highway, was pointed out in *Stackpole v. Healy*, 16 Mass. 33. So also as to railroads, in respect of liability to taxation. *Worcester v. Western Railroad Co.* 4 Met. 564, 569. The rights of any party having an easement in the lands of another are measured and defined by the purpose and character of that easement. For all purposes consistent with that easement, the right to use the land remains in the owner of the fee. *Atkins v. Boardman*, 2 Met. 457, 467. *Phipps v. Johnson*, 99 Mass. 26. The principle is the same, however extensive the rights conferred by the easement.

In the present case, the occupation of the buildings upon the demanded premises for the general purposes of trade and mechanical or manufacturing business, by lessees having no other connection with the operations or interests of the corporation than as its tenants paying rent; and the conversion of those buildings by the corporation from their original design into private stores or shops for the purpose of so changing their use, placed them beyond the scope of the corporate purposes and functions. It is such an occupation of the land as, without warrant from the public authority, involves an assumption of ownership, and entitles the demandants to treat the corporation

as tenant of the freehold by disseisin. *Jackson on Real Actions*, 97. *Johnson v. Phillips*, 13 Gray, 198. *Johnson v. Boardman*, 6 Allen, 28. The fact that the corporation has a valid easement, which entitles it to a greater or less use of the land for other purposes, is no impediment to a recovery by the demandants in this action; for the judgment will be rendered subject to such valid easement as the tenant actually has. *Alden v. Murdock*, 13 Mass. 256. *Morgan v. Moore*, 3 Gray, 319. *Castle v. Palmer*, 6 Allen, 401. The easement of the railroad corporation is of such a nature that the demandants cannot have judgment and execution that will exclude the corporation from complete possession and control of the premises for all purposes pertaining to the exercise of its corporate franchises. But they are entitled to a judgment which shall establish their title and rights as owners of the fee, and secure to them proper damages for the wrongful use of the land, as well as their costs of suit. *Prescott v. Hutchinson*, 13 Mass. 439. *Richards v. Randall*, 4 Gray, 53. Gen. Sts. c. 134, § 14.

The assessment of damages or mesue profits will be made with reference to the measure of title established by the suit. As to the land within the limits of the location, the tenant has made use of it for a valuable purpose. Its charter affords no justification of that use, and no protection against the claim of the owner of the fee for the mesne profits, against any disseisor. The assessor will therefore estimate the damages, for all the parcels alike, according to the full, clear annual value of the land, not including the improvements. Gen. Sts. c. 134, §§ 15, 16. *Hatch v. Dwight*, 17 Mass. 289, 298.

As the precise mode and extent of the projection of the building upon parcel B does not appear, we cannot indicate beforehand whether any allowance should be made for improvements upon that parcel, or in what manner the structure is to be disposed of. Its situation is such as will probably lead both parties to find their interests best promoted by an amicable adjustment in relation thereto.

The computation will include six years preceding the suit, and the time since the date of the writ to the time of the return of the assessor's report. *Curtis v. Francis*, 9 Cush. 427, 468.

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In pursuance of the agreement upon which the case is brought up to us, an assessor will be appointed to estimate the damages accordingly.

Judgment for the demandants, subject to all rights conferred upon the tenants by their corporate charter and the location of their railroad over a part of the demanded premises

HENRY EMERY vs. CITY OF LOWELL.

A landowner in a city, who drains his premises by a private drain leading from them under the adjoining street, has no right of action against the city for merely opening a passage from the street down into the drain to conduct off surface water. But if the city constructs and maintains the passage in such a manner as in effect to adopt it, in connection with the drain, as a common sewer, and by negligence in its construction or repair obstructs his drainage, it is liable to him in an action at common law for the obstruction.

GRAY, J. It appears, by the report of the justice who presided at the trial, that the plaintiff was the owner of a hotel and stable on Merrimack Street in Lowell, and of a private drain, about five feet under ground and a foot in diameter, leading therefrom across that and other streets and lands to a sewer of the Merrimack Company, and emptying into the Merrimack River, by which the cellars of his hotel and stable were continuously and effectually drained; that there was no main drain or common sewer in Merrimack Street, opposite the plaintiff's estate; that in 1850 the city of Lowell, by its superintendent of streets and its servants, for the purpose of conducting away the surface water occasioned by rains and the melting of snows, constructed a cesspool in the gutter of Merrimack Street close to the sidewalk opposite the plaintiff's house, with an opening on a level with the surface of the street, and with no precaution, except iron bars laid across the top, to prevent the dirt and offal of the street from being washed into it; that they dug down about five feet to his drain, opened it, and made a brick wall from the cesspool or opening in the street into his drain; that

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this cesspool was like others constructed for draining surface water into main drains and common sewers built by the city of Lowell; that the records of the city contain no vote, order resolution or act, authorizing the construction of this cesspool, either by the city council or the board of aldermen; but that it was not denied that it was constructed by authority of the city. There was also evidence tending to show that, by reason of the cesspool having been originally constructed without a proper place of deposit for sediment, as well as by the neglect of the city, after notice to the mayor, to clean out the cesspool and drain, the drain became choked up by the water and dirt washed into it from the street through the cesspool, and the water and filth flowed back into the plaintiff's cellar, and injured it.

This is an action of tort. The original declaration alleged that the defendants cut a hole in the plaintiff's drain, and let the surface water, mud and dirt into it, and choked it up, so that the water flowed back into and injured the plaintiff's cellar. The amended declaration contains two counts; one for negligence in the original construction of a drain from the gutter of the street into the plaintiff's drain; and the other for a neglect of duty in permitting the drain so constructed to become choked up. The question reserved is, whether the action can be maintained upon either count of the declaration.

The city charter of Lowell, granted by the legislature in 1836, provides that the city council of Lowell may "cause drains and common sewers to be laid down through any streets or private lands, paying the owners thereof such damage as they may sustain thereby." St. 1836, c. 128, § 9. By the St. of 1841, c. 115, "the selectmen of the several towns, and the mayor and aldermen of the several cities, in the Commonwealth, may lay, make, maintain and repair all main drains or common sewers in their respective towns and cities; and all the main drains or common sewers, which have heretofore been or which may hereafter be constructed by any town or city, shall be taken and deemed to be the property of such town or city;" and provision is made for assessing in writing the cost thereof by the mayor and aldermen or selectmen upon, and collecting the same of, every per

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son who may enter his particular drains into any main drain or common sewer so constructed for the draining of his cellar or land, or in obedience to the by-laws or ordinances of the town or city, or who by more remote means shall receive any benefit therefrom for draining his cellar or land. Both of these statutes were accepted by the city of Lowell immediately after their passage.

The ordinances of the city of Lowell provide that every main drain or common sewer constructed in any street or highway shall be built of such materials and dimensions and in such manner as the mayor and aldermen may order; but only after an appropriation by the city council to defray the cost; that the superintendent of streets, chosen annually by the city council, shall, under the direction of the mayor and aldermen, superintend the building thereof; and that particular drains may enter the same only by the written assent or order of the mayor and aldermen. Ordinances of Lowell, (ed. 1863,) c. 11, § 2: c. 20, § 1; c. 25.

The general rules of law, by the application of which to the circumstances of this case our decision must be guided, are well settled. A city, whose agents make a drain or sewer without authority of law through the property of another, is liable to an action of tort. *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223. *Hildreth v. Lowell*, 11 Gray, 345. A municipal corporation, voluntarily accepting a statute which authorizes it to make common sewers and to assess the expense thereof on lands benefited thereby, is not exempt from liability to private actions by persons injured by its negligence in exercising the power so granted and accepted, to the same extent as it is in the performance of duties imposed upon it by general law, exclusively for public purposes, and without its corporate assent. *Child v. Boston*, 4 Allen, 41, 52. *Bigelow v. Randolph*, 14 Gray, 541, 543. *Oliver v. Worcester*, 102 Mass. 489, 500. *Bailey v. New York*, 3 Hill, 531; S. C. 2 Denio, 433. An authority conferred upon municipal corporations or officers to determine where drains shall be built is in the nature of a judicial power, involving the exercise of a large discretion, and depending upon

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considerations affecting the public health and general convenience; and therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred. *Child v. Boston*, 4 Allen, 41. *Wilson v. New York*, 1 Denio, 595. *Mills v. Brooklyn*, 32 N. Y. 489. But the actual construction of the drains is the exercise of a merely ministerial duty, and if it is not performed with reasonable care and skill, any person whose rights of property are injured by such negligence may have an action. *Rochester White Lead Co. v. Rochester*, 3 Comst. 463. *Detroit v. Corey*, 9 Mich. 165. *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 715-722; S. C. Law Rep. 1 H. L. 113-119. And the duty of keeping the common sewers in repair and free from obstructions, after they have been constructed and become the property of the city, under a special authority conferred and accepted, is also a ministerial duty, for neglect of which the city is liable to any person injured. *Child v. Boston*, 4 Allen, 41. *New York v. Furze*, 3 Hill, 612. *Lloyd v. New York*, 1 Selden, 369. *Barton v. Syracuse*, 36 N. Y. 54.

No action of tort indeed will lie against any one for merely turning surface water upon the land of another; nor against any city or town, or its surveyor of highways, for any act done in a highway for the purpose of repairing it, although involving the digging of an excavation in the highway, and the discharging of water upon adjoining land; in the first case, because the owner of the land flowed may protect it by building thereon such walls or structures as will keep off the surface water; and in the second, because a specific remedy by petition for all such damages is given by statute. Rev. Sta. c. 25, § 6. Gen. Sta. c. 44, § 19. Upon a scrutiny of the cases on which the defendants rely, they will all be found to fall within these two classes. In *Flagg v. Worcester*, 13 Gray, 601, the first count was for suffering the surface water to flow directly from the highway upon the plaintiff's land; the second was for opening an excavation in one of two connecting streets, and thereby turning the surface water into a culvert and thence into a drain on the plaintiff's land, but this was done, as the opinion states, "for the purpose

of improving and keeping those streets in repair," the appropriate remedy for which was by petition under the statute. In *Barry v. Lowell*, 8 Allen, 128, the cesspool built by the city did not enter or communicate with any drain of the plaintiff, and the injury sued for was occasioned by the water, when the cesspool was obstructed, flowing over the surface upon the plaintiff's land and into his cellar. In *Parks v. Newburyport*, 10 Gray, 28, and in *Turner v. Dartmouth*, 13 Allen, 291, the action was for preventing surface water from flowing off as it had been accustomed to do, and turning it upon the plaintiff's land. In *Benjamin v. Wheeler*, 8 Gray, 409, and 15 Gray, 486, the injury sued for was caused by the acts of a surveyor of highways in digging a ditch in the highway for the purpose of repairing it.

It follows that the mere cutting by the city of Lowell of a passage into the plaintiff's drain for the purpose of discharging the surface water from the street gave no right of action; and that the plaintiff cannot recover upon his original declaration.

But the case finds that the city did more than this; and that, by its superintendent of streets and its servants, it built a permanent cesspool, like those constructed for draining surface water into main drains and common sewers of the city, opening into the plaintiff's drain, and thus in effect adopting that drain instead of one regularly built by the city. This was not a mere act of turning or flowing back the surface water upon the plaintiff's land, which he could have protected himself against by any barrier upon his own land, and without shutting up the drain leading from his own cellar. Nor was it an excavation made in repairing the highway, for which a party injured could have a remedy by petition under the statute. But it was the making of a structure wholly under ground, affecting the plaintiff's property by causing an obstruction of his drain, and manifestly, in its mode of construction and use, of the nature of a common sewer. If the plaintiff can prove that the injury to his cellar was caused by negligence of the city, either in the original construction of this sewer, or in not keeping it free from

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obstructions, he may maintain an action against the city. Upon both counts of the amended declaration, therefore, the

Case is to stand for trial.

T. H. Sweetser & W. S. Gardner, for the plaintiff.

T. Wentworth & G. Stevens, for the defendants.



CITY OF LOWELL vs. PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER.

An alteration in the location of an existing highway was made by the county commissioners, upon the petitioner's land, and under his agreement to bear the whole expense. He was constructing a canal across his land, and had nearly finished digging the trench through the place of the new location at the time thereof; and he proceeded to build the new way and the canal together, and carried the way over the canal upon a bridge which was finished before water was let into the canal. *Held*, that he was liable for the subsequent expenses of maintaining and keeping in repair the bridge over his canal.

The proprietor of a canal built across a highway which is subsequently traversed by a horse railroad is not exonerated by the St. of 1866, c. 286, § 1, from his liability in the first instance to the town or city for the expenses of repairs made within the location of the railroad in the bridge which conducts the highway over the canal.

CONTRACT to recover money expended by the plaintiffs in repairing a bridge across a canal in Lowell. Writ dated November 25, 1867. Trial, and verdict for the plaintiffs, in the superior court, before *Putnam, J.*, who allowed the following bill of exceptions:

"It was admitted that the repairs were necessary, and that the defendants were requested to make them and declined to do so; and no question was made that the amount sued for was properly expended. The canal crosses Merrimack Street, which is a county road; and the bridge is over the canal where it crosses the road. The defendants admitted that they built the bridge prior to Thanksgiving day 1831, and have ever since maintained it, kept it in repair, and exercised ownership over it, subject to public travel. It appeared in evidence that, prior to 1826, there was an old county road, and the defendants owned the land on both sides of said road, including the land where the

new highway was laid out as hereinafter mentioned, and also the fee in said old road. It was not contended by the plaintiffs that the defendants constructed the canal under the St. of 1792, c. 13, but under the St. of 1824, c. 47, the land being purchased by them of the Merrimack Company. On September 10, 1828, the defendants petitioned the county commissioners of Middlesex to discontinue the old road between certain points named, and in lieu of it to lay out a new highway. The commissioners adjudicated the new way to be of common convenience and necessity January 5, 1829; and made the location April 8, 1829. The bridge in question is over said new way; except perhaps a small portion at one corner of it, which it was contended by the plaintiffs, but disputed by the defendants, was within the old highway not discontinued by the commissioners."

Copies of the defendants' petition and of the record of the county commissioners were made a part of the bill of exceptions; by which it appeared that in petitioning for the alteration of the way the defendants agreed "to bear the whole expense of the alteration," and that in laying out the new way the commissioners awarded no damages to any one, and adjudged that in their opinion "no damages are sustained by any one thereby," and laid it out "to be completed and finished by the petitioners, by their own consent and agreement," on or before November 1, 1829.

"The defendants offered evidence tending to prove that, before the laying out of the new way, and as early as the spring of 1828, they, under contract with certain persons therefor, had begun to dig the canal, both north and south of said new way, under a corporate vote of September 3, 1827, and that, before April 8, 1829, and at that time, in prosecuting the work of making said canal, they had dug a trench across the place where the bridge was afterwards built;" (which trench the parties, at the argument on these exceptions in this court, agreed that there was evidence tending to show was dug "with sloping banks, to the full depth of the canal, and wide enough to drive a team of oxen through under where the bridge was afterwards put on but not to the full width of the canal at the top;") "that they

were constructing said canal at the same time they were making the new way; that they put the bridge over the canal shortly before the water was let into it, in the fall of 1831; that they let the water into said canal upon Thanksgiving day 1831; and that the new way was not travelled until the bridge was erected.

"It was in evidence that the Lowell Horse Railroad Company by consent of the mayor and aldermen of Lowell, had laid their tracks through Merrimack Street and over the bridge; and that the repairs were made within the limits of said tracks and eighteen inches each side of them.

"The defendants requested the judge to rule, that, a canal or watercourse being in course of construction by a party through his own land, and a highway being laid out over such canal or watercourse while being so constructed, the party so constructing the canal or watercourse being, in the proceedings of the laying out, ordered to make the highway agreeably to his own offer to bear the whole expense of making the same, and having made the road agreeably to the order, with a bridge over the canal or watercourse, said party is not bound to maintain the bridge; that, it appearing that the canal was begun early in 1828 and finished in 1831, and that the highway was located by the county commissioners, and built by the defendants, together with the bridge, simultaneously with the construction of the canal, the defendants would not be liable to support the bridge so erected by them in the construction of the highway; and that the defendants were not liable to pay any part of the bill, but that the Lowell Horse Railroad Company were liable for it.

"The judge declined so to rule, and ruled that the laying out of the highway by the county commissioners on April 8, 1829; established the place of the bridge as an existing highway at the time, so far as to determine the right of the defendants to the use of the land within the location for private purposes inconsistent with its use as a way; that the use of the place of the way by a canal after that time and the construction of a bridge over the same would impose upon the defendants the duty of maintaining a suitable bridge over it; and that this was so, though it might be proved that, before the time of said lay-

ing out, the defendants had begun to dig the ground for a canal, and had dug to the extent claimed by the defendants, across the place of the way, with the intention of completing it, and actually did complete their canal afterwards, so as to let water into it in November 1831.

"The judge also instructed the jury that the plaintiffs were entitled to recover, though the repairs for which the suit was brought were all made within the limits which the Lowell Horse Railroad Company were bound by law to maintain in repair, and that the obligation of said railroad company to make repairs of the bridge would not relieve the defendants from their liability to keep in repair the bridge or any part of it. To these rulings and refusals to rule, the defendants excepted."

D. S. Richardson & G. F. Richardson, (H. G. F. Corliss with them,) for the defendants.

T. H. Sweetser & G. Stevens, for the plaintiffs.

COLT, J. The law, which imposes the duty of erecting and maintaining bridges in a public highway over artificial watercourses, was stated by Chief Justice Parsons in the early case of *Perley v. Chandler*, 6 Mass. 454, 458: "If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterwards open a watercourse across the way, it will be his duty at his own expense to make and keep in repair a way over the watercourse, for the convenience of the public." "This obligation upon the owner arises from the consideration that, when the way was located, the public were to be considered as purchasers of the easement, by the payment to the owner of all damages which he sustained in consequence of the easement; and among other causes of damage might be estimated the inconvenience of opening a watercourse at his own expense."

The controversy in this case arises from the difficulty of applying these plain principles to the facts presented. The way in question was located upon the petition of the defendants, and was in fact an alteration of an old county road, made for

their accommodation, upon an agreement on their part to bear the whole expense. The corporation owned the land on both sides of the old road, including the land where the new way was located, and at the time of the final location had made some progress towards the completion of a canal across the new road. This canal made the bridge in question necessary. The work of building the new road and bridge was done by the defendants, under their agreement to be at the whole expense, and was carried on at the same time with the construction of the canal. But the bridge was completed before the water was let in.

Upon this state of facts, the court was requested substantially to rule that the defendants were not liable to support the bridge. We are of opinion that the request was rightly refused. It may be true, when a highway is located over land across which the owner, intending to make a beneficial use thereof, has commenced the construction of a watercourse, that the public easement must be subject to such prior appropriation, indicated by an actual commencement of the work; so that the original cost of the bridge and the burden of its future support will be on the public. In such case, the bridge should be ordered as a part of the original location and construction of the way. The difficulty is, that, under the peculiar circumstances of this case, the fact that there was a partial construction of the canal before the final location of the road is not decisive of an intention on the part of the defendants to make a prior appropriation so as to throw the burden of the bridge upon the public. The double position which they occupied, as builders of the road, under an agreement to be at the whole expense, and also landowners, having the right to compensation, and the use of the land subject to the public easement, takes away the otherwise significant character of the fact relied on. In determining what weight to give to it, the situation and conduct of the parties must be taken into consideration. In this way, we arrive at the real intention of the defendants. It is plain that the cost and support of a bridge, at the point in the old county road where it was crossed by this canal, would have been upon the defendants, if

this alteration in the road had not been made. It is not to be supposed that they intended, by the change which they asked for, to escape this obligation. The location under which they constructed the road makes no mention of the bridge. There is nothing in the original transactions to show that it was not built by them under their obligation as landowners, and not as contractors or agents in the building of the road. And the fact that they have exercised ownership over it, and kept it in repair ever since, is strong evidence that it was built with the understanding that the legal obligation to maintain was upon them, because there had been no intended appropriation to the uses of a canal which took precedence of the location. The defendants' original petition contained an assurance, in substance, that no additional burden should be put upon the public. Upon the whole, as this case was presented, there was no injustice done to the defendants by the instruction given to the jury upon this point.

The jury were further instructed that the plaintiffs were entitled to recover, although the repairs for which this suit was brought were all made within the limits which the Lowell Horse Railroad Company were bound by law to repair. Under the St. of 1866, c. 286, § 1, every street railroad is required to keep in repair, within certain limits, such portions of the streets, roads and bridges as are occupied by its tracks, to the satisfaction of the proper officer having charge of the streets or highways; and is made liable over to the city or town, in case any recovery is had for any defect or want of repair, provided it has had notice and opportunity to assume the defence of the suit. The statute does not relieve the city from its obligation to keep the streets, over which a street railroad is located, safe and convenient for public travel. It authorizes, for the public benefit, the use of the highway for a peculiar mode of travel, on certain conditions. The city may enforce the performance of the conditions; but all the provisions of the statute imply that the city is primarily liable for want of repair. It is not necessary to decide whether its provisions make the railroad ultimately liable to the defendants. We are of opinion that it does not exon-

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erate the defendants from their liability in the first instance to the city. As respects this liability, the bridge over the defendants' canal remains a private structure, for the repair of which they are responsible directly to the city. *Middlesex Railroad v Wakefield*, 103 Mass. 261. The defendants have no just ground to complain of the instructions given on the point.

Exceptions overruled.

MARGARET A. SHEREN vs. CITY OF LOWELL.

In an action on the Gen. Sts. c. 44, § 22, for an injury caused at six o'clock on Monday morning by the alleged defective condition of a sidewalk which the defendant town was bound to keep in repair, which condition was occasioned in the course of repairs on an adjoining building which were begun before and finished after the accident, evidence is competent of the condition of the sidewalk at seven o'clock on the previous Saturday evening.

In an action by a laborer in a mill for an injury which occurred Monday, she testified that she kept at work that day and until some time Tuesday when she took to her bed. The defendants, to contradict her, called the overseer of the mill, who testified that she worked there as usual from Monday until some time Thursday; and on cross-examination testified that she came to him Thursday and said she could not attend to her work and asked leave to go away, and he let her go. *Held*, that it was competent for the plaintiff to testify in rebuttal, that this conversation occurred Tuesday, and that she did not see him or talk with him afterwards.

In an action on the Gen. Sts. c. 44, § 22, for an injury alleged to have been caused by a defect in a highway which the defendant town was bound to keep in repair, the answer was only a general denial of the plaintiff's allegations. The town, before the trial, filed interrogatories to the plaintiff, as to the nature, location and description of the defect; the manner, circumstances and nature of the injury; what the plaintiff did immediately after being injured; whether she had since done work, and if so, what and where; and the names and residences of any physicians she had consulted. These interrogatories the plaintiff neglected to answer; and the judge refused a request of the town to require her to answer them. On the trial, the plaintiff testified as a witness, and a verdict was returned in her favor. *Held*, that exceptions to the refusal to require answers to the interrogatories could not be sustained, which did not expressly show that the town was injured by the refusal to answer them.

TORT on the Gen. Sts. c. 44, § 22, for injuries alleged to have been caused to the plaintiff by a defect in Merrimack Street, in Lowell, a highway which the defendants were bound to keep in repair and on which the plaintiff was travelling with due care at the time of the accident. The answer denied each and every

allegation of the declaration, except that the defendants were bound to keep the street in repair.

At the trial, before *Ames*, J., it appeared that the plaintiff was an operative in the Suffolk Mills, and was going, with due care, to her work, on the morning of Monday, February 8, 1869, about six o'clock, when she stumbled and fell, upon a sidewalk in Merrimack Street, and was injured; that a building adjoining the sidewalk by the side of the place of her fall was undergoing repairs, in the course of which a large hole had been dug in the sidewalk, and covered with a platform, made of boards, on Thursday, February 4; and that about three hours after her fall, that is to say, about nine o'clock on the morning of Monday, February 8, the platform was removed in the course of the repairs, the hole filled up, and the sidewalk restored to its usual condition.

James Smith, a witness called by the plaintiff, testified "that about that time he was at work in Billerica, but was in the habit of returning to Lowell on Saturday evenings, and staying there till Monday mornings; and that, on a certain Saturday night, shortly before he heard of the accident and about a week before he made a visit at the plaintiff's house and found her confined to her bed by sickness from the accident, he noticed the condition of the sidewalk at the place in question, at about seven o'clock in the evening. The defendants objected to the introduction of this evidence without a more definite fixing of the time when the witness was on the spot; but, on the assurance of the plaintiff that she could make the time certain by another witness, the judge permitted Smith to go on and describe the condition of the sidewalk, which he did, the jury being told that they were not to regard the testimony unless they were satisfied that it referred to some time not long before the accident. The plaintiff's mother afterwards testified that Smith's visit at her house was on the Sunday next following the accident."

The plaintiff testified as a witness in her own behalf, that it was dark at the time of the accident, and that the fall was occasioned by her tripping on something which she supposed to be a board. She also testified "that, on Monday, after having met

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with the accident, she went to the mill where she was employed and continued during the whole of the day; and that she went there also on Tuesday morning, and remained until about ten o'clock, at which time she gave up, and went home, and took to her bed." The defendants, to contradict the latter part of the plaintiff's testimony, called Richard F. Belden, the overseer of the mill, as a witness, and he testified "that she came to the mill and worked as usual on Monday, Tuesday and Wednesday, and part of the day on Thursday; that he kept a record of the attendance of the operatives in his room, from his own observation; and that he had made out her pay roll crediting her with her labor on these days, and her mother drew her pay for these days." On cross-examination, he said "that the plaintiff came to him on Thursday, saying that she could not attend to her work, and wanted to be 'let out,' and that he let her out accordingly; but that he had no such conversation with her on any earlier day of that week." The plaintiff, against the defendants' objection, was then recalled, and testified "that the conversation described by Belden occurred on Tuesday morning, and that she did not see him or talk with him at all after that time."

The defendants, before the trial, filed interrogatories to the plaintiff. To some of these she filed answers, but refused to answer others unless required to do so by the court. The judge required her to file answers to part of these, but not to the rest. Those which he did not require her to answer were the following: "State whether the defect was ice or snow, or a hole in the street." "If the defect was a hole or depression, state precisely where it was, and describe it carefully; and if it was ice or snow, also give a careful description of it and of its location on the street." "State particularly and fully how you received the injury; and if you fell, state what occasioned the falling, and upon what or into what you fell; give all the particulars." "State whether any one was present with you when you were injured, and whether any one assisted you after the injury; and if so, who." "State where you went immediately after the injury; and whether any one went with you; and if so, who

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and whether you went on foot or otherwise ; and how you went." " State whether you have had a physician ; if so, state his name, and the names and residences of all physicians you have employed or consulted." " State what work, if any, you have done since the injury, and where, and where you are at work now ; and upon what part of your person you were hurt."

The jury found for the plaintiff, with damages in the sum of \$3900 ; and the defendants alleged exceptions.

T. Wentworth & G. Stevens, for the defendants.

T. H. Sweetser, (*J. P. McEvoy* with him,) for the plaintiff.

COLT, J. 1. The testimony of Smith, as to the condition of the sidewalk, became material by the testimony of another witness, which fixed the time when he observed it as being shortly before the injury.

2. The defendants' witness Belden, on cross-examination, stated a new and material fact, not disclosed in the plaintiff's case ; and there can be no doubt of the plaintiff's right to rebut this new matter by her own denial.

3. As to the rulings of the judge in the matter of the interrogatories to the plaintiff filed by the defendants, the defendants' answer was simply a denial of the material facts stated in the declaration ; there was no specific ground of defence set up ; the defendants would have been successful at the trial, either by the failure of the plaintiff to prove her own case, or by the controlling effect of the evidence of the defendants. The plaintiff was only excused from answering those questions which, we think, either sought a disclosure of facts material to the support of the plaintiff's case, or a disclosure of the manner in which she proposed to prove her own case. *Wilson v. Webber*, 2 Gray 561. Gen. Sts. c. 129, §§ 46, 53.

At all events, the case does not find that the defendants were in any way injured by the plaintiff's not answering further. The knowledge derived from the answers sought would enable the defendants better to prepare in advance to meet the plaintiff's case ; and this was perhaps the only benefit to be derived from them. It is not to be presumed that any statement would be made in them different from what was stated at the trial on

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the stand. The plaintiff was herself a witness; the defendants had full opportunity to examine her, and to draw out every fact which the interrogatories sought for. It does not appear that they were surprised by her testimony, or needed time to meet any new and unexpected aspect of the case. No sufficient reason is shown for disturbing the verdict in this respect, as it does not appear that the excepting party has been at all prejudiced by the ruling objected to. *Bates v. Barber*, 4 Cush. 107.

Exceptions overruled.

SAMUEL S. WEED vs. EBENEZER D. DRAPER & others.

W. and D. made a written contract, in which D. agreed to build, under a patent of W., six machines, without expense to W. "except he is to furnish patterns for the same;" and it was agreed that, out of the proceeds of the sale, by either party, of these six or any other machines which D. might build under the patent, W. should have a certain sum, and D. the balance; and W. agreed to "hold D. harmless in all cases of sales of machines by D., and in no other case, against any and all suits against D. for an alleged infringement of W.'s patent on any other patent." Another clause fixed a minimum price per machine, for sales. A further clause provided that D. should build, at the rate of two machines per month until the whole order should be filled, "any number of machines more than six that W. may order, if W. does not order more than twelve at any one time," to be sold in like manner; and it was stipulated "that W. is to furnish one set of patterns, and only one set of patterns, free of expense to D." It was also agreed that either party might terminate the contract on four months' notice to the other; "but that, when notice is given, all orders up to the end of that time which have been given are to be filled," and that, if D. should give the notice, then it should be at the option of W. whether D. should take "all machines ordered or built or being built at the time the contract terminates," paying to W. a certain sum per machine, or D. should deliver the same to W. within one month from the termination of the contract," receiving from W. a like sum per machine. Before the six machines were all built, W. gave to D. an order for twelve additional machines; and D. a month later gave W. a notice for termination of the contract in four months, and neglected and refused to build any of the twelve machines, but completed the original six. After this notice, C., the owner of another patent, gave D. notice that he should hold D. liable for infringing his patent in building the six. W., after notifying D. that under the option clause in the contract he required D. to take the twelve machines and pay him the stipulated sum per machine, sued D. for breach of the contract; and in his declaration, after setting forth the contract and his order for twelve additional machines, alleged that D. "wholly neglected and refused to build the said twelve according to the plaintiff's order and the terms of said contract, and did wholly neglect and refuse to do so, up to the termination of said contract and ever since"; and then, under succeeding allegations, sought to recover the sum he had demanded from D. under the option clause. Jury trial was

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waived, and the judge to whom the case was submitted found that during the year in which the contract was terminated "there was a demand for these machines in the market" at the minimum price fixed in the contract, and gave judgment for the plaintiff for the amount of the difference, upon ten machines, between the sum for which the defendants would have built them under the contract, and the larger sum which the plaintiff would have been obliged to pay to others for building them. *Held*, 1. that the plaintiff's attempt to avail himself of the option, in a state of facts under which it did not exist, was no bar to his remedy for a general breach of the contract; 2. that the declaration sufficiently alleged a general breach of so much of the contract as related to the order for twelve machines; 3. that the stipulation that W. was to furnish a set of patterns was not distinctly made by the form of the contract a condition precedent to the obligation of D. to begin to manufacture the twelve machines; 4. that the mere fact of a notice given by C. of his intention to prosecute D. for an infringement of patent afforded no defence to D. for refusing to fulfil that obligation; and 5. that D. had no good ground for exceptions to the measure of the damages assessed by the judge per machine, or to the number of machines on which he assessed them.

CONTRACT. Writ dated May 8, 1865. In 1867 this case was submitted to the judgment of the superior court on agreed facts, and was argued in this court at January term 1868 on exceptions alleged by the plaintiff, which were sustained, as reported 99 Mass. 53-60.

The declaration alleged that the defendants, who were partners, made a written contract with the plaintiff, dated November 10, 1863, a copy of which was thereto annexed. Many of the clauses of this contract were quoted, or their substance given, in the previous report, and the following is an abstract of all of them which are now material: After a preamble reciting that Samuel S. Weed, the plaintiff, had obtained "valid letters patent" for an improvement in sole-cutting machines, and the defendants desired to build and sell such improved machines, the defendants agreed with the plaintiff to build six such machines without any expense to him, "except he is to furnish patterns for the same;" and further agreed "to finish, ready for immediate use, at least three of said six machines, within two months from the day the patterns are furnished," "and all within three months from the day the patterns are so furnished." It was also stipulated that, whenever the defendants should sell a machine "out of said six or other machines they may build under said patent," the plaintiff should have \$140 out of the proceeds; and whenever the plaintiff should sell a machine, "either out of said six or any other machines

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said firm may build," he should have \$160 out of the proceeds the balance of proceeds, in either case, to belong to the defendants. "And it is further agreed that said firm [the defendants] is to build any number of said machines more than six that said Weed [the plaintiff] may order, if said Weed does not order more than twelve at any one time." "And it is further agreed that, if said Weed shall order any number of machines, not more than twelve, said firm is to build two of them" "each month thereafter, until the whole order is filled." "And said Weed is to have the right to take a machine at any time by paying said firm \$140." "And it is further agreed that said Weed is to furnish one set of patterns, and only one set of patterns, free of expense to said firm, and said firm is to have the right to build and vend any number of said machines, provided for each and every machine built and sold he receives the amounts above stated from said firm." "It is also further agreed that either party to this contract may terminate it by giving the other four months' notice; but, when notice is given, all orders up to the end of that time which have been given are to be filled as above stated, and all machines not completed to be completed in the manner above stated; and all machines which said Weed orders, together with any others which said firm may have built, or may be building at the time notice is given, to the number of six, are to be taken by said Weed, and paid for at the rate of \$140 apiece within one year after the termination of the contract, provided said notice is given by said Weed; but if notice is given by said firm, then for all machines ordered or built or being built at the time the contract terminates, said firm is to take the same and pay said Weed therefor \$140 apiece, or deliver the same to said Weed built in a complete and workmanlike manner, and ready for immediate use, within one month after the termination of the contract, by said Weed's paying said firm therefor for each machine \$140 within six months after the termination of the contract, the same to be at the option of said Weed, which shall be done; if said firm takes the machines as above, said Weed is to have the right to sell as many of them as he can; and for every machine so sold

said Weed is to receive the sum of \$20 as soon as the same is sold." "And it is further agreed that, if said Weed is not paid the sums above stipulated by said firm, at once, on the sale of each and every machine, then said Weed shall have the right terminate this contract at once, without notice and without injury to any damages that may have accrued to him by reason of any breach of this contract by said firm. And it is agreed that no machine is to be sold for less than \$300." "And it is further agreed that said Weed is to hold said firm harmless in all cases of sales of said machines by said firm, and in no other case, against any and all suits brought against said firm for an alleged infringement of said Weed's patent on any other patent or patents."

The declaration further alleged that "the defendants did build six machines according to the terms of said contract, four of which were sold and disposed of by the plaintiff, and the proceeds went into the hands of the defendants, and two of which now remain in the hands of the defendants undisposed of; and the plaintiff says he furnished one set of patterns according to the terms of said contract, and has performed all other conditions precedent to said contract; and the plaintiff says he did order, on or about the last of May or first of June 1864, twelve more of said machines over and above the said six, and the defendants wholly neglected and refused to build the said twelve according to the plaintiff's order and the terms of said contract, and did wholly neglect and refuse to do so up to the termination of said contract and ever since; and the plaintiff says the defendants gave the plaintiff, on or about June 22, 1864, the requisite notice according to the terms of said contract to terminate the same on or about October 22, 1864; and the plaintiff says it was his option that the defendants should pay him \$140 apiece for all machines ordered, built or being built at the time the contract terminated, and gave the defendants notice accordingly; but the defendants, notwithstanding the same, have neglected and refused, and now neglect and refuse, to pay the plaintiff according to the terms of said contract, though often requested to do so, to wit, to pay the plaintiff \$140

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apiece for two machines now in the hands of the defendants undisposed of, and the twelve machines ordered by the plaintiff as above stated."

The answer admitted the making of the contract, and the building by the defendants of six machines pursuant to it, but alleged that the defendants "had given notice to the plaintiff terminating the said contract, as therein provided, before the plaintiff gave any order to them for the building of twelve additional machines;" denied that the defendants "were bound to fill said order, if any such was given, as alleged, for the building of said twelve additional machines;" and denied that "the plaintiff did order of them twelve more of said machines as alleged;" "and as to the two machines built by them under said contract and not sold, the defendants say that the same have not been sold, and cannot be sold, and they deny that they agreed to take the same and pay the plaintiff therefor as alleged, except after a sale thereof made; and the defendants deny that they owe the plaintiff \$140 for each of twelve machines alleged to have been ordered of them, or any part thereof, as alleged, or ever promised to pay said sums therefor; and the defendants say that, before and at the time of making said contract with the plaintiff, the plaintiff represented to them that they could build the machines in said contract mentioned without liability to any other party, and that he was lawfully authorized to license them so to build said machines, and that all pretensions of other parties to the contrary were unfounded, and that no risk whatever was incurred by the defendants in making and executing said contract in this respect, and that he owned the exclusive right to make the said machines and all material parts thereof; and the defendants were thereby induced to enter into the said contract; and the defendants were, long before the date of the plaintiff's writ, notified and cautioned by other parties, claiming to be patentees of material parts of said machines, that they would be held accountable for infringement for all acts done in fulfilment of their said contract with the plaintiff, and the defendants are ignorant whether the representations made by the plaintiff to them as aforesaid were true or false, but

allege the same to be untrue, and that so their said contract was without consideration and void for misrepresentations."

At the new trial in the superior court, at December term 1868, before *Putnam, J.*, without a jury, the judge reported the case as follows:

"The plaintiff and the defendants entered into the contract, dated November 10, 1863, as alleged in the declaration; and in pursuance of this contract the defendants proceeded to build six machines, under the plaintiff's patent, the patterns for which, excepting the pulley pattern, as hereinafter stated, were furnished by him. Before these six machines were all made, letters hereto annexed, dated respectively May 12, May 18 and June 22, passed between the parties."

The letter of May 12 was written by the defendants to the plaintiff; and in it they stated that "stock and labor have advanced so much that we shall be under the necessity of making a new arrangement after completing the first six machines," and asked the plaintiff to come to see them.

The letter of May 18 was written by the plaintiff to the defendants; and in it, after stating that it was not convenient for him to go to see the defendants at once, but that he would do so soon, and, alluding to a machine sold to parties in Montreal, he continued: "The money, \$300, for the machine to Montreal, was paid to your order before I came from there. Please deduct expense of the pulley pattern, if you have got one, and send me by express the remainder of what is due me. There is something yet due to you for altering the patterns. Please take that also out of the \$160 due me on the machine. If you have not got a pulley pattern yet, I will find you one, or send you whatever pulleys you may need while in Canada. I got a number of orders for machines, and have agents there who will do all that can be done in selling them for me. I shall now pay my whole attention to selling and setting up machinery. Please finish off those now begun as soon as possible; also be getting the castings for more. I shall want twelve more before you will be able to finish them. Please hurry them as fast as possible.

Please let me know if it will be convenient for you to make the patterns and machines for me."

The letter of June 22 was written by the defendants to the plaintiff; and in it they stated: "We can finish the six machines without a pulley pattern, but shall need one before making any more machines. You will recollect that we wrote you May 12, and again on May 24, to the effect that we could make no more machines after the first six without a new arrangement, on account of the advance in price of stock and labor. We intended that as a notice of termination of contract; but if it was not a legal notice, then we hereby give notice that we shall terminate the contract dated November 10, 1863, according to the terms therein specified, viz.: in four months from this date." It did not appear, from the report, that the letter of May 24, herein alluded to, was introduced in the case.

"The plaintiff, after receiving the letter of May 12 and sending the letter of May 18, and before the completion of all said first six machines, and before the reception of the letter of June 22, had an interview with the defendants in regard to building machines by them, under the contract, in addition to the six expressly provided for in the contract. The defendants then told the plaintiff that they did not regard his letter to them of May 18 as an order for additional machines under the contract, and asked him if he so regarded it. He told them, in reply, that he did; and that he wanted them to build twelve additional machines, at any rate, and wished them to consider him as then giving an order for twelve more machines, if his letter was not such an order. This was after the defendants had made four of the six machines, and before they had completed the last two of said six. The defendants proceeded to finish the two last machines, (the fifth and sixth,) but did not make any more as ordered or requested by the plaintiff, and refused so to do. Four of the six machines made by the defendants were sold, and the proceeds thereof divided, pursuant to the terms of the contract and the other two still remain unsold in the defendants' hands though held for sale since they were finished in the summer of

1864, the plaintiff having claimed that they belong to the defendants. There was a demand for these machines in the market in 1864, at the price of \$300, and the difference between what the defendants agreed to build these machines for, and what the plaintiff would have been required to pay others for building them, was \$114 each. The plaintiff, before commencing this suit, notified the defendants that he should look to them to pay him the sum of \$140 on each and all the machines, either made, being made, or ordered, sold or not sold, claiming those sums as payable to him in consequence of the defendants' having terminated the contract, and of the provision of said contract giving him a certain option in such case. The letter of May 12 was written and received before any order for additional machines had been given by the plaintiff to the defendants, and the letter of May 18 was written and received before the completion of said six machines, the words in said letter, 'those now begun,' referring to those of the first six not then finished.

" At the time of making said contract of November 10, 1863, letters patent of the United States had been issued to Churchill & Hatch, dated before the plaintiff's letters patent, for a machine which the defendants claimed was in some respects like that described in the plaintiff's patent, but which the plaintiff denied. The plaintiff took a license from Churchill & Hatch, which was revoked by them before November 10, 1863, the plaintiff refusing to make payments under it, claiming that the patent was invalid. This patent of Churchill & Hatch was surrendered on or about May 1866, and reissued on or about July 24, 1866. No other evidence was offered in reference to the patents than is here referred to. The defendants were notified on July 14, 1864, by Churchill & Hatch, that they should hold the defendants liable for infringement of the patent, on account of the machines which they had built, and the defendants were so notified before the surrender and reissue of the Churchill & Hatch patent, but the defendants did not inform the plaintiff that they were so notified till December 2, 1864. Churchill & Hatch brought suits against the plaintiff for an infringement of

patent, and prosecuted the same from 1862 till May 1866, when they discontinued said suits."

"The plaintiff did not furnish the defendants with the pulley patterns for the six machines; but the defendants furnished the pulleys, and charged them to the plaintiff, who paid the defendants for them. They notified the plaintiff that they could finish the six machines without any pulley patterns, but that they should need one before making any more. They did not, however, request the plaintiff to furnish them with such pattern for the building of additional machines; nor did they decline to build them on this ground, when ordered, but on the ground of an advance in the price of labor and stock."

"The plaintiff made no claim in this suit on account of any of the six machines actually built under the contract, two of which remain unsold, but claimed damages for the refusal of the defendants to proceed in building the machines ordered in addition to the six, and that he was entitled to recover the sum of \$140 for each machine not built according to said order, or else the difference between what the defendants agreed to build them for, and what he would have been required to pay others for building them, which additional price is the sum of \$114, and, for the purposes of this hearing, agreed that he should only be entitled to recover, as damages, the said sum of \$114 for each machine which the defendants should have made under the contract.

"Upon these facts, I find that the plaintiff is entitled to recover the sum of \$1407.90 from the defendants, being at the rate of \$114 each for ten machines, with interest on the same from the date of the writ. To this ruling and finding the defendants except, and the facts are reported by me to the supreme judicial court."

F. A. Brooks, for the defendants. The plaintiff alleged in his declaration, and, according to the terms of the contract and the rules of law, ought to have been required to show, that he furnished a complete set of patterns, as a condition precedent to his right to hold the defendants accountable to him. The defendants did not lose the benefit of this ground of defence merely

because they assigned other reasons for not proceeding to build the machines ordered by the plaintiff. They were not bound to state any reasons whatever; and, not having been asked for reasons, or required to give any, were not estopped by, or limited to, such only as were assigned. The facts on this point did not appear in the record when the case was previously before this court.

If the defendants did commit a breach of contract, yet the plaintiff's election not to take any machines ordered by him was an abandonment of all claim for damages occasioned by the nonconstruction of the machines, as much so as if the defendants had constructed the machines, and he had made such election afterwards; and he in his declaration has put his claim of damages solely upon the supposed liability of the defendants to pay him at the rate of \$140 on each machine, but the court in its previous decision has given a construction to the contract at variance with such a claim.

If the plaintiff, notwithstanding his election to turn over to the defendants any machines made (or presumed to have been made) upon the order given by him, was still at liberty to claim that he has suffered actual damage from not getting the machines; and if he may under his declaration recover damages on the basis of loss occasioned by the defendants' not building the machines as ordered; then the defendants contend that he has not suffered any such other loss or damage, upon the facts reported, it not appearing that he, at and after their refusal to build the machines, either wanted them, or procured them elsewhere, or tried to do so, or expended any money or incurred any liability in consequence of the act of the defendants. *Hamilton v. McPherson*, 28 N. Y. 72. Apart from the alleged liability of the defendants to the plaintiff on the option clause, (which according to the previous decision cannot be enforced,) the plaintiff has not proved, and cannot prove, any actual damages as sustained by him from the defendants' alleged breach of contract, because by the contract any right of the plaintiff to advantage or benefit from machines constructed by the defendants depended upon the happening of at least one of two contingencies.

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namely, the exercise by himself of the right to take the machines at \$140, which he declined to do, or the determination of the defendants to sell them at not less than \$300 each, thereby becoming accountable to the plaintiff for \$140 on each sale; but as the machines, when constructed, remained the property of the defendants, and by reason of the increased cost of building would have been worth more than \$300, and as it does not appear that more than \$300 each could have been obtained for them, and it does appear they were threatened with prosecution by prior patentees in case they should make any sale of machines, it therefore does not appear that any sales would have been made in fact; and the failure of the plaintiff to take the two machines previously built, (and still unsold,) though at liberty to do so during all this time, suffices to show that, if any demand existed for these machines, yet they must have been unsaleable, from a fear of the claims of other patentees, or some other cause. The fact of a demand existing for machines of this kind at \$300 means only machines freed of claims of patentees; and it does not appear to have been in the power of either party to sell them since the defendants' refusal to build.

The rule of damages adopted in the superior court, if applicable to any case, is inapplicable where there is no relation of vendor and vendee; nor could the defendants be held accountable as for ten machines in any event, unless the reasons assigned by them for declining to build (understood by the court below to be a waiver of objections for want of patterns) are to have such effect as a waiver from a time preceding the date of the letter of June 23.

But supposing that the defendants had built the machines as ordered by the plaintiff, and had sold the same so as to become accountable to the plaintiff for part of the proceeds, yet, as by the contract the plaintiff undertakes to indemnify the defendants against responsibility to third parties, in view of the claims of certain prior patentees, (under whom the plaintiff had been a licensee,) the question would still remain whether the plaintiff's share of such proceeds of sale was more or less than he might have to pay to the defendants in saving them harmless

from the claim of said prior patentees; and thus the supposed damage to the plaintiff, according to his own view, is contingent, uncertain, and incapable of calculation upon any facts contained in the report.

B. C. Moulton & T. S. Dame, for the plaintiff.

WELLS, J. We perceive nothing, in the report of the case now brought up, to modify the conclusions to which we came at the former hearing as to the construction of the contract, and the rights and obligations of the parties under it. 99 Mass. 53. It was there held that the option, reserved to the plaintiff upon termination of the contract by the defendants, to take all machines on hand at its expiration, paying \$140 each; or to require the defendants to take them and pay the plaintiff \$140 each; applied only to machines that should be in actual existence at that time, either finished or in process of construction. As the defendants had failed to commence upon the manufacture, this provision for such option was rendered inoperative; and the decision of the court below was sustained, so far as the right of the plaintiff to recover the stipulated sum for each machine ordered was concerned. But as there appeared to have been a breach of the contract, in not proceeding to manufacture according to the order given, the case was remitted to a new trial, to give the plaintiff an opportunity to sustain his action upon proof of damages appropriate to that aspect of the case. The damages have now been assessed, and we have to consider several exceptions of the defendants, both to the assessment of damages and to the maintenance of the action.

1. It is contended that the damages are not appropriate, because they were assessed as if the machines had been required for delivery upon sales by the plaintiff; whereas he had elected not to take any machines ordered by him, and thereby abandoned all claim for such damages, and relied wholly upon his supposed claim under the option clause. The answer to this objection is, that the provision of the contract securing this option to the plaintiff was defeated by a previous breach of the contract, in its main purpose, by the defendants. An attempt to avail himself of that option, in a state of facts under which

it did not exist, could not deprive the plaintiff of his remedy for a general breach of the contract.

His election, under such circumstances, to take his damages in the form in which he supposed they were thus secured to him, cannot be treated as conclusive evidence that he did not want the machines for sale; nor that they would not have been worth to him more than the sum found as the increased cost of manufacture, with reference to which the damages were assessed. The effect of that election, as a matter of fact, was for the consideration of the judge who tried the case, and his conclusion upon it is final.

2. As a matter of pleading, the defendants contend that such damages cannot be recovered under this declaration, because it is framed only for the recovery of the stipulated sum under the option clause. No such question appears to have been raised at the trial; and therefore it ought not to avail here, if the judgment can properly stand upon the pleadings. *Burnett v. Smith*, 4 Gray, 50. *Whittaker v. West Boylston*, 97 Mass. 273. As the case has been tried upon the general merits, it would be proper, even at this stage, to allow an amendment which would adapt the pleadings to the judgment to be entered. *Nichols v. Prince*, 8 Allen, 404. *Colton v. King*, 2 Allen, 317. But, upon examining the declaration, we are satisfied that there is a general breach alleged, of so much of the contract as relates to the manufacture of the twelve machines ordered, and in reference to which alone these damages were assessed. The allegation is, (after reciting the order for twelve additional machines,) "And the defendants wholly neglected and refused to build the said twelve according to the plaintiff's order and the terms of said contract, and did wholly neglect and refuse to do so up to the termination of said contract and ever since." The succeeding allegations, necessary to avail of the stipulated sum, under the option clause, as the damages in the case, do not destroy the effect of this general allegation of a breach of the contract.

3. The stipulation that "said Weed is to furnish one set of patterns, and only one set of patterns, free of expense to said firm," is not distinctly made, by the form of the contract, a con-

dition precedent to the obligation of the defendants to commence upon the manufacture of machines ordered. The report of the case does not show that it was found by the judge that the furnishing of "pulley patterns" was a necessary precedent act to the commencement of the work of manufacture. This court has no means, and it is not its province, to determine that question of fact. The report states that the defendants did not "decline to build them on this ground when ordered, but on the ground of an advance in the price of labor and stock." We observe also that the defendants have not set up this ground of defence in their answer. The objection to a recovery on this ground cannot therefore prevail.

4. The alleged danger of manufacturing and selling these machines, on account of a supposed infringement upon the patent rights of Churchill & Hatch, cannot avail the defendants. Their contract contemplated the probability that claims of that nature would be asserted, and provided that Weed should hold them harmless against them. The case does not show that they were prevented from performing their contract; nor that the rights of Churchill & Hatch were paramount, so as to justify their withdrawing from the performance of it; nor that Weed has in any respect failed to fulfil his part of the stipulation to save them harmless.

5. As the judge has found that "there was a demand for these machines in the market in 1864, at the price of \$300;" and as the plaintiff would have been entitled to require the defendants to take them and pay him \$140 each for them, if they had been constructed according to the terms of the contract, we can see no ground upon which any exception can be sustained to the measure of damages adopted by the court below.

6. Regarding the letter of June 22 as the formal notice of termination of the contract, and the plaintiff's letter of May 18 as an order for twelve additional machines, the defendants were bound, notwithstanding their notice, to continue to manufacture, under that order, up to the end of the time fixed for the termination of the contract; to wit, until the expiration of four months; making five months in all from the date of the order

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The contract required them, in the execution of such an order, to build two of the machines "each month thereafter."

Upon these considerations, we are satisfied that the decision of the superior court ought to be sustained.

Exceptions overruled.

GEORGE J. SHATTUCK vs. MACKENZIE L. GREEN.
MACKENZIE L. GREEN vs. GEORGE J. SHATTUCK.

If a tenant in common of personal property, which is in the possession of a third person as bailee of all the owners, sells his undivided share, the possession of the bailee is his constructive possession so as to attach to the sale an implied warranty of title.

The fact that the seller by parol of a chattel assigns and delivers to the buyer, whether as a muniment of title, or a symbolical delivery of the chattel, or a mere incident of the transaction, the bill of sale under which he himself acquired the chattel, does not prevent his liability upon an implied warranty of title.

TWO ACTIONS OF CONTRACT. The first action, by Shattuck against Green, was on a promissory note dated December 5, 1866, for \$300 payable on demand with interest, given by Green to Shattuck in part payment for an undivided half of the furniture, fixtures and stock in trade of an eating house in East Boston, called a dining saloon. The answer set up a failure of the consideration for the note.

The second action, by Green against Shattuck, was for breach of Shattuck's alleged warranty of title to the property sold, and to recover the amount paid by Green therefor.

At the trial of both actions together, in the superior court, before *Rockwell, J.*, there was put in evidence a bill of sale, signed and sealed by Wilks W. Corey, under date of December 7, 1866, in which said Corey, in consideration of \$600 paid by Shattuck, did "sell and convey unto the said George J. Shattuck, and his heirs and assigns, one undivided half of a dining saloon, consisting of the stock in trade, fixtures, furniture, &c., said dining saloon being situated in East Boston, on Lewis Street, No. 5, to have and to hold the above described property to the said Shattuck and his heirs and assigns forever;" which bill of sale bore the following indorsement, signed

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by Shattuck, and not dated: "Assigned over by George J. Shattuck to M. L. Green."

"It appeared in evidence that the property mentioned in this bill of sale was, at the date of said bill, in said dining saloon, which saloon was part of a building owned by the National Warehouse Company, and had been for some time used and occupied as a saloon by Corey & Stiles, said Corey being the son of Wilks W. Corey, who claimed the stock, fixtures and furniture, and who was the lessee of the saloon, either solely or in connection with his said son, or with said Corey & Stiles; that there had been conversation between Green and Shattuck about the property, and afterwards, on December 7, 1866, Shattuck bought the property of Wilks W. Corey, by trading his house for it; and that he then told Green he had purchased it, and showed him the bill of sale, and sold the property to Green on December 11, 1866, receiving \$250 in cash and the note in suit, and assigned the bill of sale. The testimony as to the conversations was somewhat in conflict; Shattuck representing that he purchased at Green's request, and for him, so that he could get the property partly on a credit; and Green representing that Shattuck purchased not by his request, but without his knowledge till he afterwards informed him of it. When Shattuck bought on December 7, he was in New Hampshire. Between the 7th and 11th of December he was not at East Boston; and he never entered into or took possession of the property, the whole business so far as he was concerned being done in New Hampshire. On December 11, Green took the bill of sale, with the assignment, and went to East Boston and entered into possession of the property with young Corey, (Stiles at the same time leaving,) and continued to carry on the saloon with young Corey, or some one holding his interest, till May 1867, when the National Warehouse Company claimed the personal property and held it. Shattuck, about a year afterwards, and after negotiation, received \$200 of Wilks W. Corey, in full settlement of his claim on account of the failure of said Corey's title. The testimony conflicted somewhat as to the part which Green took in this settlement; Shattuck representing that he

consulted Green, and that he was present at and agreed to the settlement; and Green representing that he had no part in it, though he knew of it. Shattuck, in the first action, offered to give Green credit for this \$200, seeking to recover the balance only. It did not appear that either Green or Shattuck knew of the claim and ownership of the National Warehouse Company to said personal property till some months after these purchases.

"Shattuck contended, and asked the judge to rule, that, as there was no evidence of any express warranty, neither was there evidence of any implied warranty from Shattuck to Green; because, in the sale of personal property, the vendor not being in possession, nor having any knowledge of the title which was not shared equally with the vendee, there is no ground in law of any implied warranty; that, without any implied warranty, Shattuck must recover on his note the balance after deducting the \$200 received of Corey; and that Green could not maintain his action against Shattuck for the same reason, that no warranty could be implied from the sale without possession in the vendor.

"Green asked the judge to rule that, if Wilks W. Corey was in possession at the time of the sale by him to Shattuck, by himself or others, and made and delivered the bill of sale to Shattuck; and if Shattuck, not going near the property, and taking no other possession thereof, sold it to Green; and if Green under this sale went and took possession of the property, which was surrendered to him by those holding under Corey, and used it for some months unmolested; that would be a sufficient possession by Shattuck to support a warranty and title, and render him liable to Green for money paid to Shattuck for the property.

"The judge ruled that, upon this evidence, if submitted to the jury, they would not be authorized to find an implied warranty from Shattuck to Green, and that Green could not maintain his action or defence on the ground of warranty of title and failure thereof, or of a failure of consideration of said note and directed a verdict for the plaintiff in the first case and for the defendant in the second case, which verdicts the jury returned," and Green alleged exceptions.

L. Wallace, (D. S. Richardson with him,) for Green.

T. Wentworth, for Shattuck.

MORTON, J. It is a general rule of law in this country, that in a sale of chattels a warranty of title is implied, unless the circumstances are such as to give rise to a contrary presumption. 1 Smith Lead. Cas. (6th Am. ed.) 242. 1 Parsons on Contracts, (5th ed.) 576, and cases cited. If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title, and a warranty is implied. In *Whitney v. Heywood*, 6 Cush. 82, 86, Dewey, J., says, "Possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied." The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells goods thus held as his, a warranty of title is implied. *Hubbard v. Bliss*, 12 Allen, 590. *Cushing v. Breed*, 14 Allen, 376.

In the case at bar, it appeared that Shattuck on December 7, 1866, bought of Wilks W. Corey an undivided half of the stock in trade, furniture and fixtures of a dining saloon in Boston, and on December 11, 1866, sold the same to Green. Shattuck was in New Hampshire, and did not take manual possession of the property, but it remained, as it had previously been, in the possession and use of Corey & Stiles, who were carrying on the saloon, said Corey being a son of Wilks W. Corey. Green, after the sale to him, entered into possession in connection with the younger Corey, and remained in possession until the property was taken by the National Warehouse Company under a paramount title. Thus Corey & Stiles were in actual possession of the chattels at the time of the sale to Green. There was no evidence that they held them adversely to Shattuck, or to Wilks W. Corey and Shattuck, who by the sale of December 7 became tenants in common. On the contrary, there was evidence which might well satisfy the jury that they held

possession of them as the bailees or agents of Wilks W. Corey and Shattuck. If this was so, and Shattuck sold to Green one undivided half of the property as his, there was an implied warranty of title. The ruling at the trial that the jury would not be authorized find an implied warranty was therefore erroneous. The argument that the written contract between the parties contains no express warranty, and excludes an implied one, cannot prevail. The parties did not put their contract in writing. The indorsement on the bill of sale does not purport to set out the contract of sale. That appears to have been by parol; and the fact that the vendor delivered the bill of sale, with such assignment on it, either as a muniment of title, or as a symbolical delivery, or as an incident of the transaction, does not prevent his liability upon the implied warranty of title.

In considering these exceptions, we are obliged to assume as true all the facts which the testimony in favor of the excepting parties tends to establish. At the new trial, it will of course be for the jury to decide whether there was in fact a sale by Shattuck to Green, or whether Shattuck acted merely as the agent of Green in the purchase of Corey, so that no warranty of title would be implied against him.

Exceptions sustained.

INHABITANTS OF WAYLAND *vs.* INHABITANTS OF WARE.

The St. of 1865, c. 230, § 1, gives a settlement to a soldier credited to the quota of a town in conformity with its terms, even if he was credited in excess of the proportion due from the town at the time of such credit.

On a trial of the issue whether a soldier gained a settlement in a town under the St. of 1865, c. 230, § 1, the facts that calls for troops were made by the President, and quotas assigned to all the towns in the Commonwealth, during the civil war, are to be assumed without express evidence.

On a trial of the issue whether a soldier, enlisted and mustered before the assignment of quotas to towns during the civil war, gained a settlement, under the St. of 1865, c. 230, § 1, in a particular town, by being credited to its quota when assigned, the fact that he was so credited may be proved independently of any record of the provost marshal or war department of the United States.

On the trial of an action for supporting as a pauper a discharged soldier who is alleged to have a settlement in the defendant town under the St. of 1865, c. 230, § 1, if the number of enlistments to the credit of the town at the time of the assignment of its quota is

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ascertained, evidence that the same number of soldiers, including the man in question, had previously enlisted therefrom as volunteers, or were claimed by the town as having so enlisted, in adjusting its quota with the officer having the duty of assignment, is competent, and, if uncontrolled, sufficient, evidence to prove that the man was credited to the quota of the town.

On the issue whether a soldier was credited to the quota of a town so that he gained a settlement in it under the St. of 1865, c. 230, § 1, testimony of a person who was adjutant general of the Commonwealth during the civil war, that a certain table prepared by him in 1862 assigning quotas to towns was never allowed by the war department of the United States till after 1864, but he understood that it was so allowed afterwards, though he had no personal knowledge of the fact, is incompetent, as being mere hearsay.

The record kept by a town clerk, under the Sts. of 1863, cc. 65, 229, of the soldiers who composed his town's quota of the troops furnished by the Commonwealth to the United States during the civil war, is competent, though not conclusive, evidence of facts which it is required to contain.

The disability of a soldier from wounds or disease contracted while he was engaged in the military service of the United States during the civil war, intended by the St. of 1865, c. 230, § 1, to give him a settlement in the town to whose quota he belonged, is such a disability, and such only, as terminated his military service within one year from his enlistment.

CONTRACT for expenses incurred in supporting as a pauper a minor child of James Davis, Jr. The question at issue was whether the St. of 1865, c. 230, gave Davis a settlement with the defendants.

At the trial in the superior court at June term 1869, before *Putnam, J.*, after the decision reported 97 Mass. 391 note, it was admitted that the settlement of Davis was with the plaintiffs, unless it was changed by § 1 of that statute, which provides that any inhabitant of a town in which he had resided for six months next previous to his muster into the military or naval service of the United States "as a part of the quota" of the town under any call of the President during the civil war, if he was of full age at the time of his enlistment, and continued in the service for a year or more, or died or became "disabled from wounds or disease received or contracted" while in the service, should be deemed to have acquired a settlement in that town.

"It was also admitted or proved that Davis was enlisted and mustered into the military service of the United States January 29, 1862; that he resided in Ware for more than six months previous to that time; and that he was discharged from said service on account of disability April 11, 1862. There was evidence tending to prove that he was disabled by disease contracted

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while engaged in such service; and also evidence tending to show that he was not so disabled, but that, if he was disabled by disease, it was contracted, and he was disabled thereby, long before he entered said service; and there was evidence tending to show that before his military service he was able to perform more labor than an ordinary laborer, (which was his employment,) and that since his discharge from said service he has been able to perform as much labor as before.

"To prove that Davis was credited to Ware as a part of its military quota, the plaintiffs offered in evidence the following documents, the genuineness of which was not disputed. The defendants objected to the admission of each of them; but the judge admitted them all, and they were read to the jury: 1. The original muster roll; on which the name of James Davis, Jr., appears. 2. The list of soldiers claimed by the selectmen of Ware in 1862 in a return to the adjutant general's office; in which the name of James Davis, Jr., appears. 3. The record made up by the town clerk of Ware under the Sts. of 1863, cc. 65, 229;* in which the name of James Davis, Jr., appears. 4. The new enrolment made under the order of the President, dated August 4, 1862; in which the name of James Davis, Jr., appears. 5. The table made by Adjutant General William Schouler in 1862, assigning quotas to towns in numbers and no names."

"General Schouler, who was adjutant general of the Commonwealth from before the war till early in 1866, was offered by the plaintiffs as a witness, and (the defendants objecting) was permitted to testify, and did testify, that he took said muster roll (No. 1), and said list of soldiers (No. 2), and therefrom in said table (No. 5), in 1862, allowed said Davis, though not by name, as a credit to Ware as a part of its quota; that is, that said list (No. 2) showed that Ware then in 1862 had furnished six more men than its share, and that in said table (No.

* These statutes provided that every town clerk should make and keep in his office, as part of the town archives, a full and complete record of the names of, and certain other facts concerning, "all the soldiers and officers who composed the town's quota of the troops furnished by the Commonwealth to the United States during the present rebellion."

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5) he in 1862 assigned to Ware six men less than Ware otherwise would have been required to furnish; that this table (No 5) was never allowed by the war department till after the year 1864, but he understood that they afterwards allowed it in assigning quotas to towns, but that he had no personal knowledge thereof. The defendants objected to all and every part of this evidence; but the judge admitted it all."

"There was no documentary or other evidence assigning any quotas to towns other than as aforesaid; and it appeared that after 1862 whatever assignments of quotas were made, if any, were made by the war department of the United States, under the direction of the provost marshal of the United States, and not by the Commonwealth; and there was no evidence of what said assignments were, or on what basis they were made by the provost marshal, or what credits were given them, unless the evidence of General Schouler aforesaid was competent to be considered thereon.

"There was no other evidence in the case that Davis was ever credited or allowed as a part of the quota of Ware under any call of the President during the civil war. The defendants asked the judge to instruct the jury that there was no competent evidence that Davis was ever credited or allowed as part of the quota of Ware; and that said documents could not be considered by them as evidence that he was so credited and allowed. The judge refused so to instruct the jury, but did instruct them that each and all said documents could be considered by them as such evidence, and that the same, together with General Schouler's testimony aforesaid, were competent evidence from which they might find that Davis was credited and allowed as part of the quota of Ware under some call of the President within the meaning of the statute. The judge further instructed the jury that the disability under said statute meant such disability from disease contracted while engaged in said military service as disabled the soldier from performing further military duty." The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

D. S. Richardson & F. D. Richards, for the defendants.

G. A. Somerby, (W. N. Mason with him,) for the plaintiffs.

WELLS, J. It is not controverted that James Davis, Jr., was duly enlisted and mustered into the military service of the United States during the recent civil war; and that he was at the time such a resident of Ware as to bring him within the operation of the Massachusetts statute of 1865, c. 230, § 1, provided he did in fact constitute a part of the quota of that town.

The act of Congress of 1863, c. 75, provided for enrolling and calling out the national forces; establishing enrollment districts and subdistricts; and assigning to the districts the number of men to be furnished therefrom, taking into consideration the number of volunteers and militia already furnished, so as "to equalize the numbers among the districts of the several states, considering and allowing for the numbers already furnished as aforesaid, and the time of their service."

The act of 1864, c. 13, § 2, provided that the quota of each ward of a city, town, &c., "shall be, as nearly as possible, in proportion to the number of men resident therein liable to render military service, taking into account, as far as practicable, the number which has been previously furnished therefrom."

Under these several statutes, it was held in *Bridgewater v. Plymouth*, 97 Mass. 382, that any one who, having previously enlisted as a volunteer, although discharged for disability, was taken into account in the subsequent assignment of its quota to the town from which he enlisted, was to be considered to have served as a part of the quota of that town.

It would make no difference if the number of volunteers exceeded the proportion due from the town, up to the time of assigning quotas; because that excess, being carried to the credit of the town, would reduce by the same number the quota to be assigned. Nor would an excess in the number subsequently furnished affect the consequences of the credit so given. If the credit was due to the town, it must be taken to have been allowed as of the time when due, although the formal adjustment or verification took place later.

That calls were made and quotas assigned to all towns, including the town of Ware, need not be proved by documentary

or other evidence, in a case like this. It is a fact of history, recognized and assumed by the very terms of the statute of 1865. The fact to be established, about which the difficulty arises in this case, is, that James Davis, Jr., was credited to the town of Ware in any assignment of its quota by the provost marshal.

The defendants contend that that fact can only be proved by the record of the provost marshal or war department, and that the evidence resorted to was secondary evidence, admitted without first accounting for the absence of the primary and best evidence. But we do not think that the existence of such a record as this objection supposes is to be presumed. It is not required by the statutes of the United States; nor is it necessarily implied by the nature of the transaction in question.

Even if it were to be assumed that a record exists in the war department, showing not only the quota assigned, but the number and names of volunteers allowed to the credit of the town in assigning that quota, it does not follow that the fact may not be proved by other independent evidence. If the number allowed to the credit of the town were known, or could be ascertained by comparison of its full proportion with the quota actually assigned as still due at any time, evidence that the same number, including Davis, had in fact previously enlisted from the town as volunteers, or had been claimed by the town as having so enlisted, in adjusting its quota with the officer having the duty of assignment in charge, would tend to show, and if uncontrolled would sufficiently show, that Davis was included in the credit given to the town. Such we understand to be the nature of the evidence admitted in this case. It does not bear the relation of secondary evidence to the supposed record of the provost marshal. It is independent evidence, to prove a fact which may exist in and be proved by a record, but which is not necessarily so to be proved.

But to make the chain of evidence thus resorted to complete, it was necessary to give force to a part of the testimony of Adjutant General Schouier, which was not competent as evidence; to wit, that the table of credits made up by him was

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never allowed by the war department till after the year 1864 ' he understood that they afterwards allowed it in assigning quotas to towns, but he had no personal knowledge thereof." This was the turning point of the case; and the report expressly finds that there was no evidence of what credits were given "unless the evidence of General Schouler aforesaid was competent to be considered thereon." Upon this point it was merely hearsay, and the proof therefore fails. The instructions allowed the jury to consider as competent the whole of the testimony of General Schouler, including this statement upon hearsay.

The record kept in pursuance of the Sts. of 1863, c. 65 and c. 229, being of the character of a public record, is competent evidence, though, from its nature, not conclusive of the facts it is required to contain. 1 Greenl. Ev. § 556. Stark. Ev. (4th ed.) 289, 404. Its imperfect condition may affect the credit and weight to be given to it, but does not render it inadmissible. *Sprague v. Bailey*, 19 Pick. 436.

The ruling and instruction as to what constituted the disability intended by the statute was correct. It must be such disability, and such only, as operates to terminate the service within one year from the enlistment. *Fitchburg v. Lunenburg*, 102 Mass. 358.

The admission of hearsay testimony from Adjutant General Schouler, and the instructions to the jury in relation thereto, make a new trial necessary. *Exceptions sustained.*

EDMUND LYNCH vs. HENRY SMITH.

In an action against a hackman for negligently driving horses over a child four years and seven months old and of the average ability and intelligence of children of the age of five years attending the public schools, who was crossing a street on his way home from school at the time of the accident, the question whether the child's parents were negligent in permitting him to return from school alone, and in so doing to cross the street at the time when and place where he was injured, is for the jury.

On the issue whether a child four years and seven months old, and "as intelligent as the average of children in his school five years of age, but rather small for that age" who is

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crossing a street on his way home from school suffered an injury by the negligence of another traveller, was using due care when he was injured, the opinion of his school-teacher as to his capacity to exercise such care is inadmissible in evidence.

If the parents of a child were not negligent in permitting him to cross a street alone, and while crossing he was injured by the negligence of another traveller, it is sufficient to entitle him to recover for the injury, if he was using that degree of care of which he was capable, though a less degree than would be appropriate for an adult to use under like circumstances; and, even if his parents were negligent in permitting him to cross the street alone, their negligence was not contributory, and he may recover, if in crossing he did no act which prudence would have forbidden and omitted no act which prudence would have dictated, whatever was his physical or intellectual capacity.

TORT in the plaintiff's name by his next friend for injuries alleged to have been caused on December 3, 1866, by the negligence of the defendant's servant in driving a pair of horses, drawing a hack, over the plaintiff, who at the time of the accident was crossing Henly Street in Charlestown and using due care. The answer denied that the driver was negligent, and that the plaintiff used due care.

At the trial in the superior court, before *Brigham, J.*, the plaintiff's evidence tended to show that he was born May 2, 1862; lived in Chelsea Place in Charlestown; was admitted to a primary school on Common Street in that city November 20, 1866, as being five years old, children younger than five years old not being admissible by the regulations of the school; that between the date of his admission and December 3 he had attended school "a little over a week;" that two of his brothers, aged respectively seven and nine years, who were pupils in the same school, usually came to the school-room with him, and usually left the school-room with him; "that the plaintiff was as intelligent as the average of children in the school five years of age, but rather small for that age;" that he attended the school on the morning of December 3, and upon its dismissal started to go home by his usual and proper route, across Henly Street, which was not one of the principal thoroughfares of the city, but was about thirty feet wide from curbstone to curbstone of its sidewalks, was traversed by a horse railroad, and would belong to the third class of streets in a scale of four; and that, as the plaintiff was passing (some of the witnesses said, running) across Henly Street, about ten minutes past noon, the

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defendant's servant, who was conveying some voters to the polls in a hack drawn by two horses, and for some distance before reaching the place where the plaintiff was crossing the street, was not looking forwards, but had his head turned away from the horses and was talking with a man who was on the box of the hack with him, drove over the plaintiff and injured him. "There was no evidence offered on the part of the plaintiff, that, on the day of his injury, he was attended by either of his brothers, or by any other person, either in going to or returning from school; and there was no evidence on the part of the defendant tending to disprove the evidence of the plaintiff in respect to the age of the plaintiff or his intelligence, or the usual mode of his going to and from school."

The plaintiff called his school-teacher, Sarah Browsers, as a witness, "and offered to show by her, and by others, that, in her and their opinion, the plaintiff was capable of exercising ordinary care in travelling along and across the streets through which he was called to pass in going to and returning from school, and was competent to go to and from school unattended; but the judge ruled the testimony incompetent and inadmissible, and refused to receive it."

The plaintiff's counsel requested the judge to rule "that the plaintiff, being four years and seven months old, and of the ability and intelligence of the average of children attending the public schools of the age of five years, his parents were not guilty of negligence in permitting him to go from his home to school alone, and to return home from school alone, and in so doing to cross Henly Street at the time when and place where he was when he was run over by the defendant's servant;" but the judge refused so to rule.

In submitting the case to the jury, the judge gave them these instructions without objection: "Parents would neglect the safety of their child, who, knowing that their child was proceeding to a place of danger in the street, failed to prevent, or permitted, their child to proceed to such places unprotected. It has been decided in this Commonwealth that parents, who permitted a child two years old to pass unattended across a public

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street in a city, traversed by a horse railroad, had *prima facie* neglected the safety and failed in proper care of that child. Such facts, in and of themselves, are sufficient to authorize a jury to find that such a child is not properly taken care of by those having such child in charge. The plaintiff was a child of the age of four years and seven months, permitted to go to and from school across the street where he received his injury. Was he of so tender an age as to be incapable of taking care of himself, in view of the time when he would usually cross Henly Street, and in view of the usual and ordinary kind and amount of travel on that street? If the plaintiff, in the exercise of his right of crossing the street, when capable of exercising and actually exercising ordinary care, in crossing that street received an injury from the defendant's hack and horses because they were not driven with ordinary care, he would be entitled to recover."

But the plaintiff objected to the following instructions which the judge also gave to the jury: "The negligence of a parent, or other person, to whose care a child is intrusted, has the same effect, upon an action to recover damages for an injury occasioned by another person to that child, which his own want of care would have if the person injured and such seeking damages was an adult. If that child was incapable of taking care of himself under the circumstances, that is, incapable of observing, appreciating and anticipating the danger from passing vehicles, and of avoiding it, by the exercise of such care as an adult person of ordinary prudence and caution would exercise, then his parents were chargeable with neglect in permitting him to cross that street unattended, and he cannot maintain this action. The defendant had a right to drive his horses along Henly Street; the plaintiff had as perfect a right to cross that street. The defendant in the exercise of his right would not be responsible for an injury to a person crossing that street, who was incapable of exercising, or who did not exercise, ordinary care."

The jury found for the defendant, and the plaintiff alleged exceptions, 1. to the rejection of the evidence of opinions of the plaintiff's capacity to exercise due care; 2. to the refusal to rule

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that the plaintiff's parents were not negligent; and 3. to the instructions stated as given under objection.

J. F. Pickering, for the plaintiff.

C. J. McIntire, for the defendant.

CHAPMAN, C. J. The plaintiff's declaration alleges that the defendant was driving a hack drawn by a pair of horses, in and along Henly Street in Charlestown, by his servant, and carelessly ran over the plaintiff, (who was crossing the street and using due care,) and injured him. The answer puts these allegations in issue.

It appeared in evidence that the plaintiff was a child four years and seven months old, and of the ability and intelligence of the average of children attending the public schools of the age of five years, and was attending the common school. He was crossing the street on his way home from school when the accident happened. The plaintiff's counsel requested the court to instruct the jury, that, the child being of the age and capacity stated above, his parents were not guilty of negligence in permitting him to go from his home to school alone, and to return alone, and in doing so to cross Henly Street at the time when and the place where he was run over by the defendant's servant; and he excepts to the refusal of the judge to make this ruling. But the judge properly left this matter to the jury. It is true that streets and highways are made for the use of all travellers, school children as well as others; but in an action for damages by one traveller against another, brought on the ground that the plaintiff used due care, and that he was injured by the negligent conduct of the defendant, it must appear that he, or some one on his behalf, used due care, and that his own want of care did not contribute to the injury. Some of the cases on this point are referred to in *Steele v. Burkhardt*, *post*, 59.

The question, whether a child like the plaintiff is of such capacity that he may be safely trusted to go to and from school alone, is one of fact, and not of law. Its importance arises from the necessity that exists, in an action like this, to prove the due care that he alleges. In an action for a wilful assault and battery in the street, it would be immaterial. But in an

action for negligence, either the plaintiff, or some one on his behalf, must use due care, so that his own negligence shall not have contributed directly to the injury. On this point, the testimony of the school-teacher, merely expressing her opinion of the capacity of the child, was properly excluded. Yet, in connection with a description of the child, an opinion of a person acquainted with him, and having had opportunity to observe him, as to his quickness of observation and comprehension, as compared with other persons, would be admissible. The statement of such an opinion, as to whether he was physically large or small, strong or weak, and quick or slow of movement, in comparison with others, would be according to every day's practice; and when it related to the exhibition of mental qualities, it would be of the same species. There is a class of evidence of this character which necessarily involves the statement of opinion. We have had occasion to consider it recently in *Commonwealth v. Dorsey*, 103 Mass. 412.

If the jury find that the plaintiff was of such capacity that he was in the street without negligence, either on the part of himself or his parents, then the question arises what degree of care he was bound to exercise. In *Mulligan v. Curtis*, 100 Mass. 512, it was held to be a question for the jury, whether a boy three and a half years old might not without negligence be trusted to go across the street, accompanied by his brother nine years old. Certainly the jury could not find that a boy nine years old must exercise the capacity of an adult. But it was implied that, if it was proper for him to be there, it was only necessary for him to exercise such capacity as he had. School children who are properly sent to school unattended must use such reasonable care as school children can. It must be reasonable care adapted to the circumstances, or, in other words, be ordinary care of school children.

It does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence

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would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be remote. But if the child has not acted as reasonable care adapted to the circumstances of the case would dictate, and the parent has also negligently suffered him to be there, both these facts concurring constitute negligence which directly and immediately contributes to the injury, for which the defendant ought not to be required to make compensation.

This principle was illustrated in *Munn v. Reed*, 4 Allen, 431. The plaintiff, a small child, was bitten by a dog. It is true that the liability of the owner was by statute. Gen. Sts. c. 88, § 59. But the question of negligence arose, and it was held that, if the mother of the child was not guilty of negligence in permitting the child to play with the dog, and if the child was bitten while using such care as is usual with children of its age, the action might be maintained. But this principle is inconsistent with the idea that the child must use the discretion of an adult. The instructions which were given to the jury in this case required a higher degree of care than the decided cases sanction; and regard is also to be had to the question whether the negligence of the plaintiff contributed to the injury. If the negligence of the child contributed to his being in the way of the defendant's horses, it contributed to the injury; but negligence which had no such effect would be immaterial. *Steele v. Burkhardt*, *post*, 59.

First and second exceptions overruled; third exception sustained.

CASES
*** ARGUED AND DETERMINED**
IN THE
SUPREME JUDICIAL COURT
AT THE
MARCH SESSION 1870, IN BOSTON.

PRESENT:

HON. REUBEN A. CHAPMAN,	CHIEF JUSTICE.
HON. HORACE GRAY, JR.,	} JUSTICES.
HON. JOHN WELLS,	
HON. JAMES D. COLT,	
HON. SETH AMES,	
HON. MARCUS MORTON,	

SUFFOLK COUNTY.

MOSES G. STEELE & another vs. GABRIEL F. BURKHARDT

One who places his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise and as near as possible to the sidewalk, is not restrained by the mere fact of thus violating the ordinance from maintaining an action against one who injures the horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so.

TORT for injury alleged to have been caused to the plaintiffs' horse by the negligence of the defendant's servant; submitted to the judgment of the superior court, and, on appeal, of this court, upon the following award of an arbitrator as upon a statement of agreed facts:

" I find that the injury to the plaintiffs' horse, for which they seek to recover damages in this action, was occasioned by the negligence and want of due care of the defendant's servant, then in the employment of the defendant. At the time of the injury, the plaintiffs' wagon, to which the injured horse was attached, was placed in Clinton Street in the city of Boston, by the plaintiffs' driver, having the care of the wagon for the loading of certain articles, the weight of which in each and every package thereof was less than five hundred pounds; and the wagon was then wholly or in part backed and placed across Clinton Street, and thereby the plaintiffs were guilty of a violation of an ordinance of the city, which provides as follows: 'And for the loading or unloading of any dirt, bricks, stones, sand, gravel, or of any articles, whether of the same description or not, the weight of which in any one package shall be less than five hundred pounds, no truck, cart, wagon, sleigh, sled or other vehicle shall be wholly or in part backed or placed across any street, square, lane or alley, or upon flag-stones or crossings of the same, but shall be placed lengthwise, and as near as possible to the abutting stone of the sidewalk or footway; and any owner or driver or other person having the care of any such vehicle, violating either of the provisions of this section, shall be liable to a fine of not less than five dollars, nor more than twenty dollars, for each offence.' It is in evidence that, at the time of the injury, there was sufficient room, with proper care, for the defendant's team to pass through Clinton Street, (a greater degree of care being required by reason of the position of the plaintiffs' team as aforesaid, but not greater than the defendant was bound to use, in my judgment,) but the defendant's servant, in passing between the plaintiffs' horse and the opposite curb-stone, ran over and upon the hoof of the plaintiffs' horse, with a heavy team, and in so doing was guilty of the negligence which I report; and I further find, that the only fault upon the part of the plaintiffs is the fact of their horse and wagon having been placed against the curb in violation of the city ordinance above mentioned.

"In case the court shall find, under the foregoing statement of facts, that the violation hereinbefore mentioned of said ordinance, on the part of the plaintiffs' driver, debarred the plaintiffs from maintaining their action for damages, my award would be, judgment for the defendant for his costs of court, with the costs of this reference; otherwise, my award would be for the plaintiffs, for the sum of \$225 and their costs of court."

H. J. Stevens, for the plaintiffs.

A. Russ, for the defendant.

CHAPMAN, C. J. The act complained of by the plaintiffs is, that, while their horse was standing on Clinton Street, the defendant's servant, while driving a heavy team along the street, carelessly drove it upon the hoof of the plaintiffs' horse, and injured him. The award, which the parties have agreed to accept as a statement of facts, finds that the injury was occasioned by negligence and want of due care in the defendant's servant. The terms of this finding imply that there was no negligence on the part of the plaintiffs, which contributed to the injury. And it is further found that, though the plaintiffs' team was standing there in violation of a city ordinance, yet there was room for the defendant's team to pass by, using due care, and the only fault of the plaintiffs consisted in the violation of the city ordinance. It is not found that this violation contributed to the injury. It is said by Bigelow, C. J., in *Jones v. Andover*, 10 Allen, 20, that, "in case of a collision of two vehicles on a highway, evidence that the plaintiff was travelling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence." So the evidence that the plaintiffs' team was standing in the street in violation of a city ordinance was admissible to show negligence on their part. It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. And, notwithstanding this evidence, it was competent to the arbitrator to find, as a fact, that, towards the defendant, the plaintiffs were guilty of no negligence, but were careful to leave him ample room to pass. He did so find in substance; and his finding is agreed to as a fact.

A collision on the highway sometimes happens, when both parties are in motion, and both are active in producing it. In such cases, the plaintiff must prove that he was not moving carelessly. But the collision sometimes happens, as in this case, when the plaintiff's team is standing still. In such a case, he must prove that his position was not so carelessly taken as to contribute to the collision. The fact is here found that it was not so taken, though it was in violation of the ordinance. There was therefore no such negligence on his part as to defeat the action.

Actions founded on negligence are governed by a plain principle. The plaintiff's declaration alleges that the injury happened in consequence of the negligence of the defendant. This is held to imply that there was no negligence on the part of the plaintiff which contributed to the injury; and to throw upon him the burden of proving the truth of the allegation. It may depend upon care exercised by himself personally, or by his coachman, if he is riding, or by his teamster, in his absence, or by the person in charge of him, if he is an invalid, or an infant of tender years, or in any way so situated as to need the care of another person in respect to the matter. If there was want of care, either on the part of himself or the person acting for him, and the injury is partly attributable directly to that cause, he cannot recover, simply because he cannot prove what he has alleged. Among the numerous cases sustaining this view are, *Parker v. Adams*, 12 Met. 415; *Horton v. Ipswich*, 12 Cush. 488; *Holly v. Boston Gas Light Co.* 8 Gray, 131; *Wright v. Malden & Melrose Railroad Co.* 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401.

But it is further contended that these plaintiffs are compelled to prove their own violation of law in order to establish their case, and therefore the action cannot be maintained. The substance of the ordinance referred to is, that, for loading and unloading packages weighing less than five hundred pounds, wagons shall stand lengthwise of streets, and not crosswise, under a prescribed penalty. The plaintiffs were loading packages of less weight, and their wagon was standing crosswise of the street.

But proof of the weight of these packages was not necessary. In this respect the case is like that of *Welch v. Wesson*, 6 Gray, 505, where the plaintiff was injured while he was trotting his horse illegally. It is unlike the cases of *Gregg v. Wyman*, 4 Cush. 322, and *Way v. Foster*, 1 Allen, 408, which were decided in favor of the defendant upon the ground that the plaintiff was obliged to lay the foundation of his action in his own violation of law. Even in those cases, the violation of law by the plaintiffs would not have justified an assault and battery or a false imprisonment of the plaintiffs. In this case, if the packages had weighed more than five hundred pounds, the position of the team would have been the same. In *Spofford v. Harlow*, 3 Allen, 176, it was held that, though the plaintiff's sleigh was on the wrong side of the street, in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury. And it is true generally, that, while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed.

*Judgment for the plaintiffs.**

* A similar decision was made in the following case from Suffolk, which was argued in writing at the November session 1870.

PATRICK KEARNS vs. FREDERICK SOWDEN.

TORT for injury alleged to have been caused to the plaintiff's horse by the negligence of the defendant's servant. Writ dated November 2, 1868. At the trial in the superior court, before *Brigham, C. J.*, "the evidence tended to prove that the plaintiff left his horse standing in front of a store in Broad Street in Boston, for more than five minutes, while he was in said store transacting business, and, while standing there, and when neither the plaintiff nor any person had direct charge of the horse, the servant of the defendant drove his cart against said horse, and ran over or against the foot of the horse and injured it. The defendant requested the judge to rule as follows: 'If the jury are satisfied that the plaintiff's horse had been standing unattended in the street for more than five minutes, they may consider that fact as sufficient evidence of negligence to render him to some extent responsible for the injury, and he cannot recover.' The judge declined so to rule; but gave other rulings

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HIRAM WELLINGTON vs. DOWNER KEROSENE OIL COMPANY.

A declaration that the defendant, knowing J. S. to be a retailer of fluids to be burned in lamps for illuminating purposes, and naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that, in ignorance of its dangerous properties, he retailed a pint of it to the plaintiff to be burned in his lamp for illumination; and that, while the plaintiff, in like ignorance, was so burning it, it exploded and injured him and his property; sets forth a good cause of action at common law.

There is no conclusive presumption that a retailer of fluids to be burned in lamps for illuminating purposes, or a customer to whom he sells naphtha for such a use, is aware of the danger of so burning naphtha.

A declaration which, with sufficient allegations of the defendant's knowledge and the plaintiff's care, alleges that the defendant sold to J. S. naphtha under the name of oil, contrary to the St. of 1867, c. 286; that J. S. resold it to the plaintiff, to be burned in a lamp for illuminating purposes; and that, while the plaintiff was so burning it, it exploded and injured him and his property; sets forth a good cause of action under the statute.

Whether, in order to charge, either criminally or civilly, a seller of naphtha under the name of oil, on the St. of 1867, c. 286, § 5, it is necessary to prove that he knew it was naphtha when he sold it, *quære*.

The right of action given by the St. of 1867, c. 286, to "any person suffering damage from the explosion or ignition" of fluid unlawfully sold under the statute, extends to injuries to property, and includes all persons to whom any purchaser from such seller may give or resell it.

TORT for injury of the plaintiff's person and property by the explosion of a fluid which he was burning in a lamp. Writ

on the subject of negligence, which were not excepted to except so far as they failed to give the ruling aforesaid. The jury found a verdict for the plaintiff; and the defendant excepted." The bill of exceptions did not indicate the date when the accident occurred, nor show that the plaintiff's horse was harnessed to a vehicle.

A. Cottrell, for the defendant, cited an ordinance of the city of Boston, to the effect that no person having the care or ordering of any vehicle, with or without a horse or other animal harnessed thereto, should suffer it to remain in any street of that city more than five minutes without some proper person to take care of it; Laws & Ordinances of Boston, (ed. 1856,) 102; and argued that the facts showed that the plaintiff was violating this ordinance when the accident occurred and hence could not recover.

G. H. Rich, for the plaintiff.

BY THE COURT. The defendant had not a right to require the judge to rule in the absolute form stated in his request; for it does not appear, from the report, that the fact referred to did prove any negligence towards the defendant, or contributing to the injury. *Exceptions overruled.*

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dated June 22, 1869. The declaration contained two counts; the first, upon the St. of 1867, c. 286, the material parts of which statute are printed in the margin; * the second, upon the common law.

The first count alleged that "the defendants sold to one Nathaniel E. Chase a certain quantity, to wit, one barrel, of naphtha, under the name of oil, contrary to the statute in such case made and provided; and the said Chase retailed and resold a part of the same, to wit, one pint, to the plaintiff, for the purpose of being burned in a lamp for illuminating purposes; and while the plaintiff was using the same in a lamp for illuminating purposes, the same ignited and exploded, and dangerously burned, wounded and injured the plaintiff in his face and eyes, ears, mouth, nose, head and hands, and other parts of his body, so that his life was greatly endangered and despaired of, and also burned his clothes, destroyed the gas fixtures in the entry of his dwelling-house, and otherwise injured his dwelling-house and furniture; and by reason of such burning, wounding and inju-

* "SECTION 3. No person shall mix for sale naphtha and illuminating oils, or shall sell or offer for sale such mixture, or shall sell or offer for sale, except for purposes of remanufacture, illuminating oils made from coal or petroleum, which will ignite at a temperature of less than one hundred and ten degrees Fahrenheit, to be ascertained by the application of Tagliabue's or some other approved instrument; and any person so doing shall be held to be guilty of a misdemeanor, and shall for each offence, upon conviction thereof, be liable to" certain penalties, specified in § 2, "and shall also be liable therefor to any person suffering damage from the explosion or ignition of such oil thus unlawfully sold; and such oil thus unlawfully sold, or kept or offered for sale, and the casks or packages containing the same, shall be forfeited and sold for the purposes of remanufacture, one half of the proceeds of such sale to go to the Commonwealth, and the other half to the informer."

"SECTION 4. For all the purposes of this act, all illuminating oils made from coal or petroleum, having an igniting point of less than one hundred and ten degrees Fahrenheit, to be determined in the manner provided in the third section of this act, shall be deemed to be mixed with naphtha.

"SECTION 5. Any person who shall sell, or keep or offer for sale, naphtha under the name of oil, shall, for each offence, upon conviction thereof, be liable to the same penalties provided, and shall be subject to the same liabilities set forth, in the second and third sections of this act."

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ries, the plaintiff was rendered incapable of following and transacting his necessary affairs and business for a long space of time, to wit, the space of seven weeks, and underwent during all said time great pain and distress of body and mind; and thereby the plaintiff was forced and obliged to and did pay, lay out and expend divers large sums of money for medicines, nursing and attendance of a physician in endeavoring to heal and cure his said burns and wounds and injuries, amounting in all to the sum of, to wit, the sum of five hundred dollars."

The second count alleged that "the defendants are manufacturers of and dealers in oils, and Nathaniel E. Chase was a retailer of oils and fluids to be burned in a lamp for illuminating purposes; and the defendants, knowing said Chase to be such retailer, sold and delivered to said Chase a certain quantity, to wit, one barrel, of very dangerous and explosive liquid, called naphtha, for the purpose of being retailed and resold to be burned in a lamp for illuminating purposes, it being the purpose, and the defendants knowing it to be the purpose, of the said Chase to retail and resell the same to the public to be burned in a lamp for illuminating purposes, the defendants knowing that said liquid was explosive and dangerous to life when so used; and the said Chase, not knowing the same to be dangerous and explosive, retailed and resold a certain quantity, to wit, one pint of the same, to the plaintiff to be burned in a lamp for illuminating purposes; and while the plaintiff was using the same in a lamp for illuminating purposes, and not knowing the same was naphtha, or dangerous and explosive, the same ignited and exploded" and injured the plaintiff's person and property, and caused him delay and pain and expense, as alleged in the first count.

The answer was a general denial of each and every allegation in the declaration.

Trial in the superior court, before *Lord, J.*, who allowed the following bill of exceptions: "At the trial, the plaintiff offered evidence tending to prove all the allegations in either count but the judge ruled that they would not sustain his action, if proved, and directed a verdict for the defendants; to which ruling and direction the plaintiff excepted."

E. M. Bigelow, for the plaintiff.

G. A. Somerly, for the defendants. 1. The first count seeks to charge the defendants on the statute, for injury resulting to the plaintiff from his buying naphtha under the name of oil from Chase; for the sole reason that the defendants previously sold it to Chase. But there is no privity between the plaintiff and the defendants; and the statute puts no liability on them. The whole purpose of the statute is secured and effected by rendering each seller liable for his own sale only.

2. The second count alleges a sale of naphtha, as naphtha only; and seeks to charge the defendants for negligence at common law. But the selling of naphtha to full grown persons of sound mind is not unlawful. The law presumes that Chase and the plaintiff had the knowledge and experience that naphtha is explosive and dangerous, which is common to the community. The case finds that Chase was a retailer of fluids for illumination; and therefore he had peculiar knowledge on the subject. Nor was the sale of the naphtha by the defendants to Chase the proximate cause of the plaintiff's injury. The circumstances of the case do not, therefore, disclose negligence such as was alleged in *Carter v. Towne*, 98 Mass. 567. See also *Meesel v. Lynn & Boston Railroad Co.* 8 Allen, 234; *McDonald v. Snelting*, 14 Allen, 290.

GRAY, J. This is an action of tort. Both counts of the declaration are framed, not upon any supposed privity between the parties, but upon a violation of duty in the defendants, resulting in an injury to the plaintiff. The first count is upon the St. of 1867, c. 286, and the second upon the common law. It will be convenient to consider the general question of the liability of the defendants at common law, before examining the construction and effect of the statute.

It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus a person who delivers a carboy

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which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier to whom it is delivered by the first, in the ordinary course of business, to be carried to its destination. *Farrant v. Barnes*, 11 C. B. (N. S.) 553. So a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. *George v. Skittington*, Law Rep. 5 Ex. 1. And a druggist who negligently labels a deadly poison as a harmless medicine, and sells it so labelled to dealers in such articles, is liable for an injury to any one who afterwards purchases and uses it, if there is no negligence on the part of the intermediate sellers or of the person injured. *Thomas v. Winchester*, 2 Selden, 397. *Davidson v. Nichols*, 11 Allen, 519, 520. *McDonald v. Snelling*, 14 Allen, 290, 295.

The second count of the declaration expressly avers that the defendants sold naphtha to Chase for the purpose of being retailed and resold to be burned in a lamp for illuminating purposes, knowing it to be explosive and dangerous to life when so used, and knowing Chase's business to be that of a retailer and his purpose to retail and resell the same to the public to be so used; that Chase resold a part thereof to the plaintiff to be so used, and, while he was so using it, it ignited and exploded, and injured his person and property; and that both Chase and the plaintiff were ignorant of its dangerous qualities. Proof of the facts thus alleged would show that the defendants were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous, for the purpose of being resold in the market, without giving information of its nature, and were therefore bound to contemplate, as a natural and probable consequence of their unlawful act, that it might explode or ignite, and injure an innocent purchaser or his property, and to answer in damages for such a consequence if it should come to pass. The ruling of the learned judge who presided at the trial was therefore erroneous, and the exceptions must be sustained

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In *Carter v. Towne*, 98 Mass. 567, cited for the defendants, a declaration alleging that the defendants negligently and unlawfully sold and delivered gunpowder to the plaintiff, a boy eight years old, having neither experience nor knowledge in the use of gunpowder, and being an unfit person to be intrusted with it, all of which the defendants well knew, and that the child, in ignorance of its effects, and using that care of which he was capable, exploded the gunpowder and was burned thereby, was held good upon demurrer. In that case, no question was raised of the defendants' liability to any other person than the one to whom they delivered the article. The plaintiff was afterwards held not entitled to recover of the defendants, because it appeared that the gunpowder had been carried home by the child, and put in the custody of his parents, and a part of it been fired off by him with their permission, before the explosion by which he was injured; and as the gunpowder had passed into the custody of adult persons who knew its dangerous qualities and had allowed him to use it, and was retaken by the child from their custody, before the accident sued for, the sale by the defendants was not the direct, proximate or efficient cause of the injury. S. C. 103 Mass. 507.

We cannot accede to the suggestion made by the counsel for the defendants in the case at bar, in opposition to the proof offered at the trial, that Chase and the plaintiff must be deemed to have known the dangerous qualities of naphtha.

The question remains to be considered of the liability of the defendants under the St. of 1867, c. 286, §§ 3, 5, which declares that any person "who shall sell, or keep or offer for sale, naphtha under the name of oil," shall be subject to a penalty, and "shall also be liable therefor to any person suffering damage from the explosion or ignition of such oil thus unlawfully sold."

The bill of exceptions states that the plaintiff at the trial offered evidence to support all the allegations in either count of the declaration, which would include the defendants' knowledge of the dangerous character of the article sold; and it was assumed at the argument that the defendants, when they sold the article, knew that it was naphtha. It is therefore unnecessary

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to decide whether such knowledge must be proved in order to charge them, criminally or civilly, under the statute, or whether the legislature has imposed upon every one the duty of ascertaining that any article which he undertakes to sell as oil is not naphtha. See *Herne v. Garton*, 2 El. & El. 66; *Commonwealth v. Flannelly*, 15 Gray, 195, 196; *Commonwealth v. Farren*, 9 Allen, 489. Nor have we considered whether the first count sufficiently alleges that the plaintiff was in no fault which contributed to his injury; because that objection also was not particularly argued. In both these respects, the declaration may be amended, if necessary, before another trial.

In all other respects, the first count is sufficient to charge the defendants upon the St. of 1867. That statute does not confine the civil liability of the offender, for the explosion or ignition of the article unlawfully sold, to injuries suffered by persons to whom he sells or offers it, but makes him "liable therefor to any person suffering damage." These words are broad enough to include all persons to whom any purchaser from him may give or sell it. And they doubtless include injuries to property, as well as to the person. *Brewer v. Crosby*, 11 Gray, 29. The object of the legislature would appear to have been to make any one who (at least knowingly) sends this article out into the community, under a name which does not disclose the degree of danger attending its keeping or use, himself bear the risk of all damages from its explosion or ignition to any person whose own fault or negligence does not contribute to his injury. The first count alleges a sale by the defendants to Chase of one barrel of naphtha under the name of oil, contrary to the statute; a resale by Chase to the plaintiff of one pint thereof for the purpose of being burned in a lamp for illuminating purposes; and that, while the plaintiff was so using the same, it ignited and exploded, and injured him and his property. Proof of these facts would show that the defendants' act caused an injury to the plaintiff, for which the defendants would be responsible under the statute.

Exceptions sustained.

WILBUR FISK *vs.* GILBERT WAIT.GEORGE FISK *vs.* SAME.

A. and his minor son B. were in the vestibule of their house preparing to set off fireworks while a procession was passing, when C. fired a rocket, from his house opposite, which struck and injured B. Many rockets and other fireworks were set off by other persons while the procession was passing the house. *Held*, in an action against C. for the injury as caused by his negligence, that the question whether A. and B. were careless in being in the vestibule was for the jury. *Held*, also, that evidence, offered by C., that he and A. were members of a club, which got up the procession and published notices calling on citizens to decorate and illuminate their houses along its route, but not mentioning fireworks; that they both decorated and illuminated their houses, in aid of the object of the procession and in pursuance of the call; that C. fired the rocket as a part of his illumination; and that no one had license to set off fireworks on the occasion; was immaterial.

TWO ACTIONS OF TORT; the first, for injuries occasioned to an infant by the negligent firing of a rocket by the defendant; the second, by the infant's father, for a loss of his child's services by reason of said injuries, and for the expenses of causing him to be attended by a surgeon. The principal injury alleged was the loss of one of the child's eyes.

At the trial of the actions together, in the superior court, before *Reed, J.*, the plaintiffs introduced evidence tending to show that in the autumn of 1868 they were in the vestibule of said George Fisk's house, and were proceeding to discharge a kind of fireworks called Roman candles, while a torchlight procession, "which was gotten up and carried on by Grant Club No. 1 of South Boston," was passing by the house; that the vestibule was closed, towards the street, by a storm door with glass panels; and that the father was holding the Roman candles in his hand, and the child was holding a taper at which to light them, when a rocket, fired by the defendant from his house on the other side of the street, broke through one of the panels of the door and struck the child and injured him. There was also evidence tending to show that, while the procession was passing the houses of the plaintiffs and the defendant, many rockets and different kinds of fireworks were discharged by other persons.

The defendant, for the purpose of proving that he and the plaintiffs "were engaged in a common enterprise, without right,"

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and so the plaintiffs could not recover, offered evidence tending to show "that he and George Fisk were both members of said Grant Club No. 1 of South Boston, and both contributed money to defray its general expenses; that, under the direction of said club advertisements were published in the newspapers, and printed notices distributed along the route of the procession, calling on the citizens to appropriately decorate and illuminate their premises, nothing being said therein about fireworks; that, in pursuance of said call, and to aid in giving effect and encouragement to the object of the procession, George Fisk and the defendant did decorate and illuminate their premises; that the defendant also illuminated his premises by various fireworks, including some rockets, which he fired from the top of his piazza from his hand; and that neither the plaintiffs nor the defendant, nor any person, had a license to discharge fireworks on the occasion." But the judge excluded the evidence.

The defendant also asked the judge to instruct the jury that the voluntary presence of the plaintiffs in the vestibule of the house, for the purpose of aiding in the object of the procession, was carelessness which would prevent a recovery by the plaintiffs. The judge refused so to instruct the jury, but instructed them, in connection with instructions not excepted to, that the carelessness of the plaintiffs was a question of fact for them to pass upon.

The jury found for the plaintiffs, with damages in the first case of \$2000, and in the second case of \$200; and the defendant alleged exceptions.

B. Dean, for the defendant.

G. A. Somerby, for the plaintiffs.

By THE COURT. The evidence offered by the defendant was properly rejected, because it was immaterial; and the instructions to the jury were correct. Nothing appears in the case which tends to show any concurrence of either of the plaintiffs in the unlawful act of the defendant which caused the injury or any negligence in respect to it. *Exceptions overruled.*

JAMES MAHONEY vs. METROPOLITAN RAILROAD COMPANY.

The fact that a traveller on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it is not conclusive that he does not use due care in making the attempt.

In an action against a street railway corporation for injuries alleged to have been caused to a traveller on the street by negligence of the defendants in heaping up snow by the side of their track, it appeared that the defendants heaped up snow on each side of the track so that it formed a trough, twelve or fourteen inches deep, with sides sloping down to the rails at angles of about forty-five degrees, and that, while the plaintiff was conducting across this trough his team of two horses, drawing a sled on two sets of runners, which was heavily loaded with lumber projecting over the back of the shaft horse, the load tilted forwards, when the front runners reached the first rail, so that the lumber fell on that horse and on the plaintiff, and injured them. *Held*, that the questions whether the plaintiff was negligent in attempting to cross the track, or in the manner in which he made the attempt, were for the jury.

TORT for injuries sustained by the plaintiff in attempting to cross, with his horses and sled, the street railway track of the defendants in Washington Street in Boston, on February 1, 1868, and alleged to have been caused by the negligence of the defendants in heaping up snow and ice on the sides of the track. At the trial in the superior court, before *Wilkinson, J.*, the plaintiff introduced evidence tending to show these facts:

During the latter part of January 1868 there was a heavy fall of snow, and the defendants removed it from their railway track with snow ploughs, which cleared the iron rails and heaped up snow each side of the track, where it lay on February 1 twelve or fourteen inches deep, icy, and sloping down to the rails at angles of about forty-five degrees.

Harrison Avenue is a street which runs nearly parallel with Washington Street; Davis and Dover Streets are parallel streets, connecting Washington Street and Harrison Avenue; and there is a railway track of the defendants in Dover Street. Where Davis Street joins Washington Street, the defendants' track in Washington Street runs along the middle of the carriageway, about twelve feet distant from the curb-stone of the sidewalks.

The plaintiff was a teamster and about forty years old. On February 1 he was transporting a load of lumber from Charles-

town, which lies north of Boston, to a place on Harrison Avenue south of Dover Street. The lumber weighed about 3400 pounds, consisted of joists some of which were fifty feet long, and was loaded on a sled drawn by a team of two horses.

"The sled was what is called a traverse sled, having a double set of runners, with sides like a job wagon, held up by iron supports. The lumber rested, in front, on a roller which was placed over the fore part of the sides of the sled, thence sloping down to another roller, placed at the bottom of the hind end of the sled. The lumber projected over the shaft horse's back and was fastened to the wagon sides by ropes."

The plaintiff, on his way, turned into Washington Street at a point some distance north of Davis Street, soon after noon; and he testified that "he saw the excavation made by the defendants, as he passed up southerly on Washington Street, on the right or westerly side of the street, and knew it to be dangerous, and, preferring to get into Harrison Avenue through Davis Street, where there was no horse railroad track, as there was in Dover Street, and seeing how the icy snow lay, he directed his man, who had assisted him in loading, and had accompanied him thus far, to take the leading horse by the head, and to lead him across the track, as nearly at a right angle as he could, and into Davis Street." The man obeyed the direction, "crossing nearly directly across, and at a walk; the plaintiff himself holding the shaft horse by the bridle at his head. A witness called as an expert, and not contradicted, testified that this was the correct way to cross, avoiding an acute angle crossing, which might be more likely to produce an upset. When the forward runners came upon the rail track, the hind runners being still on the snow heap on the westerly side, the load was so thrown forward that it broke the nigh forerunner and the wagon side, breaking the iron braces, and the lumber came upon the shaft horse and the plaintiff, throwing both of them down, somewhat injuring the horse, and breaking the plaintiff's ribs and doing him serious injury."

On this evidence, the defendants, without offering any evidence, asked for a ruling that the plaintiff had not shown that

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he used due care; and the judge ruled "that the plaintiff, having voluntarily driven into the excavation, knowing it to be dangerous, could not maintain his action," and directed a verdict for the defendants, which was returned. The plaintiff alleged exceptions.

J. C. Park, for the plaintiff.

W. Gaston, (*E. O. Shepard* with him,) for the defendants.

MORTON, J. This case falls within the principle of the case of *Thomas v. Western Union Telegraph Co.* 100 Mass. 157. The fact that the plaintiff saw the obstruction created by the defendants, and knew its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. A person who, in the lawful use of a highway, meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party.

In the case at bar, if the plaintiff had reasonable cause to believe that he could pass the obstruction in safety, and used reasonable care in the attempt, he is entitled to recover. *Horton v. Ipswich*, 12 Cush. 488. It is a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the street notwithstanding the obstruction, and whether in doing so he used due care.

Exceptions sustained.

FRANCES E. JONES vs. CITY OF BOSTON.

A city is not liable on the Gen. Sts. c. 44, § 22, for an injury received by a traveller on a sidewalk, which it is bound to keep in repair, through the falling upon him of a sign which the proprietor of an adjoining building had suspended over the sidewalk on an iron rod insecurely fastened to the building; although the city had notice of the position and insecurity of the sign and its fastening.

TORT on the Gen. Sts. c. 44, § 22, for an injury alleged to have been received by the plaintiff through a defect in a highway in Boston. Trial before *Morton*, J., who reported the case follows.

"At the trial the plaintiff offered to prove that, on June 7 1867, as she was travelling along the sidewalk of Union Street, a public highway in said city, which the defendants were bound to keep in repair, and using due care, a sign or signs, suspended and projecting over said sidewalk, together with the iron rod or frame from which the same were hung, but so high that persons travelling along said sidewalk would not come in contact therewith, fell upon the plaintiff, and dislocated and fractured her hip, causing her very serious injury; that said injury was caused solely by the falling of said sign or signs, and rod or frame; that said sign or signs, and rod or frame, were hung in a very unsafe and insecure manner; and that said sign or signs, and rod or frame, had so hung, as aforesaid, for the space of more than twenty-four hours prior to said injury, and after reasonable notice to the officers of said city of such suspension and condition, more than twenty-four hours prior thereto. Said sign and frame was put up by and belonged to the owner of the building to which it was attached. Upon this offer of proof, I ruled that the action could not be maintained, and so instructed the jury, who returned a verdict for the defendants; and now I report the case for the determination of the full court."

J. P. Converse, for the plaintiff.

J. P. Healy, for the defendants.

WELLS, J. For an injury received by reason of a defective awning, projecting over and across a sidewalk, and supported upon posts at the curbstone, a city or town is held to be liable. *Drake v. Lowell*, 13 Met. 292. *Day v. Milford*, 5 Allen, 98. For an injury received in a similar manner from the fall of snow and ice, projected from the roof of a building, and overhanging the sidewalk, the city or town is held not to be liable. *Hixon v. Lowell*, 13 Gray, 59, 62. In this case, the injury was caused by the falling of a sign, "suspended and projecting over the sidewalk, together with the iron rod or frame" from which it hung. It was attached to the building by the occupant, for purposes relating exclusively to his occupancy. In this fact consists all of importance that we perceive, to distinguish this case from either of those above mentioned. The question is, by which of those decisions the present case is to be governed.

In *Drake v. Lowell*, and *Day v. Milford*, the decisions do not appear to have been made upon the ground that the awnings, or the posts upon which they were supported, were of themselves obstructions in the street, and therefore defects, rendering the city or town liable for whatever injury might happen by reason of their being there. And in *Macomber v. Taunton*, 100 Mass. 255, it is decided that posts so placed are not defects. Those decisions are put exclusively upon the ground of the insufficient strength or defective condition of the awnings, whereby persons passing upon the sidewalk were exposed to danger. The awning differs from the overhanging sign, or ice, in that it is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as such. The structure itself, being adapted to the sidewalk, in some measure, as a part of its construction and arrangement for use as a sidewalk, a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk. Permitting it to remain will make the city or town responsible for it, as much as if it were originally placed there by its own officers. This test of what constitutes a defect in a way is suggested in *Barber v. Roxbury*, 11 Allen, 318, as well as in *Hixon v. Lowell*. In the latter case it was stated, as the opinion of the court, that the case of *Drake v. Lowell* went to the limit, in that direction, of liability of towns for such defects. If so, the present case is excluded.

Upon the whole, we are satisfied that this case must be governed by the decision in *Hixon v. Lowell*. The difference in the facts does not place them upon any different ground of principle. The projection of the ice was produced by the action of the elements, causing deposits of snow and water upon the roof. But it had been overhanging the sidewalk for twenty-four hours; and, under the statute which imposes it, the liability of the city or town is to be determined by the existence and character of an obstruction or cause of danger, and not by the manner of its production. There is nothing in the character of the overhanging ice, different from that of the insecure sign, which should

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exempt the city or town from liability for the one and not for the other. It subjects the owner or occupant of the building to responsibility for injuries occasioned by its fall, as much as does the falling sign, and substantially upon the same grounds. *Shipley v. Fiftly Associates*, 101 Mass. 251.

From these considerations, we are brought to the conclusion that this action cannot be maintained.

Exceptions overruled.

JAMES E. PINKHAM vs. INHABITANTS OF TOPSFIELD.

In an action on the Gen. Sts. c. 44, § 22, for an injury alleged to have been received through a defect in a highway which the defendant town was bound to keep in repair, the evidence tended to show that the place alleged to be defective was covered with smooth and slippery ice, upon a steep and springy hillside, where the road sloped not only in the direction of its course, but across it from one side to the other. *Held*, that the defendants had no ground of exception to instructions which authorized the jury to return a verdict for the plaintiff only in event of their finding that there was some special reason for the formation of ice in that particular locality owing to the construction or condition of the road, that the ice there formed rendered the highway unsafe, and that but for such defect the injury to the plaintiff would not have happened.

In an action on the Gen. Sts. c. 44, § 22, for an injury received through a defect in a highway which the defendant town was bound to keep in repair, the objection that the defect had not existed twenty-four hours at the time of the accident cannot be taken for the first time at the argument in this court of a bill of exceptions which does not show that any such question was raised at the trial.

TORT on the Gen. Sts. c. 44, § 22, for injuries alleged to have been received by the plaintiff through a defect in a highway which the defendants were bound to keep in repair. Trial, and verdict for the plaintiff, in the superior court, before Putnam, J., who allowed a bill of exceptions substantially as follows:

"The plaintiff testified that he was employed to carry a load of furniture, weighing about a ton, on a wagon drawn by two horses abreast, from Boston to Topsfield; that he started with the load from Boston on the morning of February 3, 1869, and arrived in Topsfield, at the place of the injury, about three o'clock in the afternoon; that in descending River Hill, in Topsfield, he

came to ice; that the wagon load pressed upon his horses, and the wagon began to slue on the ice, and continued to slue until he was thrown out and injured; that it was all ice for thirty or thirty-five rods from the time he began to slue till he went over at a point near what was called the Delta, at the foot of the hill," as shown on a plan which was introduced in evidence on the trial and made a part of the bill of exceptions; "that the road down the hill was slanting to the right, (and the further he got down the more it was slanting,) and was very steep the whole length of the hill; that the wagon slued clear round square, and brought the horses so that he could not manage them; that the hill sloped more to the right than it did in a straight line, and the right hand side going down was so much lower than the left hand side as to cause the slueing; and that the ice caused the wagon to slue. Evidence was also offered by the plaintiff to show that this was a springy hill; that the road was springy on its upper or left hand side, going down the hill; that there was at this time a bank of snow along this side, filling up the gutters; and that the water would work out from this bank, in the middle of the day, and run across the road. The testimony was conflicting as to the condition of the road by reason of the ice, both as to the existence and the extent of it; but it was not contended by the plaintiff that the accident would have happened had it not been for his wagon slipping on the ice, and he contended that the existence of the ice constituted a defect which would make the town liable.

"The judge, in charging the jury upon this point, instructed them that a way was not necessarily defective because it was slippery by reason of ice; that if a road was properly constructed the mere existence of smooth and slippery ice upon it, arising from natural causes and the usual effects of the climate, and not formed into ridges and heaps so as to create an obstruction, would not constitute a defect which would make a town liable; but if there was some special cause for the formation of ice in that particular locality, owing to the construction or condition of the road, it would be a defect, if it rendered the way unsafe and dangerous, though it was only smooth and slippery,

which the evidence showed that it was, calling their attention to the evidence tending to show such special cause, as hereinbefore recited.

"There was also evidence tending to show that, when the wagon first came upon the ice, and began to slue, the horses started, and ran down the hill as far as the Delta at the foot of the hill, and there the wagon was turned over upon or near to the Delta; and that the plaintiff lost the control of the horses when they started as aforesaid, and did not regain it until the wagon was upset; though the evidence was conflicting on these points.

"The defendants, upon this evidence, requested the judge to instruct the jury as follows: 1. If the plaintiff did come upon ice in the manner attempted to be proved, and the load pressed upon the horses so that he could not manage them, and thereupon his wagon slued upon ice thirty to thirty-five rods, as stated by him, he not being able to control the horses, and the wagon finally slued so as to hit the Delta, appearing on the plan outside the travelled way, and turned over, and the ice in the road was smooth and even, and not otherwise dangerous but from its presenting a slippery surface, and the road was not otherwise defective or out of repair, then the plaintiff cannot recover. 2. If the plaintiff's horses became unmanageable in consequence of the load coming upon ice, not otherwise dangerous but that it was smooth and slippery, and ran down the hill and came upon the Delta and turned over upon or near to it, the plaintiff cannot recover, even if the Delta, being outside of the travelled path, was five or six inches above the level surface of the road and covered with smooth and slippery ice; nor if, the horses being so unmanageable, the wagon slued on the ice, and came upon a sideling slope, and finally hit the Delta and went over.

"The judge so instructed the jury, but with this qualification: Unless the jury found that the ice, upon which the plaintiff first came, and without which the plaintiff testified that the accident would not have happened, constituted a defect, under the previous ruling which he had just given, by reason of the

existence of a special cause for its formation, on account of the construction or condition of the road."

J. C. Perkins & W. Gaston, for the defendants. 1. This case does not raise the question whether those circumstances, in the construction or condition of the road, assumed to have been favorable to the existence of ice in it, were in themselves defects; nor any question respecting ice in heaps or ridges forming obstructions; but presents only the question whether the existence of even and smooth ice in a highway is a defect merely because it is unsafe and dangerous in consequence of being slippery. The judge ruled that it would not be a defect, if it was formed or arose from natural causes; but would be a defect, if there was something in the construction or condition of the road creating a special cause for the formation of ice in that locality. The defendants contend that there is no valid distinction of this kind. If the ice was a defect at all, it was a defect whatever might be the cause of its existence. So if it was not in itself a defect, no cause for its formation could render it one. *Stanton v. Springfield*, 12 Allen, 566. *Hutchins v. Boston*, Ib. 571 note. *Johnson v. Lowell*, Ib. 572 note. *Luther v. Worcester*, 97 Mass. 268. *Nason v. Boston*, 14 Allen, 508.

2. The true question we take to be this: Was the ice so situated on the place in question; was it of such a character, so dangerous; and had it been there such a length of time; that the town ought, in reason, under all the circumstances, to have removed it before the plaintiff came upon it? This question is for the jury. *Hall v. Lowell*, 10 Cush. 260. *Shea v. Lowell*, 8 Allen, 136. *Payne v. Lowell*, 10 Allen, 147. *Stanton v. Springfield*, 12 Allen, 566, 569. And the defendants submit that a jury would not be warranted in finding that it was a defect for which the town is liable under the circumstances assumed. See *Stanton v. Springfield*, and other cases first cited.

3. Critically examined, the judge's ruling did not leave open for the jury the question whether this ice was formed from any special cause, but only whether there was a special cause for the formation of ice in that locality, without regard to whether this ice was formed from it or not; nor did it leave open for the jury

whether the ice had not been formed there within twenty-four hours. If the distinction attempted to be made by the judge were otherwise the true one, it would need the qualifications that this particular ice was formed from the special cause, and that it had existed twenty-four hours, without which qualifications the ruling was defective and tended to mislead.

4. The case does not suggest that the springy nature of the lill was something which the town ought to have or could have removed; nor that the snow bank on the side of the road was one which the town ought to have or could have removed; nor that the town could have taken any effectual measures to guard against the effects of either the springs or this snow. And there seems to be no reason why a town should be liable for the effects of springs which flow up through the surface of the ground than for those of rain which falls down on the surface.

5. The first instruction requested assumes that there was no defect in the road beyond the mere existence of smooth, even and slippery ice upon it. The ruling was, that this would not be a defect unless there existed a special cause for its formation in the construction or condition of the road. Taken in connection with the request, this must mean a construction or condition which did not constitute a defect or want of repair.

6. The second instruction requested assumed that the horses started and became unmanageable merely because the load came upon ice, not dangerous except from being smooth and slippery; and that they then ran down the hill, and struck against an object outside of the travelled path, and turned the wagon over, and did the damage. This assumption leaves as the point for consideration, only whether the ice the load first came upon constituted a defect. If it did not, then the fact that the horses became unmanageable and ran down the hill renders it unimportant to consider whether there were defects in the road below the point where they became unmanageable. *Davis v. Dudley*, 4 Allen, 557. *Titus v. Northbridge* 37 Mass. 258. *Horton v. Taunton*, Ib. 266 note. *Fogg v. Nahant*, 98 Mass. 578. *Cook v. Charlestown*, Ib. 80.

G. A. Somerby & I. H. Wright, for the plaintiff.

GRAY, J. This court has held that the mere fact that a highway, of no unusual slope or construction, is slippery by reason of a smooth coating of ice, from whatever cause arising, does not constitute a defect or want of repair, for which a city or town is liable, under the highway act. *Stanton v. Springfield*, 12 Allen, 566. *Hutchins v. Boston*, Ib. 571 note. *Nason v. Boston*, 14 Allen, 508. *Stone v. Hubbardston*, 100 Mass. 49. *Gilbert v. Roxbury*, Ib. 185. *Billings v. Worcester*, 102 Mass 329.

But in delivering the judgment of the court in the leading case of *Stanton v. Springfield*, Mr. Justice Hoar said, "There is no question that a way may be defective or out of repair, within the meaning of the statute, by reason of ice or snow upon it." And after mentioning, by way of illustration, cases less like the present, in which snow and ice might be obstructions to travel, he proceeded, "A way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality. It may be built at such an angle, and so exposed to the formation of ice, as to make passing over it in winter especially and usually dangerous. In all of these cases, it will be for the jury, under proper instructions, to decide, as a question of fact, whether the way is properly made and kept in proper repair." 12 Allen, 569, 570.

In this case, we are all of opinion that the rule thus declared was stated to the jury in terms of which, as applied to the facts in proof, the defendants have no cause to complain. The evidence introduced tended to show that the place alleged to be defective was upon a steep and springy hillside, where the road sloped not only in the direction of its course, but across it from one side to the other; and the instructions given to the jury called their attention particularly to the evidence, and did not authorize them to return a verdict for the plaintiff, unless they found that there was some special reason for the formation of ice in that particular locality, owing to the construction or condition of the road, that the ice there formed rendered the highway unsafe and dangerous, and that but for such defect the injury to the plaintiff would not have happened.

It does not appear from the statement, in the bill of exceptions, of the evidence and the instructions given and requested, that any question was made at the trial of the time during which the defect had existed. *Exceptions overruled.*

SAMUEL O. POLLARD VS. INHABITANTS OF WOBURN.

A town may be liable on the Gen. Sts. c. 44, § 22, for an injury resulting to a traveller from a defect in a highway, although the defective place is within the location of a railroad which crosses the highway on a level therewith.

In moving a building, by permission of a town, through a street which the town was bound to keep in repair, the ground was dug up around a post which obstructed the passage of the building, so as to cause the post to slope over and obstruct travel on the sidewalk, and at the base of the post on the side towards the carriageway there was left for several days an excavation across which some planks were laid, which at times were displaced so as to leave a hole a foot wide, open towards the carriageway. Between nine and ten o'clock on the evening of the fourth day after the moving of the building, three men, travelling on foot along the street, turned from the sidewalk into the carriageway, as they approached the obstruction, intending to pass around it, there being no sidewalk on the other side of the street. The night was dark and foggy; and there was no light on the street. Two of them had observed the hole during previous days. The third, though knowing of the removal of the building and generally of the obstruction and its dangerous nature, had never observed or known of the hole. The two passed safely. The third, who was walking at ordinary speed, abreast with and inside from the second, supposed that he was far enough out in the carriageway for safety, but, in passing the hole, his foot, on the side next to it, slipped into it, and he was thereby injured. *Held, that,* on evidence of these facts, a jury was warranted in finding that he was using due care at the time of the accident.

TORT on the Gen. Sts. c. 44, § 22, for injuries resulting to the plaintiff from his falling into a hole in a highway in Woburn on the night of May 28, 1867. Trial, and verdict for the plaintiff, before *Morton, J.*, who allowed exceptions, the substance of which was as follows:

It appeared in evidence that, under a permit from the selectmen of Woburn, a meeting-house was moved through Green Street in that town, which was a highway that the defendants were bound to keep in repair. The street was crossed, at grade by the railroad of the Woburn Branch Railroad Corporation and a board supported by posts and bearing an inscription warning of the approach of the engine was maintained at the

crossing, in conformity with the Gen. Sts. c. 63, § 84. The building being too large to pass between the posts, "this sign was taken down, and the post on the left hand side of the street was taken partly down, without removing it from the hole in which it was set in the ground, and rested upon the fence across the sidewalk, the earth having been dug up and away across the sidewalk for that purpose, and when the post leaned over leaving a hole on the side toward the street, which was covered with railroad sleepers and planks, the sleepers being from six to eight feet long. The building was removed through the street, and was all of it in its destined place, May 24. Previously to May 28, for many days this hole was at times covered, and at others was only partially covered; some of the sleepers were at times removed or displaced, and a hole a foot wide was sometimes uncovered towards the street, and next to it. There was no sidewalk upon the right hand side of Green Street; but there was a gravelled sidewalk upon the left hand side of the street, usually travelled by foot passengers going up the street."

Between nine and ten o'clock on the evening of May 28, the plaintiff, with Lincoln Emerson and Aaron Thompson, was going home, up Green Street. The night was dark; there was a fog; and there were no lights on the street. The sidewalk being narrow, Thompson walked ahead, and Emerson and the plaintiff followed, abreast, Emerson being on the side towards the carriageway. When they approached the obstruction formed by the post, they all turned out, in the same order, into the carriageway, to avoid it. They were walking at ordinary speed and none of them knew of the existence of the obstruction; and they turned into the carriageway "naturally," without making any allusion to it in their conversation with one another. Thompson and Emerson had on previous days observed the hole, left open by the occasional displacement of the planks; but the plaintiff, though he knew of the removal of the building and the general nature of the obstruction and that an excavation had been made about the post, and though he had two days before spoken to an acquaintance of the dangerous nature of

the obstruction and said that there ought to be a light there, yet never observed or knew of the open hole, and supposed that the excavation was completely covered by the planks. Thompson walked safely around the obstruction. And so did Emerson. But as the plaintiff, being on the inside from Emerson, was passing it, his left foot and leg slipped into the hole, and he thereby sustained severe injuries. Emerson, with Samuel G. Richardson, examined the place of the accident early on the following morning, and found that the hole was about two feet and a half deep and thirteen inches wide; that the distance from its outer edge to the nearest rut in the carriageway was about two feet; and that the earth on that edge appeared to have been broken down and to have fallen in.

The plaintiff himself, and Thompson, Emerson and Richardson, testified in behalf of the plaintiff; and their testimony, of which the foregoing includes the substance, was reported in full in the bill of exceptions. Among other things, Emerson testified that, at the time of the accident, the plaintiff "was close to me as we should naturally walk. I helped him out. Could not see the hole. I bore out enough, I supposed, to clear the hole. I gave him no warning." And the plaintiff, among other things, testified: "I supposed I was far enough into the street to avoid the place. Never noticed an open hole there. I did not turn further into the street, because I supposed I was out of all danger."

At the close of the plaintiff's evidence, the defendants requested, and the judge refused, a ruling that the plaintiff had not shown that he was using due care at the time of the accident.

The defendants then proved, that the place of the accident was within the location of the branch railroad; that the post was taken down by servants of the Boston & Lowell Railroad Corporation by direction of the superintendent, "upon the application of some one, it did not appear whom;" and that "the town had always, and within five years before the accident, repaired and maintained the way up to the rails of the railroad track, on either side, the railroad taking care of the planking

between the rails;" and at the conclusion of all the evidence they requested a ruling that, on it, as matter of law, they were not liable, which the judge refused and submitted the case to the jury.

W. S. Gardner, for the defendants.

A. A. Ranney, for the plaintiff.

CHAPMAN, C. J. The town was liable for an injury occasioned by a defect of the highway, though it was within the limits of the railroad as located. Gen. Sts. c. 63, §§ 60, 67, 69. *Davis v. Leominster*, 1 Allen, 184.

There was evidence tending to show that the plaintiff used ordinary care. The night being dark and foggy, the plaintiff and his companions could not see the hole; and the plaintiff did not know of its existence; but some sticks were placed loosely around it. They all turned to the right, and the plaintiff's purpose was to avoid the sticks, and he supposed he had turned far enough to avoid them. His companion who was walking close by his right side also supposed they had gone far enough to avoid them. But as the plaintiff was passing, he placed his left foot so near the hole that it went down. From all these circumstances the jury might reasonably infer that he used ordinary care, but stepped too near the hole by a mistake or miscalculation such as any ordinary person might be liable to make.

Exceptions overruled.

SIDNEY A. FISHER vs. CITY OF BOSTON.

A city is not liable for a personal injury resulting from the negligence of officers and members of its fire department in performing their duties, although the department was established and is regulated under a special statute which by its terms required acceptance by the city council before it took effect.

TORT for injuries resulting to the plaintiff from the bursting of the hose attached to a fire-engine at a fire in Boston on September 8, 1868.

The declaration was as follows: "And the plaintiff says the city of Boston was authorized by the legislature of this Com-

monwealth, first by the St. of 1825, c. 52, and subsequently by the St. of 1850, c. 262, to establish and maintain in said city a fire department for said city; and on or about June 4, 1850 said city adopted said last named act, and voluntarily established, and ever afterwards, and during the month of September 1868, voluntarily maintained a fire department for said city, under and by virtue of said authority, and appointed officers and members of said fire department, and made rules and regulations for the organization and management of said fire department, and provided engines and hose and other apparatus for the use of said fire department. And the plaintiff further says, that on or about noon of September 8, 1868, a fire broke out in a certain store numbered 11 on Federal Street in said Boston; and that certain officers and members of said fire department were present at said fire, and then and there used certain of said engines and hose and other apparatus, the property of said city, and were then and there the agents and servants of said city, in the exercise of their official duty in behalf of said city. And the plaintiff further says, that at the time of said fire the plaintiff was a member of the firm of Sidney Fisher & Company, and, as a member of said firm, personally used and occupied a store on said Federal Street, numbered 46 and 48 on said street, near the place where said fire occurred; and that, at the time of said fire, and while said fire department was engaged in extinguishing the same, the plaintiff was in the exercise of due care, and was rightfully upon the said premises used and occupied by him and his said firm, to wit, in an alley-way adjoining said store; and that the said city then and there negligently suffered certain of the hose used by said city at said fire, and attached to a steam fire-engine belonging to said city, to be defective and of insufficient strength, and out of repair; and that the members of said fire department, then and there employed by said city, then and there worked and used negligently and without due care said engine and said hose and other apparatus used at said fire by said fire department; and that, by reason of said negligence and want of due care, a part of the hose used as aforesaid, and attached to a steam fire-engine as aforesaid, burst

and a large jet and stream of water issued with great violence and force from the said burst in said hose, and struck the plaintiff, then and there standing, as aforesaid, upon his said premises, and hit him with great violence upon the head, and knocked him down, and, by reason of said negligence and want of due care, the plaintiff received severe injury, and was made sick, and deranged in mind for a long time thereafter, and was thereby caused to suffer great anguish of body and mind, and is still suffering from the effects of said injury in both mind and body, and has been and still is prevented from attending to his business since the time of said injury, by reason thereof; whereby an action against said city has accrued to the plaintiff."

The defendants demurred to this declaration, as setting forth no legal cause of action against the city; and the case was thereupon reserved by *Morton, J.*, for the determination of the full court.

D. Foster & E. H. Abbot, for the plaintiff, were first called upon. 1. If the fire apparatus had been owned and managed by a private corporation, the owner would be liable in this case.

2. The St. of 1850, c. 262, under which the fire department was maintained, regulated and managed at the time of the accident, was provided, in § 7, not to operate upon existing laws and ordinances on the subject, until adopted by the city council; and the St. of 1825, c. 52, which the St. of 1850 repealed, was provided, in § 7, not to take effect until accepted by the ballots of the citizens of Boston, at a general meeting called for that purpose. The St. of 1850, like the St. of 1825, was a special act, and conferred upon the city powers and privileges not belonging to it under the general laws; applied to Boston alone, and no other town or city could avail itself of its provisions; and did not impose any public duty to establish a fire department, but gave this privilege to the city for its own private benefit and local advantage. The city incurred no obligation under the act until it accepted the grant; and it accepted the grant because it was directly beneficial to the city. It is therefore liable to the plaintiff for the injury done him through the negligent conduct of its agents in the exercise of

the powers and privileges conferred by the act. In *Child v. Boston*, 4 Allen, 41, the city was held liable for negligently suffering a common sewer to be out of repair, on the ground that the charge of sewers and drains was not an obligation imposed upon the city by legislative authority, exclusively for public purposes, and without its corporate assent, but was voluntarily assumed, by the acceptance of the act conferring the power. In *Bigelow v. Randolph*, 14 Gray, 541, Metcalf, J., referring to the rule that a private action cannot be maintained against a town for a neglect of corporate duty, unless such action be given by statute, says that the rule is of limited application, and is not applied to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. See also *White v. Phillipston*, 10 Met. 108; *Barney v. Lowell*, 98 Mass. 570; *Eastman v. Meredith*, 36 N. H. 284; *Lloyd v. New York*, 1 Selden, 369; *Bailey v. New York*, 3 Hill, 531; *New York v. Furze*, Ib. 612; *Conrad v. Ithaca*, 16 N. Y. 158; *Meares v. Wilmington*, 9 Ired. 73; *Richmond v. Long*, 17 Grat. 375; *Nevins v. Peoria*, 41 Ill. 503; *Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 93; *Scott v. Manchester*, 1 H. & N. 59; *Western Savings Fund Society v. Philadelphia*, 31 Penn. State, 175; *Same v. Same*, Ib. 185; *Shuter v. Philadelphia*, 3 Philadel. 228; *Barton v. Syracuse*, 36 N. Y. 54; and *Jones v. New Haven*, 34 Conn. 1.

3. This case is distinguishable from *Hafford v. New Bedford*, 16 Gray, 297. That case came before the court under a declaration which alleged that the city of New Bedford, "as a municipal corporation, and in its capacity as such corporation, being legally authorized and required by law so to do," established a fire department; and it proceeded upon the assumption that the city was required by the general law, and for public purposes, to establish and maintain the department. It was not alleged therein that the city voluntarily assumed the control of the fire department by accepting the special act which conferred the authority to do so, or by accepting a general act the provisions of which any town or city might accept. That it was decided

upon the assumption that the city was bound by the general law to maintain a fire department as a political duty is manifest from the reference to it in *Walcott v. Swampscott*, 1 Allen, 101, by Bigelow, C. J., who had delivered the opinion in *Hafford v. New Bedford*.

C. H. Hill, for the defendants. 1. The demurrer admits facts well pleaded, but not conclusions of law. The plaintiff alleges the establishment of a fire department under the Sts. of 1825, c. 52, and 1850, c. 262, and the appointment of officers and establishment of rules and regulations therefor by the city government. The nature of the department, its relations to the city, and the liability of the city, must depend upon these statutes and the doings of the municipal corporation under them; and the further allegations that at the time the plaintiff incurred the injury those using the engine "were then and there the agents and servants of the city," and "then and there employed by the said city," are conclusions of law, and, if inconsistent with the facts previously alleged, are not admitted by the demurrer. Com. Dig. Pleader, Q. 6. *Foster v. Jackson*, Hob. 56. *Rex v. Bishop of Chester*, 1 Salk. 560. *Millard v. Baldwin*, 3 Gray, 484. *Lea v. Robeson*, 12 Gray, 280, 285.

2. The members of the fire department are public officers, with duties defined by law, and large discretionary powers, in the exercise of which they are not subject to any control by the city. The city government, in appointing them, acts as a branch of the general government of the Commonwealth, and appoints them for purely public purposes and solely for the public benefit. They are not, therefore, servants of the city, and the maxim *respondet superior* does not apply. Laws & Ordinances of Boston, (ed. 1869,) 224, 225, 231 & seq. *Hafford v. New Bedford*, 16 Gray, 297. *Walcott v. Swampscott*, 1 Allen, 101. *Buttrick v. Lowell*, Ib. 172. *Barney v. Lowell*, 98 Mass. 570, and cases there cited. *Bailey v. New York*, 3 Hill, 531. Denio, C. J., in *Conrad v. Ithaca*, 16 N. Y. 163 & seq. *Hall v. Smith*, 2 Bing. 156. *Holliday v. St. Leonard Shoreditch*, 11 C. B. (N. S.) 192. The acceptance of the Sts. of 1825 and 1850 does not change the character of the fire department, or the relations of its offi-

cers and members to the city. Whether they are public officers, and exist for public purposes, cannot be affected by the fact that the city government was consulted and its consent obtained at the time the department was established.

3. This case likewise falls within the rule that a private action cannot be maintained against a municipal corporation for a neglect or nonperformance of a corporate duty, unless such action be given by statute. Bro. Ab. *Accion sur le Case*, pl. 93. *Mower v. Leicester*, 9 Mass. 247. *Holman v. Townsend*, 13 Met. 297. *Bigelow v. Randolph*, 14 Gray, 541. *Eastman v. Meredith*, 36 N. H. 284. *Wilson v. New York*, 1 Denio, 595. *Mills v. Brooklyn*, 32 N. Y. 489. Those exceptions to the rule which have to be considered here are distinguishable from the present case. They are cases where the corporation receives a direct remuneration for its expenditure and trouble from a particular class in the community, the payment of which is compulsory, and which creates a condition, or an obligation in the nature of an implied contract, that the work for which the remuneration is given shall be well done; where the city or its servants are negligent in the performance of a work, and thus the case is of malfeasance and not of nonfeasance; and where a work is undertaken by the city voluntarily for its own advantage, and the power to undertake it is extraordinary and in the nature of a special privilege granted to it, and not an ordinary or purely corporate duty — where, in short, the city may be regarded as a mere volunteer. *Henly v. Lyme*, 5 Bing. 91; *S. C.* 3 B. & Ad. 77; 1 Bing. N. C. 222; 2 Cl. & Fin. 331. *Scott v. Manchester*, 1 H. & N. 59, and 2 H. & N. 204. *Cowley v. Sunderland*, 6 H. & N. 564. *Mersey Docks Trustees v Gibbs*, 11 H. L. Cas. 686, 717, 718, 721, 722. *Child v. Boston*, 4 Allen, 41, 52, 53. *New York v. Furze*, 3 Hill, 612. *Rochester White Lead Co. v. Rochester*, 3 Comst. 463. *Conrad v. Ithaca*, 16 N. Y. 158. *Pittsburg v. Grier*, 22 Penn. State, 54. In the present case, the object of the department is solely the protection and safety of the public; the expenses of it are paid by the city treasury, and met by ordinary taxation; the city has no corporate interest apart from the interest of the public in

supporting it, derives no benefit from it, and cannot be said to have received any special privilege from the statute establishing it; and the fault, if any, was purely of omission. The case falls exactly within *Bigelow v. Randolph*, 14 Gray, 541, 544, 545, and *Eastman v. Meredith*, 36 N. H. 284.

GRAY, J. Cities and towns are authorized by law to procure and maintain fire-engines and reservoirs of water therefor, and to pay the necessary expense thereof, either by general taxation or out of moneys belonging to the town; because the prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is therefore within the scope of municipal authority. *Allen v. Taunton*, 19 Pick. 485. *Torrey v. Millbury*, 21 Pick. 64. *Hardy v. Waltham*, 3 Met. 163. For the same reason, they are expressly authorized by statute to put conductors into the pipes of aqueduct corporations for the purpose of drawing therefrom, free of expense, as much water as is necessary to extinguish fires. Gen. Sts. c. 65, § 14. St. 1867, c. 158.

But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity; nor is any part of the expense thereof authorized to be assessed upon owners of buildings or any other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire-engines owned by them, than in the case of a town house or a public way. *Hafford v. New Bedford*, 16 Gray, 297. *Eastman v. Meredith*, 36 N. H. 284. *Bigelow v. Randolph*, 14 Gray, 541. *Oliver v Worcester*, 102 Mass. 489, 499.

It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire-engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the per-

formance of which the city or town has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents. In *Weightman v. Washington*, 1 Black, 39, 49, the supreme court of the United States said: "Municipal corporations undoubtedly are invested with certain powers, which from their nature are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because in their nature they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual, for the failure on their part to perform such a duty."

The duty of extinguishing fires, and of keeping the engines in repair and ready for use, is imposed by the statutes of the Commonwealth, not upon towns and cities, but upon firewards, engineers and other officers, chosen either by the inhabitants, or by the selectmen or mayor and aldermen. Gen. Sts. c. 24, §§ 4, 6, 7, 9, 13, 26, 29. So where a distinct fire department is established in a village or district, the district may raise money for the purchase of engines and other necessary apparatus, and for incidental expenses; but the charge and management thereof are imposed upon the engineers and other officers, when elected. §§ 33, 40, 41, 43. The firewards, engineers and other similar officers are not the servants or agents of the city or town, but are public officers, for whose acts in their official capacity the city or town or fire district is not made responsible, except in the single case of the pulling down of a building to prevent the spreading of a fire. §§ 5, 41. *Taylor v. Plymouth*, 8 Met. 462.

Nor is it material that in the city of Boston a fire department has been established and is regulated under a special statute, accepted by the city council. St. 1350, c. 262. The engineers

and members of that department are no less public officers, and no more agents of the city, than firewards and similar officers under the General Statutes. In the leading case of *Hafford v. New Bedford*, 16 Gray, 297, the fire department, for the negligence of whose members the city was held not to be liable to an action, was established and regulated, and its officers and members appointed, under a similar special statute.

This case is not like that of an act done by the city for its own corporate advantage and immediate emolument, as in *Oliver v. Worcester*, 102 Mass. 489; or in constructing or repairing a common sewer, laid under authority of a statute voluntarily accepted by the corporation, which permits the assessment of a contribution to the expense thereof upon the abutters, as in *Emery v. Lowell*, ante, 13. But it comes precisely within the rule laid down in *Hafford v. New Bedford*, and since applied to various similar cases. *Walcott v. Swampscott*, 1 Allen, 101. *Buttrick v. Lowell*, Ib. 172. *Barber v. Roxbury*, 11 Allen, 312. *Barney v. Lowell*, 98 Mass. 570. *Demurrer sustained.*

HENRY F. YOUNG vs. CITY OF BOSTON & another.

The St. of 1846, c. 167, gave the city of Boston authority to regulate the use of the Cochituate water and establish water rates; and enacted that "the occupant of any tenement" should be liable to pay the rate "for the use of the water in such tenement;" and in certain cases "the owner thereof" should be liable also. A city ordinance accordingly provided that for the use of the water "in model houses, so called," there should be charged, "for each tenement having water fixtures within the same," a specified rate; delegated to a board its authority under the statute, with power to ascertain by meters the quantity used in any case and establish a rate therefor instead of the specific rate; and made it the duty of a registrar to cut off the water for nonpayment of rates. J. S., with his family, was "tenant and occupant" of one of ten suites of rooms in a model lodging-house owned by a corporation which had the general charge of the building and controlled the halls, passages and outer doors. Each suite "was occupied by a separate tenant," and contained "a kitchen, sleeping-room and all the conveniences of a common dwelling-house," including separate water fixtures. All these fixtures were supplied with the water from the same pipe. The board set a meter on this pipe; established a rate for the use of the water as measured by the meter; and, against the protest of J. S. and the corporation, charged it to the corporation and refused to make a separate charge to each tenant; and the city treasurer, who was collector of the rates, refused to accept from J. S. the amount of the specific rate, which J. S. tendered in payment for the use

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of the water in his suite of rooms. *Held*, that J. S. was the occupant of a tenement entitled under the statute and ordinance to the use of the water therein on payment or tender of the specific rate, and might maintain a bill in equity to restrain the city and the registrar from cutting off the water from his suite of rooms.

BILL IN EQUITY filed February 24, 1868, against the city of Boston and William F. Davis, its water registrar, praying for an injunction against cutting off the Cochituate water from the plaintiff's tenement, and for general relief.

The bill alleged that the plaintiff was tenant and occupant of a tenement numbered 2 in a building called a model lodging-house, situated at number 3 Osborn Place in Boston and owned by the Model Lodging-house Association, a corporation; that this tenement was supplied with the Cochituate water by fixtures within it, including a water closet, and entirely dependent for water on the Cochituate water so supplied; that by law, and by the St. of 1846, c. 167, the plaintiff was entitled to the use of that water on payment of the usual reasonable and equitable rates therefor, and by the city ordinances the annual water rates for a tenement of a model lodging-house having fixtures within said tenement were three dollars, and a like additional sum if the tenement contained a water closet in use, which rates were as large as was usual, reasonable or equitable; that the plaintiff, in payment of his said annual rates, tendered six dollars to the city treasurer, (who was the proper officer to receive payment of all such rates,) and was still and ever has been ready to pay said sum, but the treasurer refused to receive it in payment of the plaintiff's water rates; and finally, that the water registrar was threatening, and had given notice to the Model Lodging-house Association of his intention, to cut off the Cochituate water from the plaintiff's tenement, alleging the command and authority of the city in justification of such cutting off, whereas the plaintiff denied that the registrar had such command and authority from the city, and further denied that the city had a right to give such command and authority.

The answer admitted that the model lodging-house described in the bill belonged to the Model Lodging-house Association and that the city furnished water to it; but left the plaintiff to

prove "whether he occupies rooms or apartments" in it, denied that the city furnished water to the plaintiff, and alleged ignorance whether the plaintiff was dependent for a supply of water on the water which the city furnished; admitted that by a city ordinance the rates alleged by the plaintiff were charged by the city for supplying water to tenements in model lodging-houses; but denied that such rates applied where the water was measured by meters; and then proceeded thus: "And for answer to the rest of the plaintiff's bill these defendants say, that, by the statutes of the Commonwealth, and by the ordinances passed by the city of Boston under and in conformity with them, the Cochituate Water Board of said city have vested in them the powers conferred upon the city council of Boston by the several acts of the general court for supplying the city of Boston with pure water; that said water board furnishes water to John L. Emmons, treasurer of the Model Lodging-house Association, for the model lodging-house mentioned in the bill; that the association by its porter or agent occupies and takes charge of the staircases and passages in the building, used in common with the tenants thereof, and lets out to various tenants the several suites of lodgings therein; that the association, as the occupants of the building, are liable to pay the rates charged as the price of the water furnished thereto; that each suite of lodgings has water fixtures of its own, and the water is furnished thereto by one common pipe, and the price thereof is charged to Emmons, as treasurer as aforesaid; that by the ordinances of said city the Cochituate Water Board is empowered in any case to ascertain by a water meter the quantity of water used, and to establish a rate therefor according to the amount used; that in consequence of the great number of water fixtures placed in said model lodging-houses the Cochituate Water Board adjudged it necessary to, and did, place a water meter therein, and did fix a rate for the water supplied, as ascertained and measured by said meter, and that they charged Emmons for the water so used according to said meter; all of which the said Cochituate Water Board had a right to do, to protect the inhabitants of the city from a great waste of water by the tenants in

the building, and the consequent danger of a failure in the supply thereof; and the defendants say that, if the cost of water used by the tenants of the building is greater than it would be if there were no water meter and if each suite of lodgings were charged the fixed price mentioned in said bill, it is in consequence of the extravagant and wasteful quantity of water used by the tenants thereof; wherefore the defendants pray that this bill may be dismissed," and for their costs.

Issue was joined on the answer, and the case reserved by *Gray, J.*, for the determination of the full court, on the pleadings and the following statement of facts:

"The plaintiff with his family is and has been for some years a tenant and occupant of a suite of apartments or tenement, numbered 2 in model lodging-house at No. 3 Osborn Place in Boston, owned by a corporation called the Model Lodging-house Association. There are ten suites of apartments or tenements in the house, each one of which contains a kitchen, sleeping-room and water closet, and all the conveniences of a common dwelling-house. The water used in this model lodging-house is charged to John L. Emmons, treasurer of the corporation, and is furnished by one pipe, to which a water meter has been attached, and from this pipe there are separate pipes to each set of apartments, which are dependent on the Cochituate water for a supply. There are no fixtures in the house which are used in common by the tenants, and there would be no mechanical difficulty in applying a water meter to measure the amount of water used in each tenement or suite of rooms. While each tenement or suite of rooms is occupied by a separate tenant, the halls and passages and outer doors are controlled by the corporation, who have the general charge of the building and have heretofore paid the entire water rates for the whole building and charged the same to the several tenants. The rate payable by tenants for the use of water in model lodging-houses is six dollars a year for each tenement in which the water is not measured by a meter; and this sum the plaintiff has tendered, and is ready and willing to pay, to the treasurer of the city, but the treasurer refuses to receive the same. The water board of the city

charge the treasurer of the Model Lodging-house Association at the rate of three cents for each and every one hundred gallons of water used in the building, as measured by the meter, which they have caused to be attached as aforesaid; and they refuse to make a separate charge to each tenant for the quantity used by him. The plaintiff and Emmons, before the beginning of the term for which the water bill in question is charged, both protested against the above mode of measurement, and acts of the water board. The sum charged the whole house, when apportioned among the tenants, is more than double the rates fixed by the ordinances for the tenements or model lodging-houses where there is no water meter. The water board claim the right, when there is a great quantity of water used in any one building, to measure the same by a water meter, in their discretion, and charge for the water so measured to the occupants of the whole building. The cost of a water meter is so great as to render its application to a common dwelling-house, or to single tenements in a model lodging-house, impracticable. There is no separate account kept with each tenant in a model lodging-house, but only with the individual owning and controlling the whole building. The water registrar of Boston threatens and intends to cut off the water from the lodging-house, if the whole rate charged by the water board to Emmons is not paid.

"If, upon the case disclosed by the bill and answer and these facts, the court shall be of opinion that the Cochituate water board are justified in measuring and charging for the water furnished to the model lodging-house in this manner, and the water registrar in cutting off the water aforesaid, then this bill is to be dismissed; otherwise a perpetual injunction is to be granted, or such other order or decree entered, as law and equity may require."

It was further agreed that special statutes of the Commonwealth, and the city ordinances, might be referred to by either party at the argument, and those portions thereof to which reference was made are printed in the margin.*

* The St. of 1846, c. 167, § 1, authorized the city of Boston "to take, hold and convey to, into and through the said city, the water of Long Pond," i. e. the

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G. O. Shattuck & O. W. Holmes, Jr., for the plaintiff. 1. The water registrar threatens to cut off the water from the tenement occupied by the plaintiff in a model lodging-house, if he does not pay a rate assessed by the water board which is double the rate charged in such cases by the ordinance of the city; and goes further, and threatens and intends to cut off the water although the plaintiff does pay the increased rate, if the occupants of other tenements in the model lodging-house do not pay also. The plaintiff denies the authority both of the water board to charge for, and of the registrar to cut off, the water in this manner.

Cochituate water, "for the purpose of furnishing a supply of pure water for the said city." In § 2, it provided that the city might "regulate the use of the said water within and without the said city, and establish the prices or rents to be paid therefor;" and in § 14, that "the occupant of any tenement shall be liable for the payment of the price or rent for the use of the water in such tenement, and the owner thereof shall be also liable, if, on being notified of such use, he does not object thereto."

The city ordinances in force at the time of the proceedings in this case empowered a board, entitled the Cochituate Water Board, to have and exercise all the powers vested in the city council by the St. of 1846, c. 167, so far as they could be legally delegated. *Laws & Ordinances of Boston*, (ed. 1863,) 795. They also provided for the annual choice by the city council of a water registrar who should "assess the water rates according to the tariff established by the city council," and "exercise a constant supervision over the use of the water and attend to the enforcement of all regulations relative thereto," and "cut off the supply in all cases of nonpayment of the water rent for sixty days after the same is due," and "under the control of the Cochituate Water Board make abatements in the water rents in all proper cases." *Ib.* 796, 797. They further provided, in the tariff of water rates, that "the following rates for the use of the Cochituate water in model houses, so called," should be charged, "viz: for each tenement having water fixtures within the same, three dollars annually; and for each tenement not having water fixtures within the same, but taking the water from general fixtures, used in common with other tenements, two dollars annually; and in addition to the foregoing rates, there shall also be charged for each such tenement, in which a water closet or bathing tub is used, three dollars annually." *Ib.* 804. And they also provided that the water board should "have power to ascertain by meters the quantity of water used in any case," and "when in any case the quantity used shall be ascertained and measured, in manner before mentioned, the Cochituate Water Board may establish a water rate therefor, instead of the specific rate hereinbefore established." *Ib.* 807.

2. The water board bases its authority on the provisions of the ordinance that it "shall have power to ascertain by meters the quantity of water used in any case," "and when in any case the quantity used shall be ascertained and measured" in that manner, "may establish a water rate therefor, instead of the specific rate." The plaintiff contends that this means that, wherever a person is chargeable with a specific rate under the ordinance, the board may substitute a rate fixed by the quantity of water ascertained, by applying a meter, to have been actually used in that case—not a rate by a guess from the quantity ascertained to have been used in a whole street or any other aggregation of tenements, but a rate proportioned to a specific quantity, for which a specific rate had been previously charged.

Under the ordinance the plaintiff is chargeable with a specific rate for which he is separately liable, namely: six dollars per annum. The ordinance establishes this rate for "each tenement" "in model houses, so called," "having water fixtures within the same," and a water closet in use; and the St. of 1846, c. 167, § 14, provides that "the occupant of any tenement shall be liable for the payment of the price or rent for the use of the water in such tenement." It is enough for the plaintiff that the ordinance construes the word "tenement" as applying to his case. But see also *Stockwell v. Hunter*, 11 Met. 448, 454; and *Commonwealth v. Watson*, 97 Mass. 562. For the purpose of liability under the statute, there cannot be two different tenements which embrace the same set of rooms. If the plaintiff is occupant of a tenement within the statute and ordinance, the Model Lodging-house Association cannot be the same.

3. The city not only did not, but could not, give the authority claimed by the water board, by which the most frugal water taker may be compelled to bear the burden of the prodigal occupant of another tenement. Nor could it give the registrar power to cut off water from the plaintiff because the occupants of other tenements did not pay their bills. This is a public use. *Wayland v. Middlesex*, 4 Gray, 500. And the public have a right to use the water on equal and reasonable terms. *Lum-*

bard v. Stearns, 4 Cush. 60. *Twells v. Pennsylvania Railroad Co.* 3 Am. Law Reg. (N. S.) 728, 734. *Sandford v. Catawissa, Williamsport & Erie Railroad Co.* 24 Penn. State, 378. *Beekman v. Saratoga & Schenectady Railroad Co.* 3 Paige, 45, 75. *Gaslight Co. v. Colliday*, 25 Maryl. 1, 16. *Shepard v. Milwaukee Gaslight Co.* 6 Wisc. 539, and *Same v. Same*, 15 Wisc. 318.

C. H. Hill, for the defendants. 1. The material facts are simple. The water board furnishes Emmons, the treasurer of the association, with water for a model lodging-house. The account is kept with him; the contract for the water is made with him. The defendants have made no contract with the plaintiff, are under no obligation to furnish him with water, and do not know him in the premises.

2. The first question is, whether the board has authority to place a meter in one lodging-house, and thereby measure the water furnished, and charge for it accordingly, without doing the same to all parties receiving water from the city, or even to all model lodging-houses. There is no distinction between this case and that in which it has been decided that the board can do so in respect of hotels. *Parker v. Boston*, 1 Allen, 361. The St. of 1846, c. 167, gives broad powers to the city in relation to the subject. Water rates are not taxes, but prices paid for a commodity sold. Absolute equality in these prices, such as would be required in taxation, is impracticable; and all that the city is bound to do is, to provide some plan by which substantial justice shall be done to all paying for the water, and an equality established among them so far as the nature of the thing furnished, the generous supply of it, and the inherent difficulties connected with regulating the use of it, render practicable. When there is a large number of persons using the water in a building, the dangers of waste are greatly increased, and the court will not say that in such instances public officers who have no pecuniary interest in the results may not in their discretion adopt a more efficient method of measuring the quantity supplied, than in instances where the water is used by very few and the dangers of waste are slight. The case finds that it

is impracticable to measure water in all instances by a meter, but that in tenements where a great quantity is used the saving thus made will more than compensate for the expense of the meter. The gist of the complaint of the association is, that they are obliged to pay for the water which they use, while other people may be able to escape paying for it. This case is analogous in principle to *Fitchburg Railroad Co. v. Gage*, 12 Gray, 393, and *Boston & Worcester Railroad Co. v. Western Railroad Co.* 14 Gray, 253.

3. This model lodging-house is a "tenement," within the meaning of the ordinance; and the occupant responsible for the water rates is the association having the general charge of the building, and not the tenants of the various suites of apartments. *Kirby v. Boylston Market Association*, 14 Gray, 249. *Milford v. Holbrook*, 9 Allen, 17. It is unnecessary to consider what the rights of the plaintiff would be if he had ever demanded that water should be furnished to him by a separate pipe, in the manner in which separate dwelling-houses are supplied. He has made no such demand, and the association cannot raise any objection for him. But the defendants contend that there must be a limit on the rights of people occupying suites of apartments and separate rooms in a building, to demand that separate supplies of water shall be furnished to, and separate accounts kept with, them; and that, where such a suite of apartments or a room is merely a subdivision of another tenement, that is to say, where the occupant of the building responsible to the public is another person, who subdivides the building but yet retains the general control of it, the city is not bound, as matter of law, to furnish pipes to, or apportion the rates among, the lesser tenants.

CHAPMAN, C. J. By the St. of 1846, c. 167, entitled "An act for supplying the city of Boston with pure water," the city was authorized by and through the agency of three commissioners to construct its now existing aqueduct. It was to be maintained and regulated under the authority of the city council, and at the expense of the city; and one of its principal objects was to supply the occupants of tenements in the city.

The plaintiff occupies a tenement in a model lodging-house so called; and a special provision is made in the city ordinances for this class of tenements. A section of the ordinances cited, establishing the rates of charges for the use of the water in such houses, provides that, "for each tenement having water fixtures within the same," the rate shall be "three dollars annually; and for each tenement not having water fixtures within the same, but taking the water from general fixtures used in common with other tenements, two dollars annually." The word "tenement" is obviously used to describe such part of the house as is separately occupied by a single family, in contradistinction from the whole house. The water board and registrar are to be governed by this ordinance. *Parker v. Boston*, 1 Allen, 361. And no more authority is conferred upon them by the ordinance to compel the occupants of a tenement to take the water in common with the occupants of the other tenements in the house, than to compel the occupants of all the separate houses in a block or a street to take the water in common with each other; it being agreed that the plaintiff's tenement has separate fixtures, and he not using, nor desiring to use, the water in common with others.

Decree for the plaintiff.

WILLIAM M. PARROTT & another vs. JOHN B. DEARBORN.

An officer, who has attached a horse and placed it in a suitable stable and made the stabler keeper, is liable for the neglect of the stabler to keep the horse with ordinary care; but if neither he himself, nor any one for whose care of the horse he is responsible, knows or is negligent in not knowing, that the horse has peculiar tricks or habits, he is not liable for an omission of extraordinary care to guard the horse against injury by reason of them.

TORT by Parrott and Henry Hodgkins, against a deputy of the sheriff of Suffolk. Trial in the superior court, before *Reed, J.*, who allowed the following bill of exceptions:

"The only issue between the parties was that of the negligence of the defendant in the care and keeping of a horse. It

appeared in evidence that the plaintiffs were partners, doing business in Boston; that on October 19, 1868, the defendant received a writ against them in favor of Asa Tirrell, with instructions to attach personal property; that at about four o'clock in the afternoon of that day he attached the stock and fixtures in their store, and also the horse, then standing harnessed to a wagon in front of the store; that Parrott had gone to Gloucester for the night; but that Hodgkins was present, and informed the defendant that they should give bond and dissolve the attachment the next morning. The defendant placed the horse and wagon in the hands of his keeper, Tobias Roby, with directions to take them to a stable called Nims's stable, at the same time giving him a deputation in writing to the proprietor of said stable as his keeper of them. Roby drove the horse to the stable, and delivered it, with the deputation in writing as keeper, to the foreman of the stable; and himself returned to the plaintiffs' store as keeper of the property there attached, and remained there till the bond was given on the following day. On such return, he was informed by the plaintiffs' driver that it would not be safe to tie the horse in the stable, as it had a habit of pulling back and might be injured. Roby did not communicate this to the defendant or the stabler. When the defendant attached the horse, he asked no questions and received no information. There was no evidence that this habit of the horse, if it existed, was known to the plaintiffs. The horse remained in the stable till about noon the next day, when, a bond having been given and the attachment dissolved, Roby returned the horse to the plaintiffs at their store. The plaintiffs did not know where the defendant took the horse when he attached it, nor where it had been kept when returned. Evidence was introduced tending to show that the horse was perfectly sound when attached by the defendant, but when returned was permanently lamed and his value greatly impaired; and that said injury was caused by improper and negligent treatment and care while in the stable, and at no other place. Evidence was introduced by the defendant tending to show that such injury was caused by the vicious habits of the horse, and not by any

Parrott v. Dearborn.

negligence or want of care, and that the stable where the horse was kept was a suitable place, and maintained by an experienced and competent man.

"The judge instructed the jury, that the question for them to consider was, whether the defendant had been guilty of any negligence; that the defendant, having taken the horse on attachment, was responsible for the same degree of care, and only the same degree of care, as he would have been if he had hired the horse of the plaintiffs; that the first question for the jury to settle was, whether, under the circumstances, the defendant had selected a proper stable, such as a prudent man hiring a horse would have done; that if they were satisfied that he had done this, his whole duty would then have been discharged; that it would then be immaterial what was done to or with the horse afterwards in the stable; that, whatever might have taken place there, the defendant would not be liable therefor, and that their verdict should be for him; but that, if they should find that the defendant had not selected a proper stable, then and then only it would be material to inquire what had been done with the horse in the stable, and whether there had been any negligence or want of care there in the treatment of the horse whereby it had been injured; and if, on such inquiry, they should find that the defendant had not selected a proper stable, and that there had been negligence in the care of the horse in the stable, the defendant would then be liable for such negligence. The judge further instructed the jury, that, if the horse had any habit which rendered special caution necessary in care of the horse, the plaintiffs were bound to communicate it to the defendant, to the same extent as they would be to a person hiring a horse; and that the communication of such fact to Roby, as stated above, would not affect the defendant, as it was not communicated to him. The verdict was for the defendant, and to the foregoing instructions the plaintiffs except."

C. T. Russell & S. Bancroft, for the plaintiffs.

R. M. Morse, Jr., for the defendant.

AMES, J. Upon the attachment of personal property on mesne process, it is the duty of the officer to keep it safely

until it shall be required either to be taken on execution in favor of the creditor or to be restored to the debtor, according to the event of the suit. This duty he may perform personally, or by the agency of others, at his convenience and discretion; but in either event the property is in his keeping, and he is responsible for its safety. If he sees fit to employ agents of his own selection, he cannot thereby limit his responsibility for any loss or damage that may befall the property, to his own personal default or neglect. He would be responsible, according to the general law of agency, for negligence, mismanagement or bad faith on the part of his servants or agents. The general owner of the attached property is not a party to the contract between the officer and such agents, and has no control over their selection. Even if the attaching officer in this case should be held responsible, according to the rule given to the jury, "only for the same degree of care as he would have been if he had hired the horse of the plaintiffs," he would still be responsible for the default and negligence of his servant. Story on Bailments, § 400. It has repeatedly been decided that the keeper is merely the servant of the officer. The instructions given to the jury assumed, throughout, that the only duty of the attaching officer was to select a proper stable in which to put the horse, "such as a prudent man hiring a horse" would have selected; and that, if he had done this, it would be wholly immaterial what might be the treatment of the horse afterwards at the stable. This was an erroneous view of the law, and the jury should have been instructed that the officer would be responsible for any want of due and ordinary care, on the part of himself or his keeper, in the treatment of the horse after the attachment. As to the risk of injury from peculiar habits or tricks of the horse, his duty to take precautions against such injury would depend entirely upon his information, or means of knowledge, upon the subject of those tricks or peculiarities.

Exceptions sustained.

WILLIAM G. CHAFFEE *vs.* BOSTON & LOWELL RAILROAD
CORPORATION.

If at a railroad station the direct and usual course for passengers to reach from the station-house cars waiting to receive them is by crossing one of the tracks, they have a right to rely, to some extent, for their safety in crossing, upon proper and usual signals of warning to be given by trains or cars approaching upon it.

The fact that a person who, in attempting to cross a railroad track, does not, at the instant of stepping on it, look to ascertain whether a train is approaching, is not conclusive of a want of due care on his part.

At a railroad station, the direct and usual course for passengers to reach from the station-house trains going northward was by crossing a platform eight feet wide, and then one of the tracks. Upon the arrival at this station of a train going northward, between quarter and half past five o'clock on a dusky afternoon about the middle of November, a passenger, on his way to it from the station-house, walked diagonally across the platform some thirty feet, to the outer edge of the platform, looking meanwhile up and down the track to ascertain if a train or car was approaching upon it, and then stepped upon the track without so looking at the moment, and was instantly struck and injured by a hand-car which was passing southward over the track at a speed of more than ten miles per hour. His view northward, along the track, as he walked across the platform, extended only to a point from forty to forty-five feet north of the place where he stepped from the platform. There were no lights on the hand-car, nor any at the station except from the train which he was endeavoring to reach, and from two lanterns on a post at the point which bounded his northward view; and no signal of warning was given to him except simultaneously with the collision. *Held*, that the question whether he used due care was for the jury, in an action by him against the railroad corporation to recover for his injuries as caused by their negligence.

TORT for personal injuries sustained by the plaintiff by being run over by a hand-car on the defendants' railroad track at Milk Row station in Somerville, and alleged to have been caused by their negligence.

At the trial in this court, before *Morton, J.*, the plaintiff testified that, soon after five o'clock on the afternoon of November 13, 1867, he was waiting, as a passenger, in the passenger-room of the defendants' station-house at the Milk Row station, for the arrival of their train from Boston, on which he was intending to travel to Winchester, having a season ticket from the defendants which entitled him to daily passages between Boston and Winchester until January 1, 1868; that there was a double track at the station, and the trains running north from Boston (that is to say, from Boston to Winchester) passed over the

track furthest from the station-house, and in order to reach them from the station-house it was necessary to cross over the intervening track; that the station-house was thirty-five feet long, and the door opening from the passenger-room to the platform was eight or ten feet from the north end of the building; that the platform was eight feet wide, the space between the outer edge of it and the first rail of the nearest track eighteen or twenty inches wide, the gauge of the tracks four feet and eight inches, and the space between the tracks along the front of the station-house about six feet wide; that the train was due from Boston from twenty to twenty-five minutes past five o'clock, and this evening was on time; that he heard the noise of its approach, and, with the other passengers, six or seven in number, stepped to the door of the passenger-room, and when he reached that door the train had stopped, the engine of it resting near a bridge thirty-five or forty feet north of the station-house; "that there were two lanterns on a post seven or eight feet above the fence north of the station, used as a target to stop the trains; that after leaving the door he walked diagonally down and across the platform, partly turned down the track towards Boston; that he looked both ways to see if the track was clear, and could see nothing, stepped off the platform, and was struck by he did not know what, and was afterwards carried into the station." On cross-examination, he testified "that he heard no one call out to him before he was struck; that no one took hold of him while on the platform; that the lights he alluded to as on the fence were about thirty feet above him; that he looked up and down when he was walking on the platform from the door of the station to where he stepped off the platform; that he could see up the track towards Winchester as far as the lights; that he saw no one step off the platform before him; that the station-master was in the room when he left it; that when he went out of the station he looked up and down the track, and looked up and down when crossing the platform; that when he stepped down from the platform he did not look up or down the track; and that he went down the platform from the door at his usual gait, to the end of the platform, where he stepped off, not fast—had time enough."

Andrew F. Arnold, a witness for the plaintiff, testified that he was one of the passengers who were waiting with the plaintiff to take the train; "that he went out first, and the plaintiff came out very soon afterwards; that the train had stopped before the plaintiff left the station; that the engine of the train was between the station and the bridge over the track above the station; that the plaintiff went across the platform angling towards Boston; that he looked up and down the track; that the witness was looking for the engine, and saw the hand-car passing him on the down track from towards Winchester; that it was going very fast, twelve or fifteen miles an hour; that no notice of it was given, and there was no light upon it; that it was quite dusky, being cloudy; that the hand-car struck the plaintiff on the back of his leg; that the witness did not think the plaintiff saw the hand-car, his back was towards it; that the car went on twelve or fifteen feet after it passed him before it hit the plaintiff; that he called out to the plaintiff as he was stepping off the platform, but he did not hear; and that no one was near him or took hold of him." On cross-examination, he said "that he was from twenty to twenty-five feet from the plaintiff when the car struck him; that he saw the hand-car from twenty to twenty-five feet before it struck the plaintiff; that he called out to the plaintiff as he stepped off, as did some one in the hand-car; that the witness could see the plaintiff, and if the plaintiff had looked he could have seen the car as far up the track as to the lights; that, as the plaintiff came out of the door of the station, he cast his eyes both ways; that the hand-car kept on from a hundred and fifty to two hundred feet, after it struck the plaintiff, before it was stopped; and that the plaintiff, as he came out of the door of the station-house, could not see up the track towards Winchester more than twenty to thirty feet, not above where the lights were."

Charles Leonard, another witness called by the plaintiff, testified that, at the time of the accident, he was in the employment of the defendants as a repairer of tracks from Somerville to Medford, about four miles, and for that purpose used the hand-car, and that he and two other men were on the hand-car when

It struck the plaintiff; "that one of the two and himself were turning the crank; that they were going as fast as they could till within a hundred feet of the place where the plaintiff was struck; that the brake was out of order, so they could not stop the car, and the defendants' head-mechanic, as also the head-repairer on that station, knew of it for about two months; that the car kept on a hundred and fifty to two hundred feet after it struck the plaintiff; that the witness shouted at the plaintiff, but the plaintiff did not hear; that he saw the plaintiff step right off the platform, and before the car; and that there was no light on the car."

Stuart French, also called by the plaintiff, testified that he came from Boston on the train which the plaintiff intended to take; that it had come to a full stop, and he was stepping off the cars on the side next to the station-house when he saw the hand-car come down the track and strike the plaintiff; that the plaintiff was opposite the lower or southern end of the station-house, and the witness was four or five feet from him. On cross-examination, he testified that he saw the hand-car about half a rod before it struck the plaintiff; that the collision was opposite the lower end of the station-house, and he was opposite the point where it took place.

Samuel Paine, also called by the plaintiff, testified "that he was walking towards the station, on the night of the accident, between the railway tracks; saw the plaintiff when he was struck by the hand-car, and was twenty to twenty-five feet below him, towards Boston, between the tracks; that he saw the plaintiff walking towards him across the platform diagonally from the door of the station-house; that the plaintiff stepped off the platform opposite the lower end of the station-house, that the hand-car was going ten or twelve miles per hour, and went on, after the collision, a hundred and fifty to a hundred and eighty feet before it stopped." On cross-examination, he said "that he saw the plaintiff making across the platform, and sang out to him to look out just as he was in the act of stepping off; that there were six or eight persons on the platform; and that it was light enough for him to see where the hand-car stopped."

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"It was admitted that the plaintiff was a season ticket passenger, and entitled to the rights of such passenger; and it was not claimed that he was notified of the approach of cars by the station-master, or that it was usual to give such notice."

"Upon the close of the plaintiff's testimony, the defendants' counsel asked the judge to rule, as matter of law, and so instruct the jury, that the plaintiff had not shown himself to be in the exercise of due care at the time he received the injury he sought to recover for, and so was not entitled to recover, as his own want of due care contributed to the accident. The judge declined so to rule; but ruled that upon the evidence in the case the jury were to judge whether the plaintiff, when he received the injury complained of, was in the exercise of due care. The defendants then put in evidence that did not materially vary that offered by the plaintiff, as to the question of his being in the exercise of due care; and again renewed their motion for an instruction to the jury that the plaintiff was not entitled to recover, on the ground that he was not in the exercise of due care at the time he received the injury he sought to recover for, which the judge declined to give.

"Among other instructions given to the jury, not excepted to, upon the subject of the plaintiff's being in the exercise of due care at the time he received the injury, the judge instructed them that, to entitle him to their verdict, the plaintiff must satisfy them that when he received the injury he was in the exercise of due care himself and his want of it did not contribute to his injury; that it would not be due and proper care on his part, if he should have left the station on the occasion in question and attempted to cross the track without looking to see whether it was clear or not; but that, upon the evidence in this case, it was for the jury to determine whether the plaintiff, at the time he received the injury, was acting as a man of ordinary prudence and care would have acted under like circumstances. And if they were satisfied that he did so act on this occasion, then it would be due care on his part. After the charge to the jury, the defendants requested the judge to instruct the jury as follows, upon the point of the plaintiff's being in the exercise

of due care at the time he received the injury complained of: 'That, when a person steps upon a railroad track, the law requires him to show affirmatively that he was at the time in the active exercise of such care as would satisfy a reasonable man that he could step upon the tracks with safety; and if, at that time, there is an absence of affirmative care and thought, the plaintiff cannot recover.' This instruction the judge declined to give, having already charged the jury upon the subject embraced in the request." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. G. Abbott, for the defendants. Taking the plaintiff's evidence as true, it does not show that he used due care. In crossing a railroad track, which may be used by trains or cars, although carelessly, at any time, and where to look up and down before stepping upon it is all that is required to ascertain if it can be crossed safely, no person can be said to be careful, or other than positively careless, who steps upon it without looking, and is struck by an approaching train or car. If, in such a case, at the moment when he steps on the track, (the only time when care is necessary,) the passenger does not use his sight and hearing to determine whether the track is free and safe, he cannot be said to be using any care at all. The substance of numerous decisions of this court is, that, as matter of law, it is not due care for any person to enter upon a railroad track without using all his senses, at the very time of so doing, to ascertain if it is safe. *Warren v. Fitchburg Railroad Co.* 8 Allen, 227. *Butlerfield v. Western Railroad Co.* 10 Allen, 532. *Bancroft v. Boston & Worcester Railroad Co.* 97 Mass 275. *Forryth v. Boston & Albany Railroad Co.* 103 Mass. 510. See also *Steves v. Oswego & Syracuse Railroad Co.* 18 N. Y. 422. In *Warren v. Fitchburg Railroad Co.*, the court held that it was the fact 'hat the plaintiff, while waiting as a passenger to take the train, was told by the defendants' station-master to cross the track, and was doing so in obedience to that order, which took the case out of the ordinary rule and justified the submission of it to the jury.

The testimony in the case at bar shows that the plaintiff did not, immediately before entering on the track, look to see if it was safe for him to do so; and that, if he had looked, he might have seen the hand-car and avoided it. The station being thirty-five feet long, and the lights seven or eight feet above a fence north of the station, he must have been able to see more than forty feet, at least, up the track, from the place where he stepped off; and it is therefore certain, not only that he did not look up the track, with a view to ascertain if it was safe, at the moment when he attempted to cross it, but also that he had not looked up towards Winchester for some little time; since, after such looking, the hand-car must have had time to pass over a distance of more than forty feet. And if, as was contended, the plaintiff could not see up the track further than the lights, that is, from forty to forty-five feet, then there was so much the more reason for him to look immediately before entering upon it, as he must have known how quickly a train or car may pass over such a space. *Bancroft v. Boston & Worcester Railroad Co.* 97 Mass. 275. The ruling of the judge permitted the jury to find that, if the plaintiff looked at the moment he left the station-house, and at no other and later time, it was due care on his part; that is, that he might walk down the platform twenty-five or thirty feet with his back towards one point from which a train might approach, and attempt to cross the track without looking in that direction after leaving the station-house, although at the point at which he left the station-house he could only see fifteen or eighteen feet up the track. Such conduct on the part of the plaintiff was not only, as matter of law, want of due care, but, as a practical question to be determined by the common sense and experience of men, it was grossly careless.

The instruction specially asked for was applicable to the testimony and should have been given. The plaintiff was bound to prove that, when he was injured, he was in the exercise of affirmative care commensurate with the exigency of the case; not that he had been careful at some time before, and was giving no attention to the matter when he received the injury. Here, under the instructions given, the jury were only told that

it would not be due care if the plaintiff left the station-house, and attempted to cross the track without looking to see if it was clear; no instructions being given to govern them in determining at what place or at what time he must look. They should at least have been instructed that the care of a reasonable man was required of the plaintiff when he entered upon the place where he was exposed to danger. *Gilman v. Deerfield*, 15 Gray, 577.

G. A. Somerby, for the plaintiff.

COLT, J. The plaintiff must show, by positive evidence, in cases of this description, that he was in the exercise of due care, and that his want of it did not contribute to the injury of which he complains. If, as a matter of common knowledge and experience, the court can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may be properly told, as matter of law, that he cannot recover. But the question of ordinary care is, in most cases, even where the facts are undisputed, a question of fact, which it is peculiarly the province of the jury to settle, under proper instructions.

A person who attempts to cross a railroad track, under any circumstances, can hardly be said to be in the exercise of due care, unless he takes reasonable precaution to assure himself, by actual observation, that there are no approaching cars upon it. But the degree of caution he must exercise will be affected by the situation and surrounding circumstances. If he is a passenger passing from the station-house in the direct and usual course to enter cars which are waiting to receive passengers, and obliged by the location of the tracks to pass over a track that is unoccupied, he has a right to rely to some extent upon proper and usual signals of warning, to be given by trains or cars passing the unoccupied track at such a place and under such circumstances.

In the case at bar, the plaintiff was a passenger, and the defendants were bound to afford the security and protection to which he was entitled in that relation. The arrangement of the

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defendants' station-buildings and tracks was such that he was obliged to pass over one track to reach the train he was to take. There was no other way of access to the cars. He testified that, while walking from the door of the passenger-room to the place where he stepped from the platform, he looked up and down the track to see if it was clear, and saw nothing; that the night was dark, and, immediately after stepping from the platform upon the track, he was struck and injured by a passing hand-car, which had no light upon it.

There is evidence in this, that the plaintiff, in the act of crossing, was thoughtful of the danger to which he was exposed, and was in the exercise of some degree of care with reference to it. Whether it was due care under all the circumstances, applying as the measure of due care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger, was a question for the jury. It cannot be maintained, as matter of law, that the plaintiff was negligent in not looking up and down the track at the moment when, in a dark night, he stepped from the platform upon it. He had assured himself shortly before, by looking each way, that there was no car approaching which would make the crossing hazardous. His attention, with due regard to his own safety, may have been properly turned for the instant, to see if there was any obstruction before him on the track, or excavation in his way, or danger of collision with other passengers passing to or from the cars. *Gaynor v. Old Colony & Newport Railway Co.* 100 Mass. 208. *Warren v. Fitchburg Railroad Co.* 8 Allen 227. *Forsyth v. Boston & Albany Railroad Co.* 103 Mass. 510.

Exceptions overruled.

Ramsden v. Boston & Albany Railroad Company.

ROBERT RAMSDEN & wife *vs.* BOSTON & ALBANY RAILROAD
COMPANY.

A railroad corporation is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of his fare.

TORT for an assault and battery. The declaration was as follows: "And the plaintiffs say that Ellen Ramsden, the female plaintiff, on August 7, 1868, got on the cars belonging to the defendants, at Newton Corner in the county of Middlesex, to go to West Newton, between the hours of nine and ten in the evening; that on demand of one Twitchell, conductor of the train, a servant of the defendants, in their employ, she paid him fifteen cents for her fare to West Newton; that soon thereafter said Twitchell again called upon her for her fare, and she declined to pay him, as she had once paid him, when said Twitchell, using gross, insulting and abusive language, attempted to extort said fare from her, and then grossly, wantonly and publicly assaulted her person, to force said fare from her, and pulled, wrenched and twisted her parasol from her hands, against her will and efforts to retain it, to hold as security for the payment of said fare; that said plaintiff Ellen was thereby put in great fear, both in body and mind, and was made sick, and thereby, being with child, a miscarriage was caused, and she was imprisoned for the space of seven weeks, and was compelled to pay fifty dollars for medical attendance, and said plaintiff Robert thereby lost the service of his said wife Ellen for said seven weeks, of the value of fifty dollars; to the damage of the plaintiffs, as they say, in the sum of one thousand dollars." The answer denied each and every allegation of the declaration, and alleged that "if any person did the acts complained of, it was not as the defendants' servant or agent, or under such instructions that they are in any manner responsible for his acts or omissions." Trial in the superior court, before *Reed, J.*, who made the following report to this court:

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"This is an action of tort. The pleadings make a part hereof. The plaintiffs introduced evidence tending to show that the female plaintiff got on board the defendants' cars at Newton Corner, for the purpose of going to West Newton in an evening train; that she paid the fare to the conductor; that afterwards the conductor demanded the fare again; that she said she had before paid it; that the conductor told her she lied; that the conversation between them was in a loud tone; that the attention of people in the cars was attracted by it; that she was confused and shamed and excited by it; that the conductor demanded of her that she should give him her parasol to keep as security, or as payment for the fare; that she refused; that he took hold of it, and after somewhat of a struggle took it away from her; and that, by reason of this, the said plaintiff, a few days afterwards, was prematurely delivered of a child, and had suffered much in health.

"After the testimony for the plaintiffs was concluded, the judge announced to the counsel that at the conclusion of the case, whenever that should be, the rulings would be as follows; and that, after hearing them, the counsel upon the one side or the other might proceed or not with the case to the jury, as they might elect. These are the rulings: 'Upon the pleadings, the action is tort in the nature of trespass for an assault. In order to maintain the action, the plaintiffs must show that an assault was committed upon the female plaintiff. A conductor, by virtue of his implied authority as such, that being the only authority shown in this case, has no right to seize articles of property belonging to a passenger for the purpose of thus enforcing the payment of fare. And if a conductor does this, or attempts to do this, and, in so doing, and for the sole purpose of seizing such property, commits an assault on a passenger, the corporation is not responsible in trespass for such acts.' Upon the announcement of these rulings, with the foregoing statement made by the judge to the counsel, the plaintiffs' counsel consented to a verdict for the defendants."

I. D. Van Duzee, for the plaintiffs.

G. S. Hale, for the defendants. It must be assumed, on this report, that there is nothing to charge the defendants unless they would be liable on the precise facts assumed in the ruling.

The conductor, by virtue of his implied authority as conductor, (which is the only authority shown in the case,) had no right to seize property of a passenger to enforce payment of a fare. His only authority was to demand and receive the fare, and perhaps eject the passenger refusing to pay it. The corporation has a right to lay a toll on passengers. Gen. Sts. c. 63, § 112. And a passenger refusing to pay the toll on demand has no right to transportation. § 113. It may be inferred that a conductor, being appointed to collect the toll, has authority to refuse transportation if the toll is refused. But a conductor, as such, has not authority to commence a suit for the corporation. *Ashuelot Manufacturing Co. v. Marsh*, 1 Cush. 507. And therefore he has no implied authority to cause the seizure of a passenger's property by legal process; nor *a fortiori* to seize it himself without process. He having no such implied authority, the corporation cannot be liable for his acts in attempting to exercise it. Nor could the defendants have given him such an authority expressly, if they had wished to; they having no right to exercise it themselves. And further, on the ruling in this case the assault was committed "for the sole purpose of seizing the property." Suppose that the conductor had followed the plaintiff to her home, and had there seized the property, would these defendants have been liable? Would a creditor, who sends a person to collect his bills, be liable for an assault by the collector, or a forcible seizure of the debtor's property from his person, on account of the implied authority given the collector? Would a plaintiff be liable for an illegal attachment of property by an officer who was directed to serve the writ by arrest? Would he be liable for an illegal seizure by an officer, sent to replevy specified property, of other and different property, in order to force the delivery of the former?

The case falls strictly within the principle thus stated by Hoar, J., in *Howe v. Newmarch*, 12 Allen, 49, 56, 57: "The master is not responsible as a trespasser, unless, by direct or im-

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plied authority to the servant, he consents to the wrongful act. But if the master give an order to the servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable." The only order to be presumed to have been given by the defendants to the conductor, in the case at bar, is that arising from his employment as a conductor, to collect fares. This cannot be held to imply the use of force and violence in obtaining a fare, unless to prevent the passenger refusing to pay it from being carried in the cars. The only thing left to the conductor's discretion, as to the occasion, was to judge whether the fare was improperly refused, and whether the plaintiff should be removed therefor. The only thing so left, as to the extent and kind of force to be used, was what extent and what kind should be used to remove the passenger from the cars. See also *Poultton v. London & Southwestern Railway Co.* Law Rep. 2 Q. B. 534; *Roe v. Birkenhead, Lancashire & Cheshire Junction Railway Co.* 7 Exch. 36; *Eastern Counties Railway Co. v. Broom*, 6 Exch. 314; *Lyons v. Martin*, 8 Ad. & El. 512; *Aldrich v. Boston & Worcester Railroad Co.* 100 Mass. 31; *Aycrigg v. New York & Erie Railroad Co.* 1 Vroom, 460; *Wilson v. Peverly*, 2 N. H. 548; *Church v. Mansfield*, 20 Conn. 284; *Thames Steamboat Co. v. Housatonic Railroad Co.* 24 Conn. 40; *Brown v. Purviance*, 2 Har. & Gill, 316; *Oxford v. Peter*, 28 Ill. 434.

GRAY, J.* A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. *Moore v. Fitchburg Railroad Co.* 4 Gray, 465. *Hewitt v. Swift*, 3 Allen, 420. *Holmes v. Wakefield*, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent; *Howe v. Newmarch*, 12 Allen, 49; or even if it is contrary to an express order of the master. *Philadelphia & Reading Railroad Co. v. Derby*, 14 How. 468.

* COLT, J., did not sit in this case.

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare. *O'Brien v. Boston & Worcester Railroad Co.* 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare; or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or by compelling him to jump off while the train is in motion; in either case, the corporation is liable. *Moore v. Fitchburg Railroad Co.*, *Hewitt v. Swift*, and *Holmes v. Wakefield*, above cited.

We are all of opinion that this case cannot be distinguished in principle from those just mentioned. The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured. In *Monument National Bank v. Globe Works*, 101 Mass. 59, Mr. Justice Hoar said, "No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable in this Commonwealth for one committed by its servants."

The ruling of the learned judge who presided at the trial, that if the conductor, in seizing, or attempting to seize, articles of property belonging to a passenger, for the purpose of thus enforcing the payment of fare, committed an assault upon the passenger, the corporation was not responsible for such acts, was therefore erroneous.

Verdict set aside.

HILL MANUFACTURING COMPANY *vs.* BOSTON & LOWELL RAIL ROAD CORPORATION.

The successive roads of three railroad corporations, together with the line of a steamboat company whose boats plied from the end of the third road, constituted a route between two cities. The first corporation had a written contract with the second for mutual transportation of goods over and beyond their roads, having in view transportation between the two cities, and providing that the first corporation might "bill freight through," and for any loss of goods beyond its own road the second corporation would indemnify it; and the general course in transporting goods from the first city to the second was for the first corporation to receive and receipt for them, as "to be forwarded" to the second city; to dispatch them over its own road and the second road, with a way bill in which they were marked for through transportation which way-bill the third road took, with the goods, from the second road, and in its turn delivered, with the goods, to the steamboat company; and to collect the entire freight, not only for the transportation over its own road and the second road, in pursuance of the written contract, but also over the road of the third corporation and the line of the steamboat company. After deducting from the freight thus collected a portion fixed in its written contract with the second road as due for its own transportation of the goods, it paid the balance to that road, which, after deducting a portion fixed by oral agreement between itself and the third road, paid the residue to the third road, which divided it with the steamboat line in pursuance of an oral agreement between itself and that line. But between the first corporation and the third corporation and steamboat line, and between the second corporation and the steamboat line, there was no agreement except what may be inferred from this course of business. *Held*, that these facts warranted the inference that the first corporation was liable as a common carrier over the whole route, to a person from whom, in this course of business, it received goods for transportation from the first city to the second city.

A common carrier, who ships goods over part of his route on a vessel which he does not own or charter, is not relieved from liability by the U. S. St. of 1851, c. 43, if the goods are destroyed by an accidental fire on the vessel.

CONTRACT, to charge the defendants as common carriers with the loss of thirty cases of bleached cottons, delivered to them by the Lowell Bleachery, in behalf of the plaintiffs, for transportation from Lowell to New York City, consigned to the plaintiffs' factor in the latter place. The case was submitted to the determination of the court on a statement of agreed facts, of which the following are the material parts:

The defendants leased and worked the Stony Brook Railroad, which extended from Lowell to Groton Junction and there connected with the Worcester & Nashua Railroad, which extended from Groton Junction to Worcester and at Worcester connected with the Providence & Worcester Railroad, which

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extended from Worcester to Providence in Rhode Island, where its tracks ran upon the wharf of the Providence & New York Steamship Company, whose steamers plied from Providence to New York. The defendants, and the Worcester & Nashua Railroad Corporation, the Providence & Worcester Railroad Company, and the Providence & New York Steamship Company, were independent corporations, and had had no connection in business except as hereinafter stated.

From and after the 1st of January 1868, a contract existed between the defendants and the Worcester & Nashua Railroad Corporation, which on May 20, 1868, was reduced to writing and signed by their proper officers. The material parts of this writing are printed in the margin.*

* "This memorandum of agreement, made May 20, 1868, by and between the Boston & Lowell Railroad Corporation, party of the first part, and the Worcester & Nashua Railroad Corporation, party of the second part, witnesseth :

"Whereas the said parties have a mutual and common interest in the business of transporting through passengers and merchandise between Lowell and Worcester and points beyond in either direction, over and upon certain railroads operated and managed by them respectively, viz. : the Stony Brook Railroad, operated by said first party, and the Worcester & Nashua Railroad, operated by said second party,

"Now therefore, for the better and more convenient conducting of said joint business, and to promote harmony between the parties, it is hereby mutually agreed that the said joint business, as hereinafter particularly defined, shall be conducted and adjusted between the parties in the manner and upon the terms and conditions set forth in the following articles of specification, viz :

"*Art. 1.* Each party shall keep and maintain its respective portion of the said line of railroads in good and safe working condition, and shall run thereon for the accommodation of said business such passenger and freight trains and at such times as may from time to time be agreed upon.

"*Art. 2.* Each party shall sell tickets to passengers and bill freight from its principal stations in the line aforesaid, to the principal stations of the parties in the said line, and the party of the first part shall also bill freight and ticket passengers to such other points beyond Worcester as the party of the second part may from time to time direct, and each shall furnish therefor its own tickets, way bills and other incidental stationery.

"*Art. 3.* The party of the first part shall furnish passenger and baggage cars and motive power and men for its own part of the line only. But for the

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In May 1868 the plaintiffs delivered the goods to the Lowell Bleachery in Lowell, to be bleached and then sent by the

joint freight it shall furnish its proportion of cars, in either direction, according to the miles which such freight is transported by rail under the joint way bills authorized by this agreement. To facilitate the computations for car service, in the settlements of the same, as hereinafter provided, it is agreed that the portions of railroads composing this line shall be rated at the following lengths, viz: Lowell to Groton Junction, 17 miles; Groton Junction to Worcester, 28 miles; Worcester to Providence, 44 miles.

"Art. 4. The party of the second part shall furnish passenger and baggage cars and motive power and men for its part of the said line; also its proportion of freight cars, according to miles run, as aforesaid; and further shall guarantee, and does hereby guarantee to said first party, the furnishing for joint use of a proper proportion of freight cars, or suitable water conveyances and proper transportation of passengers and freight ticketed or billed by the first party over and upon said line and beyond to New York, Providence, and intermediate places, or other points to which the said second party may authorize the sale of tickets or billing of freight by the said first party.

"Art. 5. The freight cars for joint business, as aforesaid, shall be kept in repair and running order by, and be at all times at the risk of, the party owning the same, excepting that cars broken by careless usage or defect of track, upon any part of the line herein established, are to be repaired by the party on whose road they are so broken.

"Art. 6. The party of the first part shall assume all risks upon joint or through passengers and freight while upon its own portion of the line, and not elsewhere. The party of the second part shall assume all risks upon joint or through passengers or freight, while upon its own portion of the line, and further shall save harmless the said first party from all claims, costs or damages arising out of injuries to passengers or losses or damages in fact on freight or passengers billed or ticketed by said first party to New York or elsewhere over said second party's road, by their consent, or on freight and passengers billed or ticketed from New York or elsewhere, over said second party's road, to stations on the road of the first party, excepting always and only the risk as first named, of the first party on its own part of the line. In case of damage or loss to joint freight or baggage in transportation, when it cannot be ascertained where such damage or loss occurred, the same shall be shared in proportion of miles transported by the whole line from New York or elsewhere, over which said freight or baggage was transported under this joint contract, the said second party assuming, as between the parties hereto, all except the share of the party of the first part."

"Art. 7. As it may be impracticable for each party at all times to furnish the exact proportion of freight cars required for the joint business herein referred to, it is agreed that a car account shall be kept and adjusted once a month

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Bleachery to the plaintiffs' factor in New York City, whose name was Josiah Colby. On May 22 the Bleachery delivered the goods, addressed to Colby in New York City, to the defendants' agent at the freight depot of the defendants in Lowell, and took from him a receipt, which he signed, as follows: "Received of the Lowell Bleachery, to be forwarded to New York, thirty packages of goods marked, 22, Josiah Colby, H. C. A.; 7, Josiah Colby, H. C. D.; 1, Josiah Colby, H. C. B." The Bleachery at the same time delivered to the defendants a forwarding order, at the bottom of which was printed in red ink, "Charge freight to Lowell Bleachery," it being the invariable usage of the Bleachery to give orders in this form whenever it was to pay the freight on goods sent by it, and the defendants being used, at the end of each month, to present to and collect from the Bleachery a bill of charges on such freight. "The defendants charged the whole freight on the thirty cases of goods, from Lowell to New York, at the rate of thirty cents per hundred, and at the end of the month presented their bill to the Bleachery Company, which was paid by them June 9, 1868. In

And either party furnishing more than its proper proportion shall receive from the other as full compensation therefor one third of a cent per mile for each ton transported in such excess cars over such other party's part of the line."

"Art. 8. The party of the second part shall have exclusive control of the through joint tariffs of rates for passengers and freight under this contract, and may make and modify the rates at their own discretion."

"Art. 9. Each party shall collect and be responsible in general account for the charges on joint freight made payable at its own stations, or for joint tickets sold thereat, and on the part of the second party at and for stations beyond Worcester, as aforesaid.

"Art. 10. Settlements shall be made and all balances between the parties hereto shall be adjusted and paid over once in every month, and the party of the first part shall be entitled to and receive as its full share from the receipts of such joint business at the following rates, viz: " [Here were specified rates for freight and passengers between Lowell and Groton Junction.]

"Art. 11. This contract shall date back and take effect on business of the first day of January 1868, and continue in force one year therefrom, and thereafter until terminated by notice in writing from either party to the other, delivered not less than three months before the time specified by such notice for termination."

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thus sending goods to the plaintiffs' agent in New York, the Bleachery Company were acting for the plaintiffs."

"The goods were forthwith transported from Lowell by the defendants' agents over the Stony Brook Railroad to Groton Junction, and there delivered, with the cars in which they were transported, to agents of the Worcester & Nashua Railroad Corporation, and by them carried over their railroad to Worcester, where they were by them in like manner delivered to agents of the Providence & Worcester Railroad Company, and carried over their railroad to Providence, the defendants' cars being used until their arrival at the latter place, where agents of said Providence & Worcester Railroad removed the goods from the cars and delivered them in good order to agents of the Providence & New York Steamship Company, by whom they were placed on board one of said company's boats bound for New York; and this was the only mode in which goods were ever transported from Lowell to New York by this route. The steamer, with these goods on board, arrived at New York on Sunday morning, May 24, about 9 o'clock, the usual hour of arrival, and was laid alongside of the wharf, and no goods were removed from her. The wharf belonged to the steamship company, and at the head of the dock were the company's offices extending to within a few feet of the steamer as she lay at the wharf. No person was present in the offices, except one watchman. About twelve o'clock, he was informed by some one in the street that the offices were on fire; on examining, the fire had made such headway inside of the offices that it was impossible to stop it; and in a few minutes it was communicated to the steamer, which could not be moved, having no steam on and the steamer, with the merchandise on board, was partly consumed. It has never been known what was the cause of the fire in the company's office, but it was agreed that it was not caused by design of the owners of the steamer. Colby had received no notice of the arrival of the steamer at the time of the fire; and it was not the custom to unload or deliver the goods arriving on Sunday till the Monday following. The plaintiffs' loss and damage upon the goods by the fire was \$4558.24."

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"The course of business which had subsisted since January 1, 1868, with regard to goods shipped by the Bleachery in the manner in which these were shipped, was this: A way-bill containing a list of all goods sent on each day, in the form printed in the margin,* was forwarded with the goods and delivered by the defendants to the Worcester & Nashua Railroad Corporation at Groton Junction, and by them delivered at Worcester to the Providence & Worcester Railroad Company, who delivered it to the Providence & New York Steamship Company at Providence. A duplicate way-bill, a copy of which is printed in the margin,† (and, when freight was paid in Lowell, marked 'paid,') was forwarded with the goods and delivered by the defendants to the agents of the Worcester & Nashua Railroad Corporation at Groton Junction, and by them delivered to the agents of the Providence & Worcester Railroad Company at Worcester, who delivered the same to the Providence & New York Steamship Company at Providence; and when the freight had been paid in Lowell, the steamship company sent said bill to the consignee, and stamped the name of the steamer bringing the goods and the date upon it, which was delivered to the consignee with the merchandise. This would have been done in the present instance, but for the happening of the fire.

* STONY BROOK RAILROAD.

Way-Bill of Merchandise forwarded from _____ 18

No. of Car.	Consignee and Destination.	Description of Articles.	Cubic Feet.	Weight.	Expenses.	Rate.	Freight payable at	Freight payable at

† Steamboat, May 22, 1868.

Mr. Josiah Colby to Stony Brook Railroad Company, Dr.

For Transportation of Merchandise from Lowell to New York *viâ* Providence.

	Weight.	Cubic Feet.	Expenses.	W. & N. Ft.	Worcester to N. Y.	Total.
20 Cases Doms.	7620					23 38

Prov. & N. Y.
S. S. Co.
May 23,
1868.
Oceanus.

Received Payment.

Paid.

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"The Worcester & Nashua Railroad Corporation, before the sending of the goods sued for in this action, had directed the defendants to ticket passengers and bill freight from stations on the defendants' line of railroad, to New York, over the Worcester & Nashua Railroad, by way of Providence, according to the contract between them; and had fixed the rate of freight from Lowell to New York under said contract; and this was the rate charged by the defendants, and paid by the Bleachery for the goods sued for. The defendants charged and collected the entire freight for said goods, in pursuance of said contract, and received to their own use the price per ton provided in said contract, and paid over to the Worcester & Nashua Railroad Corporation the balance. The said balance was divided between the three remaining corporations over whose routes the goods passed, in the following manner and proportions, viz: the Worcester & Nashua Railroad Corporation received to its own use 34 per cent. of the whole charge from Lowell to New York, less the amount retained by the defendants, and paid over the residue to the Providence & Worcester Railroad Company; and said residue was divided by the Providence & Worcester Railroad Company and the Providence & New York Steamship Company, in the ratio of 44 to 66. This division of the balance, after paying the defendants, was effected in pursuance of oral agreements between the Worcester & Nashua Railroad Corporation and the Providence & Worcester Railroad Company, and between the Providence & Worcester Railroad Company and the Providence & New York Steamship Company; but there was no agreement, oral or otherwise, between the defendants and either the Providence & Worcester Railroad Company or the Providence & New York Steamship Company, nor between the Worcester & Nashua Railroad Corporation and said steamship company."

"The court, upon the foregoing facts, so far as the same are competent, are to render such judgment as the law requires, it being agreed that they may draw any inferences from the competent facts stated that a jury would be justified in drawing."

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J. G. Abbott, for the plaintiffs, besides cases cited for the defendants and in the opinion, cited *Najac v. Boston & Lowell Railroad Co.* 7 Allen, 329; *Fitchburg & Worcester Railroad Co. v. Hanna*, 6 Gray, 539; *Simkins v. Norwich & New London Steamboat Co.* 11 Cush. 102; *Cobb v. Abbot*, 14 Pick. 289; *Weed v. Saratoga & Schenectady Railroad Co.* 19 Wend. 534; *Fairchild v. Slocum*, *Ib.* 329; *Champion v. Bostwick*, 18 Wend. 175; *Hart v. Rensselaer & Saratoga Railroad Co.* 4 Selden, 37; *Quimby v. Vanderbilt*, 17 N. Y. 306 *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332; *Mytton v. Midland Railway Co.* 4 H. & N. 615; *Bristol & Exeter Railway Co. v. Collins*, 7 H. L. Cas. 194.

F. P. Goulding, for the defendants. 1. The liability of common carriers can be made to attach to the defendants in one of two modes only; by showing a special and express undertaking to carry the goods from Lowell to New York; or by showing such an arrangement between them and the other carriers constituting the line of transportation as to impose a joint liability on all the parties to it. *Nutting v. Connecticut River Railroad Co.* 1 Gray, 502. *Darling v. Boston & Worcester Railroad Co.* 11 Allen, 295. *Gass v. New York, Providence & Boston Railroad Co.* 99 Mass. 220. *Burroughs v. Norwich & Worcester Railroad Co.* 100 Mass. 26.

2. There was no such express and special undertaking of the defendants. The receipt and forwarding order were the only papers that passed between the parties; and they only stated the fact of the delivery to and acceptance by the defendants of these goods to be forwarded to New York. The law imposes from that fact the obligation to transport them safely over the defendants' road, and deliver them to the next carrier in the line; and the papers therefore imposed no liability which the law would not impose without them. *Naugatuck Railroad Co. v. Waterbury Button Co.* 24 Conn. 468. *Elmore v. Naugatuck Railroad Co.* 23 Conn. 457. *Hood v. New York & New Haven Railroad Co.* 22 Conn. 1. *Farmers' & Mechanics' Bank v. Champlain Transportation Co.* 18 Verm. 131, and 23 Verm. 186. *Van Santvoord v. St. John*, 6 Hill, 157 *Nutting v. Connecticut*

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River Railroad Co. 1 Gray, 502. *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189. *Converse v. Norwich & New York Transportation Co.* 33 Conn. 166. The duplicate way-bill (so called) which it was the course of business to send with goods sent as these were, and deliver with the goods to the consignee, would not, even if delivered, constitute a contract to assume a further liability. It is a mere receipt for freight, the only purpose of which was to inform the successive carriers and the consignee that the entire freight had been prepaid, and cannot add any liability other than would be implied from the fact of prepayment. The case finds that the defendants "charged and collected the entire freight for said goods, in pursuance of said contract" with the Worcester & Nashua Railroad. It distinctly appears, therefore, what interest they had in the freight collected. The statement in this duplicate way-bill, that Colby is "debtor for transportation of merchandise from Lowell to New York," does not import a contract on the defendants' part to carry through, but at most that the freight had been or was to be collected by the defendants. If it is contended that its terms constitute an express undertaking to carry through, it is sufficient to reply that it was never delivered to the plaintiffs, and further, that the defendants do not appear to be parties to it.

3. Nor was there any arrangement between the defendants and the other carriers, which imposed a joint liability. When there are arrangements between connecting carriers as to through freight, the liability of each is to be determined by a fair construction of the terms. *Darling v. Boston & Worcester Railroad Co.* 11 Allen, 295. So far as the plaintiffs rely upon the written contract of the defendants with the Worcester & Nashua Railroad, it would seem to be decisive to answer in substantially the language of the court in *Burroughs v. Norwich & Worcester Railroad Co.* 100 Mass. 26, that this contract expressly provides that the defendants should assume all risks upon through freight while upon their portion of the line, and not elsewhere, and that the goods were injured elsewhere, and while in the exclusive custody of the steamship company. As between the parties to it, and as to third persons, it does not constitute a partnership

There is no community of interest in the property by means of which the business is done, or the profits which result from it; no common fund from which expenses are paid and profits divided; no community of control or management. One of the parties to it might be making large profits, the other large losses, in the business which is the subject of the contract. "There was no general agreement between the companies by which they were to share the proceeds of the whole business on all the lines; so that it is not within the principle laid down in *Champion v. Bostwick*, 18 Wend. 176." Hoar, J., in *Gass v. New York, Providence & Boston Railroad Co.* 99 Mass. 220, 227. It can make no difference that the parties term the business a joint business. What they mean by joint business is through business. The words are used interchangeably in the contract. The arrangement for furnishing proportionate numbers of freight cars was made to meet the inconvenience of transfer at the point of junction, and is a mere exchange of cars for mutual accommodation.

4. Even if it is granted that the defendants and the Worcester & Nashua Railroad Corporation were partners under the written contract, it does not follow that the defendants are liable in this action. The goods were not injured while either of the parties to the contract had custody of them; and no connection whatever is shown to have existed between the defendants or the Worcester & Nashua Railroad Corporation and the steamship company.

The only facts which can be adduced to establish the liability of the defendants are these: that they charged and collected the entire freight; that by the contract with the Worcester & Nashua Railroad Corporation they provided for the means of transportation of goods billed to New York; and that they took a stipulation of indemnity from that corporation against all claims, costs and damages arising out of injuries or losses occurring on freight billed by them to New York or elsewhere, except such as should occur on their own portion of the line.

But they charged and collected the entire freight, in pursuance of the contract, as the agents of the next carrier, except as

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to so much as would pay their own earnings, and they paid it over to the next carrier accordingly. There was no claim of title to the whole freight, but only a power and agency as to it. The case does not differ in this respect from *Gass v. New York, Providence & Boston Railroad Co.*, or *Burroughs v. Norwich & Worcester Railroad Co.*

The provision for the means of transportation of goods billed to New York was reciprocal with that made by the defendants to carry goods coming from the other direction, and was merely an arrangement by which the defendants secured to the public the advantage of an unbroken line of transportation. It is an element which has existed in all the similar cases recently before the court, including both the cases of *Gass* and *Burroughs*.

The further stipulation for an indemnity does not conclude the defendants upon the question of general liability, or of liability in any particular case, and was inserted in the contract out of abundant caution and to meet any possible emergency. By it, as between themselves and the Worcester & Nashua Railroad Corporation, the defendants would exclude all question; but do not assume, directly or indirectly, any responsibility as to third persons.

The whole arrangement subsisting in this case is analogous to that in *Darling v. Boston & Worcester Railroad Co.* 11 Allen, 295.

5. Finally, whatever view may be taken of the arrangements between the carriers constituting the line over which these goods were transported, the defendants cannot be held liable in this action. The damage to the goods occurred by a fire on board of a vessel engaged in commerce between the states, which was not caused by the design, and there is no evidence that it was caused by the neglect, of the company which owned the vessel; and that company are exempted from liability for the loss, by the U. S. St. of 1851, c. 43; 9 U. S. Sts. at Large, 635.* The

* U. S. 1851, c. 43, § 1. "No owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board any such ship or

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navigation from Providence to New York on Long Island Sound was not inland navigation. See *Moore v. American Transportation Co.* 24 How. 1, 38. And if the defendants would otherwise be liable, they also are exempted by this statute; for, if they are regarded as so connected with the steamship company in the business of through transportation as to be jointly liable with them for all losses on any part of the route, then they are *pro hac vice* shipowners within the meaning of the statute; and if the arrangement and course of business were such as to imply an undertaking on their part to carry through, the undertaking was so far qualified by the statute as to entitle them to the same immunity which it conferred on the carriers by water whose route and facilities they availed themselves of.

AMES, J. The law applicable to the conveyance of goods by successive carriers over connecting but independent lines of transportation has recently been very fully considered by this court. The case now before us does not appear to call for anything more than the application of the rules laid down in *Darling v. Boston & Worcester Railroad Co.* 11 Allen, 295, and *Burroughs v. Norwich & Worcester Railroad Co.* 100 Mass. 26. It is well settled that a railway company may by contract assume to carry goods beyond, as well as within, the limits of its own line of road; and the claim of the plaintiffs is, that the de-

vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners; *provided*, that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of shipowners."

§ 5. "The charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof."

§ 7. "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

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defendants have made such a contract in this instance, and have rendered themselves liable as common carriers for the entire distance.

The case finds that the defendants, by means of their written contract with the Worcester & Nashua Railroad Corporation, had secured the means of placing themselves in connection with an established line of transportation, partly by railroad and partly by steamboat, between Lowell and New York. They had no contract themselves with the proprietors of any part of the line beyond the city of Worcester; but the corporation with which they were immediately dealing had such contracts. The manner in which the freight money should be apportioned among the successive carriers was fully arranged and agreed upon. There can be no doubt that the object to be gained by their written contract with that corporation was to form a connection with the city of New York, and in that way to extend their business and increase their profits. Their arrangements had made it substantially certain that all goods forwarded over and beyond their line would ordinarily go and be delivered at their place of destination in the regular course of business. By the sixth article of the written contract with that corporation, the latter undertakes to indemnify the defendants against all losses and damages happening in any part of the joint line beyond the limits of the defendants' own road. The defendants were therefore in a position in which, without any great or extraordinary risk, they might assume the responsibility of common carriers for the entire distance. The precise and well considered precaution which they had taken, to be secured against all the risks of accident or mistake beyond their own limits, is a plain indication that they considered all goods, so transported, at their risk, as between them and the owners of these goods. If they were under no liability beyond their own *termini* except that of forwarding agents, they needed no such promise of indemnity. It is a matter of no consequence that the owners of the goods sent were not parties to this particular arrangement, or that it was not a thing of which they had any knowledge. The question is, What was the contract which the

defendants made with the plaintiffs on receiving the goods? The plaintiffs do not claim that it was reduced to a formal shape, and so expressed in apt words as to define with technical precision the exact rights and liabilities of each party, but they insist that the general character of the defendants' arrangements concerning the transportation of goods, and their general course of business on the subject, were perfectly well known to the Bleachery Company, who for this purpose were the plaintiffs agents; and that this course of business was implied in and made a part of the contract under which the goods were received and forwarded; that is to say, that the contract was made with reference to that course of business, and to the practice which the defendants had adopted under it.

The case is submitted with an agreement that the court may draw any inferences from the competent facts stated that a jury would be justified in drawing; and the only matter in controversy is the question, What was the defendants' contract upon the receipt of the goods? They had placed themselves in a position to do New York business, by having established a through joint line, under a written agreement with the Worcester & Nashua Railroad Company. It was a part of the agreement, that they were authorized by the latter corporation to give way-bills for freight for the entire distance, or, in the language of the contract, "to bill freight through." It was also a part of the agreement, not merely that all goods after they had left the defendants' line should be at the risk of the Worcester & Nashua Railroad, but that this latter corporation should indemnify the defendants and save them harmless against loss or damage happening beyond their limits. The true interpretation of the facts then seems to be, that the defendants were to contract in the first instance with the owner or consignor of the goods, for the entire distance, and were encouraged and induced to do so by the assurance that they should really lose nothing in so doing. Such being their position, they offer to receive goods to be carried to New York; they receive them to be delivered there; they give a way-bill for the entire distance; they take pay for transportation over the whole of the line; the

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whole course of proceedings is exactly what it would be if they meant to contract for the whole distance; and to all appearance, as between them and the owner, the freight money is one indivisible item. We think these circumstances justify the inference that they assumed the liability for the entire transit, relying upon a third party for indemnity against all risks occurring beyond their own limits.

If the defendants incurred the liability of common carriers for the entire journey, as in our judgment upon the agreed facts they did, their liability as such did not cease upon the mere arrival of the steamboat at the wharf in New York. No notice had been given to the owner of the goods of their arrival. No reasonable time (as they arrived on Sunday morning) had been allowed for their removal. They had not been landed from the vessel, but still continued, in law and in fact, in the possession of the last carrier in the line, at the time of the fire. There was neither actual nor constructive delivery of them to the consignee. *Hyde v. Trent & Mersey Navigation Co.* 5 T. R. 389. *Chickering v. Fowler*, 4 Pick. 371.

The statute of the United States, relied upon by the defendants, does not apply to cases like the present. It undertakes to exempt the owners of vessels from responsibility for losses arising from accidental fires, and it provides that charterers, who man, victual and navigate vessels, shall be deemed the owners within the meaning of the act. But these defendants are neither owners nor charterers of the steamboat, and do not come within the terms of the act. It certainly was not the intention of congress to extend the exemption, provided for by the statute, to expressmen or other common carriers who may avail themselves of the facilities afforded them by steamboats or other vessels for the transportation of packages in the fulfilment of contracts under which they assume the well known common law liability. The result therefore must be

Judgment for the plaintiffs for the amount agreed, with interest

EDWARD R. MAYO vs. BOSTON & MAINE RAILROAD.
SAME & wife vs. SAME.

To sustain an action for an injury received by the plaintiff through the defendant's negligence, it is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence, but the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received.

At a railroad station there was a double track, planked between the rails; and on each side of this track was a platform leading to a highway. The station-house adjoined the highway and one platform. A passenger, having arrived at this station in a train on the track furthest from the station-house, alighted upon the platform adjoining that track, stepped from the end of it down upon the highway, from four to six feet in the rear of the train as it departed, and attempted to reach the station-house by crossing the double track, over the planked space, at a proper place for passengers arriving like herself to cross to it, where there was nothing except the departing train to obstruct her view along the tracks, and where the platform on the other side would not retard her movement upon arriving there. In this attempt, she was struck and injured by a train approaching on the track nearest to the station-house, from the direction in which the other train was departing. *Held*, in an action by her against the railroad corporation for the injury, that the mere fact that she began to cross at a time when her view along the tracks was thus obstructed by the departing train was not conclusive that she did not use due care.

TWO ACTIONS OF TORT against a railroad corporation for an injury to the female plaintiff.

At the trial of these actions together, before *Gray, J.*, "there was evidence that, on the morning of February 1, 1867, Mrs. Mayo, with her son, six or seven years old, and a woman named Thayer, bought tickets, and were carried in the defendants' cars from Boston to Wyoming; that the defendants' railroad had two tracks; that the station at Wyoming was on the west side of the railroad; that the platform of the station, and a like platform on the east side of the railroad, had no steps next the railroad, but had two steps at their north ends, at which point a highway crossed the railroad on a level; that the outward bound train ran upon the east or right hand track; that these passengers, after the train had stopped, got out of the front end upon the platform on that side, near its north end, and, immediately after the train had started again, stepped down from the platform upon the highway, and thence upon the railroad, in order to cross to the station, the plaintiff leading her boy by the

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hand ; that Thayer, assisted by a man standing on the platform of the station, reached the platform ; and that Mrs. Mayo, before reaching it, was struck by the locomotive engine of a train coming towards Boston on the west track, and severely injured."

Mrs. Mayo testified : " We got out of the cars quite near the end of the platform, on the opposite side of the tracks from the depot. I stepped backwards, holding back my dress, till all the cars of the train by which we went out had passed. Then I stepped down the two steps at the end of the platform upon the road ; and as I got down upon the road, being very timid as to cars, I looked up and down the road, and towards the depot, to see if there was any flag or notice of any danger. A gentleman passed before me ; and then Miss Thayer. As I stepped across, I heard no sound, except of the retreating cars ; and my first impression was that they were backing. When I came to myself, I was lying upon the ground, I think between the two tracks. I saw no gate or flagman across the road ; that was what I looked for. I did not see or hear anything. My eyesight and hearing were good. Just as soon as the way was clear, as soon as the train had moved off, I crossed. I was going to the depot. I knew my way from the depot. I had not the least information, or the slightest idea, that another train was expected at that time." On cross-examination she testified : " I meant to go to the depot ; that is my only recollection. The last car had not moved away more than four to six feet, when I began to cross the railroad. As soon as it had passed, directly, I went down. I had no baggage except my parasol."

Miss Thayer testified : " I prepared to cross as soon as the cars had passed. We said nothing to each other while on the platform, except that we would cross ; and we started in company. I had reached the inner track next the depot, when someone called out, and I therefore looked up and saw the engine coming, which was the first I knew of it. A gentleman crossed about six feet in front of me. I saw no train, no flag, and no person to indicate any danger or train coming ; and I heard no one speak, no whistle, no bell. As I stepped down, I looked in every direction. There was no gate or flag or flagman on the

road. I had no idea of anything coming. I went almost straight across."

It was proved that at the time of the accident the following was one of the regulations established by the defendants for the management of their road: "Trains must stop before arriving at passenger stations, when another train is receiving or discharging passengers at such station. Enginemen will sound their whistle with a continued sound, when approaching a regular station where their train is not to stop. Express trains will pass through stations at a rate of speed not exceeding twenty-five miles, and extra trains not exceeding fifteen miles, per hour." And there was additional testimony, tending to show that the engine of the train which struck Mrs. Mayo passed the rear car of the departing train on the highway; that it was running at a speed "faster than common;" that no whistle was blown nor bell sounded on it; that it consisted of nine or ten cars; that the smoke from the engine of the departing train obscured the view of it as it approached; and that when it stopped the rear car of it rested two thirds across the highway. It appeared that the spaces between the rails were planked, across the highway; and the evidence left it uncertain whether the planking extended further down, between the platforms.

There was evidence tending to show that Alvan Lynde, the station-master, was standing on the platform adjoining the station-house, when Mrs. Mayo and her boy, and Miss Thayer, began to cross the tracks; that, being aware of the approaching train, though by reason of the smoke of the departing train he could not see it, he sprang forward across the track on which it was coming, called to them to keep back, extended his arms to stop them, and had caught hold of Mrs. Mayo's arm at the moment when the engine struck her; and that, if Mrs. Mayo had stopped when he extended his arms towards her, she would have escaped the peril; but Mrs. Mayo and Miss Thayer, being recalled, testified that they did not see Lynde or any other person make such a motion to stop them as he described. There was also some evidence tending to show that Mrs. Mayo was crossing the tracks diagonally.

The question whether, on the evidence of which the foregoing is the substance, a jury would be warranted in finding verdicts for the plaintiffs, was reserved for the determination of the full court; if it would be, the cases to stand for trial; otherwise, judgments to be entered for the defendants.

H. W. Paine & A. A. Ranney, for the plaintiffs.

B. F. Thomas & C. F. Choate, for the defendants.

WELLS, J. There was evidence tending to show a failure, on the part of those who had charge of the incoming train, to adopt the reasonable precautions required by a proper consideration for the safety of human life, as well as by the regulations of the road, in respect to the manner of approaching stations at a time when another train is receiving or discharging passengers. The testimony also tended to show a noncompliance with the St. of 1862, c. 81, in regard to the crossing of highways. The question of negligence on the part of the defendants must therefore be submitted to a jury; unless the facts disclosed at the trial preclude any recovery, for the reason that her own fault contributed to bring the injury upon the female plaintiff.

It is well settled that, in order to recover for an injury on the ground of negligence of another party, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose; or that the injury is in no part due to his own fault or want of care. The burden rests upon the plaintiff to make this appear. Although, in form, a proposition to be established affirmatively, it is not necessarily to be proved by affirmative testimony addressed directly to its support. The burden is held to be upon the plaintiff, for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to wit, that the injury to the plaintiff was caused by the negligent or wrongful conduct of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as by affirmative testimony. All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may

be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault.

In cases of accident like the present, the question of due care on the part of the plaintiff presents itself in two aspects; one being whether it was consistent with due care that she was in the place of danger; the other, whether, being in such a place, she used such reasonable precautions as were necessary for her safety or protection against the danger.

When one voluntarily puts himself in a place of exposure to injury, without some reason of necessity or propriety to justify him in so doing, and injury happens to him in consequence of his being in that place, he is not allowed to recover for such injury, although he may be able to show negligence in the conduct of the other party. The decisions in *Todd v. Old Colony & Fall River Railroad Co.* 7 Allen, 207, and *Hickey v. Boston & Lowell Railroad Co.* 14 Allen, 429, were made entirely upon this ground. The case of *Lucas v. New Bedford & Taunton Railroad Co.* 6 Gray, 64, stands mainly upon the same consideration. It was an element in the decision of the recent case of *Forsyth v. Boston & Albany Railroad Co.* 103 Mass. 510; and also in the case of *Bancroft v. Boston & Worcester Railroad Co.* 97 Mass. 275. In the case last named, the opinion of the court lays especial stress upon what is regarded as a fact in the case, that the plaintiff "attempted to pass across the track unnecessarily," instead of reaching the highway through a passage prepared for that purpose without going upon the track of the railroad.

Such cases stand upon a different footing from those in which the arrangements of the road for the accommodation of persons in taking or leaving the cars, or crossing the track, afford a reasonable justification to the party for being upon the track, and thus exposed to the dangers incident to such a position. Of the latter class are *Warren v. Fitchburg Railroad Co.* 8 Allen, 227, *Caswell v. Boston & Worcester Railroad Co.* 98 Mass. 194 and *Gaynor v. Old Colony & Newport Railway Co.* 100 Mass. 208. Although the burden of proof still remains upon the plaintiff, in these cases, to show the exercise of such a degree of

care as was appropriate to the place and occasion, yet the court will not attempt to decide the question of due care upon the preponderance of the evidence. The surrounding circumstances, and the whole conduct of the plaintiff in reference thereto, will ordinarily afford ground for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential fact. However indicative of carelessness the circumstances may seem to the court, if there be any evidence upon which it is competent for the jury to find that reasonable care was in fact exercised, it is proper to submit it to them. It is only when the whole evidence on which the plaintiff's case rests shows conclusively that he was careless, or when there is no evidence tending to show the contrary, that it is deemed to be the duty of the court to withdraw the case from the jury, or to direct a verdict for the defendant. *Gahagan v. Boston & Lowell Railroad Co.* 1 Allen, 187. In *Butterfield v. Western Railroad Co.* 10 Allen, 532, the omission of the plaintiff to take any observation with his eyes to ascertain whether a train was near, although he knew that he was coming upon the track, was an undisputed fact, for which there was no excuse, and no explanation to make it consistent with reasonable care on his part.

In the case now before us, there is some evidence, in the statements of Mrs. Mayo, tending to show the exercise of due care by her, and we perceive no distinct and unquestioned fact in her conduct, either of acts or omissions, which will enable us to hold her to be precluded from presenting all the circumstances to the consideration of the jury, in order that they may pass upon the question. According to her own testimony, she was crossing the track apparently within the highway, and at the proper place for passengers, alighting from the cars by which she had arrived, to cross to the station-house. We infer from the evidence that the crossing place was placed between the rails, so as to facilitate her movements; and there was no platform to retard them upon reaching the opposite side. There was no curve nor high bank near, to conceal the approaching train; and if the rear of the departing train had gone no more than six, or even four, feet beyond her when she began to cross,

yet, before reaching the further track, her means of observation would, in the natural course of things, be so enlarged as to give opportunity for circumspection in the attempt to cross the narrow space of a single track. We do not perceive, therefore, in the mere fact that she started to cross the railroad track so soon after the train by which she came had left the station, such clear and inexcusable want of care as to justify the court in withdrawing the case from the jury.

The conduct of Mrs. Mayo, as testified to by herself and others, must be weighed by a jury, to determine whether in fact she did use due care, both in attempting to cross at the time she did, and in the manner in which she endeavored to accomplish the crossing. If she went upon the track, where another train was to be expected at any time, when she was unable to see whether it was approaching or not, or without looking to see if the way was clear of danger, she did not use that reasonable precaution which every one is bound to exercise for his own protection in such places. We are unable to see how the accident could have happened without some want of proper care on her part. The inference from the result is very strong. But its force is applicable only in disproof of whatever testimony there may be tending to show the exercise of care. It presents only a question of preponderance; and however decided that preponderance, it does not transfer the determination of the issue from the jury to the court.

If Mrs. Mayo was passing towards the station obliquely down the track, as one witness testified; or if she persisted in crossing in spite of warnings from the station-master, as testified by him and another witness, such fact would tend to show fault on her part sufficient to prevent her from recovering. But these are not conceded to be facts; and the truth as well as the effect of such evidence must be passed upon by the jury. The cases will accordingly
Stand for trial.

**PEMBERTON COMPANY vs. NEW YORK CENTRAL RAILROAD
COMPANY.**

An agent in St. Louis for several railroad corporations whose roads together formed a line from that city to Boston was instructed by one of them (whose road lay in New York) not to receive any cotton in its behalf for transportation without writing into the bill of lading an exemption of the carriers from the risk of fire. A factor in St. Louis of a mill corporation in Massachusetts, who was aware of these instructions, and had frequently argued to the railroad agent that the carriers would be liable for a loss by fire notwithstanding such a writing; and who had repeatedly delivered to said agent parcels of cotton for transportation over the line to his principals in Boston, and in each instance, after the delivery, had received from him and forwarded to them a bill of lading of the parcel as the only bill of lading thereof, knowing that the clause "Owner's risk of fire" was written into it, and which stipulated for the exemption of the line from that risk as a part of the consideration of the contract; delivered another parcel of cotton to the agent in St. Louis on June 30, for transportation to Boston, and afterwards, and while the cotton was still in St. Louis, received from him a like bill of lading, dated July 1, as the only bill of lading of it, and, knowing its contents, forwarded it to his principals. Before this transaction, their treasurer, in conversation with the railroad agent, had said that he did not like the exemption clause above quoted, and the agent had replied that it made no difference, and that the carriers were liable notwithstanding what they wrote in that way; but this conversation was not intended or understood by either party, at the time, as varying the legal effect of any previous or subsequent contracts for transportation. On the line between St. Louis and Boston the cotton was destroyed by fire, upon the railroad in New York, without negligence of that railroad corporation. *Held*, that the railroad corporation was not liable for the loss.

It is mere fact that a railroad corporation, transporting bales of cotton as a common carrier, packed them into a car so tightly that on their taking fire, the car could not be unloaded, is not conclusive of negligence in the packing.

CONTRACT, with counts in tort, against the defendants as common carriers, to recover the value of some bales of cotton which they had received and agreed to transport for hire over their railroad in the state of New York. No question was made as to the form of the declaration. The answer admitted the receipt of the goods, but denied the defendants' liability; and alleged that the goods were lost and destroyed by fire, and not through any negligence of the defendants, and that they received and undertook to transport the goods solely under a written contract, which they alleged to have been signed by the agent of the plaintiffs in their behalf. Trial, without a jury, before *Gray, J.*, who reported the following case to the full court:

"The defendants were common carriers, whose railroad extended from Buffalo to Albany in the state of New York. The

cotton, being the property of the plaintiffs, was delivered on June 30, 1865, at St. Louis, by Frank G. Pratt, the plaintiffs' factor and authorized agent, to Jacob Merritt, to be transported over the line of the defendants' and other railroads, of which Merritt was the recognized transportation agent; and was forwarded by Merritt, consigned to the plaintiffs' treasurer at Boston. The rate of freight was orally agreed upon by Pratt and Merritt, before the latter received the cotton; and after Merritt had received the cotton, and while it was in his possession at his press in St. Louis for the purpose of being compressed, a paper was signed by him, and delivered by him, or by some clerk authorized by him, to Pratt, who knew its contents and afterwards forwarded it to the plaintiffs at Boston."

This paper, dated July 1, 1865, under the caption "Merritt's Express Freight Line," was entitled "Freight Contract, St. Louis to Boston, *via* New York Central, Pennsylvania Central or Baltimore & Ohio Railroads;" "Route, rail;" and acknowledged the receipt from Pratt of "a hundred and forty-four bales of cotton: Owner's risk of fire: Contract time from St. Louis to Boston, fourteen days:" "at the rate of \$9.60 per bale, or to pay a forfeiture of 5c. per 100 lbs. per day for each and every day said cotton is over said time in transit:" "This contract and the responsibility of the parties hereto being limited and controlled by the rules and regulations printed on the back of this receipt," one of which was as follows: "It is agreed, and is a part of the consideration of this contract, that the line will not be responsible for loss or damage to goods occasioned by fire, from any cause whatever, while in transit or at stations."

"Pratt had previously delivered to Merritt large amounts of cotton for transportation by the same line to the plaintiffs at Boston; and after the delivery of each parcel to Merritt, and before it was taken to the railroad station, had received a similar bill of lading, with knowledge that it contained the words 'Owner's risk of fire,' which was by him sent to and received by the plaintiffs. Merritt's instructions from the defendants were, to receive no cotton in their behalf for transportation,

without writing in the contract or bill of lading the exception of the risk of fire; and he had frequently informed Pratt that he had no authority to receive cotton without such an exception. It had often been a subject of discussion and controversy, between Merritt and Pratt, whether the railroad corporations would be liable for a loss by fire, notwithstanding the terms of the bills of lading, Pratt insisting that they were so liable, and that the words in question had no legal effect. Each bill of lading was delivered by Merritt, and received by Pratt, as the only bill of lading of the goods described therein. Neither Pratt nor the plaintiffs ever assented to such an exception, otherwise than may be properly inferred from the facts above stated.

"The plaintiffs' treasurer, whose place of business was in Boston, testified that before July 1, 1865, perhaps within a week or a month of it, but he should think six months before, he met Merritt in the street in Boston, talking with another person whom he was trying to induce to let him ship freight for him; that the witness stopped a moment, and said, 'I do not like that clause—Owner's risk of fire;' and Merritt said, that would make no difference—that the railroad companies were liable notwithstanding what they wrote in that way. From this testimony, and the manner in which it was stated by the witness, I was of opinion, and find as matter of fact, that this conversation was not intended or understood by either party at the time as varying the legal effect of any contracts previously or subsequently made between Pratt and Merritt. This testimony was introduced against the objection of the defendants; and the question of its competency, if material, is reserved.

"On July 12, 1865, while the cotton was on its way to Boston, over the defendants' railroad, in a wooden car covered with canvas and painted, such as cotton and other merchandise were usually carried in, and forming one of a freight train of some twenty cars, the cotton was found to be on fire; the train was immediately stopped; the doors of the car, which were sliding doors closed and locked, were opened, but the bales of cotton were so closely packed and wedged in that they could not be removed, notwithstanding every effort was made to do so; the

train was drawn at once to the next station, a quarter of a mile off, where there was abundance of water; a hole was cut in the top of the car, and every possible effort made to extinguish the fire by pouring on water, and by other means, without success; and the car was then detached from the train, and part of the cotton saved. It was admitted that there was no negligence after the fire was discovered. But it was contended for the plaintiffs, that the negligence of the defendants in packing the cotton in the car caused the loss. I find, as a fact, that there was no such negligence. The questions, whether this finding is warranted by law, and whether upon the whole case the defendants are liable, are reserved for the determination of the full court." If, in their opinion, the plaintiffs were entitled to recover, judgment was to be rendered for them for a certain sum, otherwise judgment for the defendants.

J. D. Ball & G. C. Tobey, for the plaintiffs. 1. The defendants, being common carriers, were bound to receive all merchandise offered to them for transportation, and could not limit their common law liability for it without the assent of the party delivering it to be transported. And if they had no right themselves to refuse to transport merchandise unless with a limitation of their liability, they could not do so through an agent. Their instructions to Merritt to receive no cotton in their behalf for transportation, without writing the exception of the risk of fire in the contract or bill of lading, were therefore against public policy and of no force. Had the instructions been to insert the exception whenever agreed to by the shipper, they might have been valid. If the defendants could limit Merritt's power in this respect, they might limit the power of all their officers and agents, and, being a corporation acting by officers and agents only, might effectually nullify all their common law liability. Therefore, when they created him their agent, they invested him, notwithstanding their instructions, with authority to receive freight under a limited liability when the shippers assented to the limitation, but subject to all the common law liability when the shippers did not assent to the limitation. It follows, that the fact of Merritt's informing Pratt of his instructions is of no avail

to the defendants. Merritt, on the facts, stands as their general agent.

2. The rate of freight was agreed upon before the cotton was received; and the cotton was delivered to Merritt on June 30, to be transported over a line consisting, in part, of the defendants' railroad. The contract was thus complete, and the full common law liability of common carriers attached to the defendants, on June 30. When there is an attempt to limit the liability in the original contract, the assent to the limitation must be given at the time the merchandise is received or the contract entered upon; and the burden to show such an assent is on the defendants. *Brown v. Eastern Railroad Co.* 11 Cush. 97-100. *Malone v. Boston & Worcester Railroad Co.* 12 Gray, 388. *Perry v. Thompson*, 98 Mass. 249, 253. Redfield on Carriers, §§ 144-148. But the facts in this case do not even show any such attempt; for it was not till July 1, or after July 1, (and the report does not find how long after,) that the receipt was given, making any allusion to a limitation of liability. The common law liability had already attached, and there is nothing in the facts which shows, at any time after the receipt was given, any assent of the plaintiffs to its modifications of that liability. The case distinctly finds that it had often been a subject of discussion and controversy between Merritt and Pratt, whether the railroad corporations would be liable for a loss by fire, notwithstanding the terms of the bills of lading, Pratt insisting that they were so liable and that the words in question had no legal effect. The fact that bills of lading in similar form had frequently before been given to Pratt has therefore no tendency to show that he assented to the limitation in those cases or in this case; for it thus appears that he had insisted that the railroad corporations were liable notwithstanding such bills of lading. The previous course of dealing, in the light of this "discussion and controversy," shows a distinct refusal to agree to any limitation whatever of liability; and the case, instead of showing any assent, shows only an unsuccessful attempt to limit liability, Pratt insisting upon no limitation. *Judson v. Western Railroad Co.* 6 Allen, 490, 491. *Buckland v. Adams Express Co.* 97 Mass. 124.

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Perry v. Thompson, 98 Mass. 249. Redfield on Carriers, §§ 141-148. *Levering v. Union Transportation & Insurance Co.* 42 Missouri, 88, 93. *Grace v. Adams Express Co.* 100 Mass. 505. *Michigan Central Railroad Co. v. Hale*, 6 Mich. 257, 258. In no instance is it shown that the plaintiffs, except through Pratt, received any of those bills of lading until after the cotton was in transit, and Merritt's statement to the plaintiffs' treasurer shows that Merritt himself considered the attempted limitation of no force, and is also conclusive that Pratt never had assented to the exception in any previous bills of lading. *Simons v. Great Western Railway Co.* 2 C. B. (N. S.) 620.

3. The report finds that the bales of cotton were so closely packed and wedged in that they could not be removed, notwithstanding every effort was made to do so. Such a mode of packing the cotton into the car was in and of itself negligence, and the judge should have so found. *Sager v. Portsmouth, Saco & Portland Railroad Co.* 31 Maine, 228. *Squire v. New York Central Railroad Co.* 98 Mass. 239, 246. *Levering v. Union Transportation & Insurance Co.* 42 Missouri, 88, 96.

E. Merwin, for the defendants. 1. It is settled law that common carriers may by special contract, or by notice with the express or implied assent of the party for whom they are transporting goods, exempt themselves from liability for loss by fire or other casualty not resulting from their own negligence. *Grace v. Adams*, 100 Mass. 505. *Squire v. New York Central Railroad Co.* 98 Mass. 239. *Perry v. Thompson*, *ib.* 249. *Judson v. Western Railroad Co.* 6 Allen, 486. *Smith v. New York Central Railroad Co.* 24 N. Y. 222. *Bissell v. New York Central Railroad Co.* 25 N. Y. 442. *York Co. v. Central Railroad Co.* 3 Wallace, 113. The bill of lading given by the agent of the defendants and accepted by the plaintiffs' agent constituted such a contract. *Grace v. Adams*, 100 Mass. 505. *Gage v. Tirrell*, 9 Allen, 299, 307, 308. *York Co. v. Central Railroad Co.* 3 Wallace, 113. *Ohloff v. Briscall*, Law Rep. 1 P. C. 231. The defendants had a right to insist upon the exemption from liability for loss by fire, and to instruct Merritt to receive no cotton in their behalf for transportation without such an exemption; because, first, they

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were under no legal obligation whatever to make any contract with the plaintiffs at St. Louis in reference to the transportation of the cotton; Redfield on Carriers, § 140; *Judson v. Western Railroad Co.* 6 Allen, 490, 491; and secondly, because the plaintiffs accepted the consideration for this exemption, in the benefit of a reduced rate of freight, and other advantages secured to them in the bill of lading.

2. The discussions which had taken place upon some previous bailments, as to the legal effect of the fire clause, are not competent to impair the binding force of this bill of lading as the contract of the parties. On the contrary, if admissible, they furnish an additional reason why it should be held conclusive. The defendants insisted upon the clause for the very reason, as they contended, that its legal effect was to exempt them from loss by fire; and the plaintiffs accepted the contract thus written, "as the only bill of lading," not only with full knowledge of its terms, but thus also of what the defendants claimed to be its meaning and effect, and were content to run their own risk as to that question. No question or objection whatever was made in behalf of the plaintiffs when this bill of lading was delivered and accepted; and this acquiescence, especially in view of the former course of dealing, is, of itself, conclusive upon the plaintiffs. The conversation of their treasurer with Merritt is incompetent; and has no bearing except to show that the plaintiffs well understood that the fire clause had been and would continue to be inserted in all bills of lading given in behalf of the defendants at St. Louis, and that the defendants would not receive cotton at the former rates of freight except with that exemption — with which knowledge the plaintiffs received without objection the bill of lading now in issue.

3. The question of negligence was one of fact, and the finding of the judge thereon is conclusive.

MORRIS, J. The principles of law upon which the rights of the parties in this case depend have been fully discussed in several recent cases in this Commonwealth. *Grace v. Adams*, 100 Mass. 505. *Squire v. New York Central Railroad Co.* 98 Mass. 239. *Perry v. Thompson*, Ib. 249. *Judson v. Western Railroad*

Ca. 6 Allen, 486. These cases conclusively settle that a common carrier may by a special contract, limit his common law liability, so as not to be responsible for a loss or damage by fire occurring without negligence on his part.

We are of opinion that the case at bar falls within this principle. It appears from the report, that the defendants received the cotton which is the subject of this suit, for transportation under a written contract or bill of lading, which contained an exemption from all risk of loss or damage by fire. And it is clear that the plaintiffs accepted this bill of lading as the contract under which their goods were to be carried. They had no other voucher or evidence of the contract. They had often before forwarded cotton over this line, under contracts with Merritt, as agent of the defendants, all of which contained the same exemption. Their agent, Pratt, knew that Merritt had no authority to receive, or contract for the transportation of, cotton on behalf of the defendants, except upon a contract containing this exception of the risk of fire; and at the time this cotton was delivered to be forwarded, and as a part of the transaction, he received the bill of lading in question, knowing its contents and making no objections to its terms, and forwarded it to the plaintiffs in Boston as the only bill of lading or contract of carriage of these goods. The bill of lading thus delivered and accepted constituted the only contract of carriage, and both parties are bound by its provisions.

The fact that Pratt and the plaintiffs' treasurer had previously expressed their belief that, notwithstanding the terms of the bills of lading, the defendants would be liable in case of loss by fire, is immaterial. It is clear that this was merely an expression of opinion as to the legal effect of the contract, and was not intended or understood as varying its terms.

The plaintiffs urge that the defendants as common carriers were required by law to transport all goods offered them; and that the plaintiffs had a right to insist that their cotton should be carried by the defendants under their common law liability as insurers. But the plaintiffs did not choose to insist upon their rights at common law; and, instead of doing so, volunta-

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rily and intelligently entered into a special contract with the defendants. They received the benefits of this contract in the reduced freight and other advantages secured to them therein, and must be held to be bound by the condition which threw the risk of fire upon them.

The question, whether the loss was caused by any negligence of the defendants, is a question of fact, and the finding thereon of the judge who heard the case is conclusive. As, therefore, the loss in this case was caused by fire, without negligence on the part of the defendants, it follows that the plaintiffs are not entitled to recover.

Judgment for the defendants.

EDWARD WHITNEY & others vs. MERCHANTS' UNION EXPRESS COMPANY.

A express company, having received from the drawer, for collection, with instructions to return it at once if not paid, a draft for a sum overdue from the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay more than the principal sum. Thereupon the company, without collecting anything on the draft, agreed with him that they would hold it till he could inquire of the drawer as to the additional amount; and he wrote, the same day, making such inquiry, and adding, "The parties will hold the draft until I hear from you." Upon receiving a reply, in due course of mail, from the drawer, that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft, which the express company continued to hold but neglected again to present. The third day was Sunday; and on the fourth day he became insolvent. *Held*, that the express company were liable for the drawer's loss on the draft by the drawee's insolvency.

CONTRACT, with an alternative count in tort, for negligence of the defendants in the matter of a draft for \$2401.20, drawn on October 13, 1868, at Boston, by the plaintiffs, (who were merchants in that city, under the name of Sprague, Soule & Company,) upon the firm of Plummer & Company at Providence in Rhode Island. Writ dated November 7, 1868. Trial in the superior court, before *Putnam, J.*, who reported the following case to this court:

"The defendants were common carriers between Boston and Providence, and it was a part of their business to take drafts

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like this for collection. The plaintiffs made the draft on the day of its date, and delivered it to the defendants at their office in Boston, with instructions to collect the same. One of the defendants' clerks asked if it was to be protested in case of non-payment. The plaintiffs' clerk replied that they were not to protest it, but to return it at once if not paid. The defendants gave a receipt stating that they received the draft for collection.

"The deposition of James M. Plummer was introduced, to the effect that he was a partner in the firm of Plummer & Company, doing business as flour dealers in Providence in October 1868; that on October 10, 1868, a bill for \$2400 for flour became due from them to the plaintiffs; that on October 14 the draft in question was presented by a messenger of the defendants; that he told the messenger that he would not pay the draft for that amount, but would pay the \$2400, the amount of the bill; that he did not understand what the \$1.20 additional was for, and that he would write to the plaintiffs that day and ascertain, and the messenger said he would hold the draft for the witness to write what the \$1.20 was for; that their clerk wrote in the afternoon of that day, at the usual time for writing letters, a letter in the name of Plummer & Company, stating to the plaintiffs, 'Your draft for \$2401.20 came to hand this morning, but we did not pay it because we did not understand what the \$1.20 was for. The parties will hold it until we hear from you;' that he received an answer on the morning of October 16, in which the plaintiffs stated that 'the \$1.20 was for three days' interest;' that as soon as he received it he was ready and able to pay the draft for the full amount of \$2401.20, and should have paid it if it had been presented; that no demand of payment was made during the 16th or 17th of October, but that they continued ready and able to pay the draft during all the 16th, and during the next day, which was Saturday; and that on Monday the firm became insolvent, and had not since been able to pay over fifty per cent. on the dollar of their debts, but had settled with most of their creditors at that rate.

"A clerk of the plaintiffs testified that he called at the defendants' office on October 19, to inquire why the draft had not

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been collected, and the defendants' clerk told him they would inquire about it; that, receiving no information, he called again on Tuesday, and was told that a communication had been sent that morning to the plaintiffs; and that, receiving nothing, he called again on Wednesday, and was told that Plummer & Company did not understand the item of \$1.20.

"One of the plaintiffs testified that he replied to the letter of inquiry, written by Plummer & Company, as soon as it was received, explaining the \$1.20; and that they had been able to collect only \$1200 on the debt.

"It was admitted that it is usual to draw drafts similar to this, in like circumstances, for a debt due from the drawer to the drawee. The defendants offered no evidence; and the case was taken from the jury, and reported, under an agreement of the parties that if, upon this evidence, the jury would be warranted in finding a verdict for the plaintiffs, a judgment should be entered for the plaintiffs for \$1233.21, and interest thereon since December 30, 1868."

G. O. Shattuck, for the plaintiffs.

J. G. Abbott & O. Stevens, for the defendants.

COLT, J. Under the instructions given to the defendants, at the time they received this draft for collection, it was their duty to collect it, or to return it at once to the plaintiff if not paid. It was duly presented by the defendants' messenger for payment on the fourteenth of October, and payment refused. Instead of returning the draft at once, they retained possession of it, in order to enable the drawees to obtain, by correspondence, some explanation from the plaintiffs as to the amount for which it was drawn. Satisfactory explanations were received in due course of mail, and Plummer & Company, the drawees, were ready on the morning of the sixteenth of the same month, to pay the full amount. But the draft was not again presented and on the nineteenth they failed and have since been unable to pay.

It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds or violates or neglects

them, he is responsible for all losses which are the natural consequence of his act. And we are of opinion that there is evidence of neglect in this case, upon which the jury would have been warranted in finding a verdict for the plaintiffs.

The defendants would clearly have avoided all liability, by returning the draft at once, upon the refusal to pay. It is urged, that the defendants had done all they were bound to do, when they had presented the draft and caused the plaintiff to be notified of its nonpayment; that the notice which was immediately communicated by the letter of Plummer & Company, asking explanation, was equivalent to a return of the draft; that this notice was given by the procurement or assent of the defendants, as early as they would be required to give it, if they had themselves done it instead of intrusting it to Plummer & Company; and that, after the receipt of it, it was the duty of the plaintiffs to give new instructions, if they desired the draft presented for payment a second time.

There would be force in these considerations, if the letter of Plummer & Company was only a simple notice of nonpayment, with no suggestion of further action in regard to it. It expresses and implies much more. The reason for the refusal to pay is stated, and the plaintiffs are told that the defendants will hold the draft until they, Plummer & Company, hear from them. Plainly, if the defendants avail themselves of the letter as a performance of their obligation to give notice, they must abide by the whole of its contents. They make Plummer & Company their agents in writing it, and authorize the plaintiffs to rely on the assurance which substantially it contains, that upon the receipt by Plummer & Company of their explanation the draft would be paid, or returned or notice of its nonpayment given. There is no suggestion in it, that the defendants were awaiting further instructions from the plaintiffs, or needed or expected them. It clearly implies that the defendants had only suspended, at the suggestion of Plummer & Company, and for their accommodation, the further performance of the duty they had undertaken, until an answer and explanation could be returned to Plummer & Company. The plaintiffs had no new

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instructions to give, nor had the defendants any right to expect them. They trusted to others, instead of corresponding themselves with the plaintiffs, who in this matter are in no respect chargeable with neglect. The loss is wholly due to the neglect of the defendants, and must be borne by them. According to the agreement of the parties, the entry must be

Judgment for the plaintiffs.

CHARLES RICHARDSON & others vs. ISAAC RICH & others.

If common carriers by water, whose duty of transportation is fulfilled upon landing goods on a wharf in a city, cause them to be carried from the wharf to the place of business of the consignee in the city, they have no lien on them for such additional transportation, (whether or not it is performed by their own servants,) in the absence of any authority for it from either consignor or consignee; and the facts that they received the goods from the consignor marked with the place of business of the consignee, and gave no bill of lading or written receipt for them, do not import such an authority.

TORT for the conversion of six kegs of lead. Trial in the superior court, without a jury, before *Lord, J.*, who found these facts :

"In May 1867, the plaintiffs were merchants, having a place of business at No. 61 Broad Street, Boston; and the defendants were proprietors of a line of steamboats running from ports in Maine to Boston. The defendants owned no teams, but were in the habit of sending perishable articles and small packages, brought on their boats to Boston, to the place of business or residence of the consignee, when they had not previously received directions to the contrary, by a certain teamster, allowing him to add the amount of his charge for cartage to the freight bill and collect the entire sum from the consignee. This custom was not known to the plaintiffs, who owned teams for the carting of their goods. Before the transaction hereinafter stated, the parties had no dealings with each other. At the time above stated, the defendants received on one of their boats, at a port in Maine, for transmission to the plaintiffs, six kegs of lead, marked 'Charles Richardson & Co. 61 Broad St., Boston.

No bill of lading or receipt was given. The lead was brought to a wharf in Boston, and there landed. Shortly after its arrival, the defendants' agent sent it, by the teamster above referred to, to the plaintiffs' place of business, giving the teamster for collection a bill against the plaintiffs for freight to Boston, one dollar, upon which the teamster wrote the additional charge for cartage, twenty-five cents. He carried the lead to the plaintiffs' place of business, and presented the bill for payment. The plaintiffs offered to pay the freight, but refused to pay the charge for cartage. The teamster accordingly declined to leave the lead, and carried it back to the defendants' agent, who placed it in their storehouse. The latter took back the bill from the teamster, erased the word 'cartage' on it, and inserted the word 'expense,' leaving the amount of the charge, twenty-five cents, as before. The plaintiffs, having been notified by their consignor, knew of the arrival of the goods, and, about two hours after the arrival of the steamer, sent their team to the wharf; but the goods had been sent out, as above stated, the teams passing each other. Subsequently, on the same day, one of the plaintiffs came with a team to the wharf, and demanded the lead, tendering payment of the one dollar for freight, but the defendants refused to deliver it unless both items on the bill were paid. The defendants admitted that they had not paid, and were not bound to pay, the teamster for the carting."

Upon these facts, the defendants requested the judge to rule that they had a lien upon the lead until the charges, both for freight and cartage, were paid; but the judge ruled otherwise, and gave judgment for the plaintiffs. The defendants alleged exceptions.

R. M. Morse, Jr., & C. P. Greenough, for the defendants.

J. O. Teele, for the plaintiffs.

AMES, J. The defendants, as common carriers by water, would presumptively be under no obligation to do anything more than to convey the goods to the wharf in Boston, and there to land them. In general, it would not be a part of their contract to carry them from the wharf to the consignees' usual place of business; and the fact that they were employed as

common carriers would not of itself indicate that they were expected or employed to do anything more than to land the goods safely, and at their usual landing place in Boston. The marks on the kegs, giving the street and number of the plaintiffs' place of business, would apprise the defendants whom they were to notify, but would not modify or enlarge their contract. When the goods were properly and safely landed, therefore, the defendants had done all that they were bound as common carriers, or had been employed, to do. If they undertook afterwards to do anything more, it was entirely outside of anything expressed or implied in their contract. It is true that the report finds that it was their habit to send goods from their landing place to the warehouses of their respective consignees, but nothing appears to show that it was an established and well known usage of the business, and it is expressly alleged that the plaintiffs had no knowledge of any such practice.

The question then is, simply, whether the carrier, by his own act, and without any authority, express or implied, from consignor or consignee, can impose upon the latter the further and additional obligation of paying the carrier himself, or some new intermediate carrier selected by him, for the transportation of the goods from the wharf to the consignees' place of business. Probably in the great majority of instances such an arrangement might be convenient to all parties concerned, and in such cases no question would be raised. But it is not difficult to suppose cases in which it might happen that the consignee would greatly prefer to have the goods conveyed, not to his usual place of business, but to some entirely different place, where he might be bound by contract, or for any other reason might prefer, to have them sent. Or he may be provided with wagons, horses and men of his own; and for that reason may prefer to convey the goods himself, by his own servants or agents. At all events, he has the right to judge for himself in what manner and to what place he will remove the goods, after the carrier has brought them to the end of the line over which he undertook to transport them.

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The defendants, then, appear to be in the position of carriers, who, having no legal claim on the goods for anything besides the freight, (that is to say, the freight from the port in Maine to Boston,) refuse to deliver them unless a further sum, which they have no right to charge, be first paid. Such a refusal is evidence of a conversion. *Adams v. Clark*, 9 Cush. 215.

Exceptions overruled.

WILLIAM EDWARDS & another vs. WHITE LINE TRANSIT COMPANY.

It is no defence to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner.

CONTRACT against common carriers for breach of their agreement to carry safely from Cincinnati to Providence, and deliver to the plaintiffs, a car load of middlings. Another count on a contract to carry corn is now immaterial.

At the trial in the superior court, before *Morton*, J., without a jury, it appeared that the plaintiffs, doing business in Providence, bought the middlings in question from the firm of David Schwartz & Company in Cincinnati; and that David Schwartz & Company delivered them to the defendants, received from the defendants a receipt, and sent it to the plaintiffs with a sight draft for the price of the middlings, which the plaintiffs accepted. On these facts the judge ruled that the property in the middlings was vested in the plaintiffs.

It also appeared that David Schwartz & Company bought the middlings from persons in Cincinnati, under an agreement to pay for them in cash on delivery to the defendants, but had not done so; that when the middlings, in the hands of the defendants, reached Buffalo in New York, they were attached as the property of David Schwartz & Company, by the sheriff of Erie County, upon writs issued in favor of these persons, in suits brought by them against David Schwartz & Company

for the price thereof; and that these suits were prosecuted to judgment, and the middlings sold upon executions issuing thereon.

“The defendants contended that the sale to David Schwartz & Company was a conditional one, viz: upon the payment of the cash for the same, and that, they having failed to pay in cash, no title vested in them which they could transfer to the plaintiffs. But the judge ruled that as the parties who sold the middlings to David Schwartz & Company, and who alone could take advantage of said condition, (if there was one,) had commenced their suits, and had prosecuted the same to final judgment, for the price of the property thus sold, they had waived any right which they might have had to take advantage of the same. But he also ruled that, as under the attachments the goods were taken out of the possession of the defendants, and as he found that there was no collusion or negligence or fraud on their part, the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Company, they were in the custody of the law for adjudication; that the defendants could not obtain possession of them so as to fulfil their contract, except by a forcible violation of the law; and that for these reasons the plaintiffs could not recover for the middlings;” and he found for the defendants. The plaintiffs alleged exceptions.

L. Child & L. M. Child, for the plaintiffs.

G. S. Hale, for the defendants, cited *Stiles v. Davis*, 1 Black, 101; *Verrall v. Robinson*, 4 Dowl. Pr. Cas. 242; *S. C.* 5 Tyrwh. 1069; 2 Cr., M. & R. 495; *Bliven v. Hudson River Railroad Co.* 35 Barb. 188; *S. C.* 36 N. Y. 403; *Hagan v. Lucas*, 10 Pet. 400; *Fletcher v. Fletcher*, 7 N. H. 452; *New Hampshire Iron Factory Co. v. Platt*, 5 N. H. 193; *Burton v. Wilkinson*, 19 Verm. 186; *Touteng v. Hubbard*, 3 B. & P. 291.

WELLS, J. The only exception relied on here is that which relates to the car load of "middlings" taken from the carriers by attachment, and sold on execution, in a suit brought in New York against the plaintiffs' consignors, David Schwartz & Company, by parties from whom they had previously obtained the property.

The court held, and we think correctly, that there was a sufficient transfer and delivery from David Schwartz & Company. to vest the title in the plaintiffs; that the suit against David Schwartz & Company, the judgment therein, and levy upon the property, were sufficient to show a waiver of the condition of the sale by which David Schwartz & Company obtained possession of it from the former owners. Aside from that consideration, any defect in the title of the bailor could not be set up against him or against his consignee, by the bailee, unless the superior title had been asserted against the bailee. In this case the property was not taken from the carrier by virtue, or upon the assertion of any superior title in the former owners. It was taken as the property of David Schwartz & Company, by means of legal process against them. For all purposes of this decision, therefore, we may lay out of view the claim that Schwartz & Company had not acquired title and right to transfer the property, and regard the plaintiffs as having become the absolute owners of it before the attachment.

The judge who tried the case decided, that, "as under the attachments the goods were taken out of the possession of the defendants" without collusion, negligence or fraud on their part, "the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Company, they were in the custody of the law for adjudication;" and that the defendants could not be held liable for not transporting and delivering goods so taken from them. This ruling is in accordance with what might seem, at first sight, to be the decision of

the supreme court of the United States in *Stiles v. Davis*, 1 Black, 101. The defendants' counsel insists that to hold otherwise would be in direct conflict with that decision.

We do not so regard the matter. In *Stiles v. Davis*, the action was not brought upon the contract of carriage; nor for a violation, by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination, upon a demand made there; with no denial of the plaintiffs' right, but merely for the reason that they were detained under attachment by legal process; would not be a conversion of the property. The case decides nothing more. The question, whether the same facts would constitute a good defence to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided, and was not raised by the form of the action. The opinion, by Mr. Justice Nelson, does indeed assign, as a reason for the decision, that the goods "were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it;" that "the right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs." But this language must be interpreted with reference to the precise question then under consideration. In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property, not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings *in rem* is in the custody of the law, or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment of property of another than a defendant in the suit is a trespass; and, as to the true owner, the property is not regarded as in the custody of the law. It may be re

claimed by replevin; except where the replevin would bring state and federal authorities into conflict, as in *Howe v. Freeman*, 14 Gray, 566; S. C. 24 How. 450. The officer may always be held liable as a trespasser for its full value, notwithstanding the pendency, and without reference to the suit in which the attachment was made. This liability is expressly recognized in the closing paragraph of the opinion of Mr. Justice Nelson. See also *Buck v. Colbath*, 3 Wallace, 334. It does not appear, from the report, how far, if at all, the decision in *Stiles v. Davis* was affected by the fact that the carrier was made a party to the proceedings, as garnishee.

The present suit is brought against the defendants upon their contract as carriers. Assuming that the title to the property had vested in the plaintiffs, according to the finding of the facts at the trial, the attachment by the officer, in a suit against David Schwartz & Company, was a mere trespass. As against the plaintiffs, it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfilment of his contract, or his liability as carrier, by the intervention of such an act of dispossession, any more than he is by destruction from fire, or loss by theft, robbery or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract, or upon his obligations as common carrier. The owner may, it is true, maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him.

It will not be understood, of course, that these considerations apply to the case of such an attachment in a suit against the owner of the property. If the present plaintiffs had been defendants in the suit in which the attachment was made, the case would have stood differently. In that state of facts, the property would have been strictly in the custody of the law, so far as these parties were concerned, and the intervention of those

Adams v. Scott.

legal proceedings would have deprived the plaintiffs of the right to require the delivery of the property to themselves until released from that custody.

But it is not so upon the state of facts shown by this report; and the ruling of the court against the plaintiffs upon this branch of the case was wrong. They are therefore entitled to a new trial upon the counts of their declaration relating to the car load of "middlings;" and for that purpose the

Exceptions are sustained.

REUBEN A. ADAMS vs. MOSES B. SCOTT & trustees.

In an action against a resident of another state who appears and answers, common carriers, having in their possession, in this state, in course of transportation to the defendant at his place of residence, a sealed package of money belonging to him, may be summoned and charged as his trustees.

CONTRACT on a promissory note. The principal defendant, whose residence was at Norwich in Connecticut, appeared, answered, and filed a declaration in set-off. The parties summoned as trustees were an express company. In the superior court, "upon motion to charge them as trustees, it appeared that they as common carriers had taken a package securely sealed up, containing money, and directed to a person of the same name as the defendant at Norwich, Connecticut. The plaintiff filed allegations that the person to whom the package was addressed was in fact the principal defendant, and that the package was his property when intrusted to the carriers and also when process was served. Issue being joined, the facts were found as alleged by the plaintiff. While the package was thus in transit and in the custody of the trustees in Boston, this process was served upon them." Lord, J., ordered the trustees to be charged, and they alleged exceptions.

J. Nickerson, for the plaintiff.

A. Russ, for the trustees.

MORTON, J. The answers of the trustees disclose that they have in their possession a package supposed to contain money, sealed up and directed to a person of the same name as the defendant at Norwich, Connecticut. Upon the trial of an issue upon additional allegations filed by the plaintiff, it was proved that the person to whom the package was addressed was in fact the defendant; that the package contained money; and that it was the property of the defendant when it was intrusted to the trustees and when the process was served upon them. The case thus differs from *Bottom v. Clarke*, 7 Cush. 487, in which the trustees were discharged because it did not appear that the locked trunk in their hands contained any goods, effects or credits of the principal defendant which were attachable. In the case at bar, the sealed package is proved to contain money belonging to the defendant, and thus the trustees are brought within the provisions of the Gen. Sta. c. 142, § 21, "having goods, effects or credits of the defendant intrusted or deposited in their hands or possession." They are therefore chargeable as trustees, unless the fact that the money was in their hands as common carriers, *in transitu*, exonerates them.

There is no reason why a common carrier should not be liable to the trustee process, in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a nondelivery of the goods at their place of destination. But we are of opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law, that a carrier is responsible for all losses, except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no loss, but the defendant's property has been sequestered by the law, to be applied to his use and benefit. Every man holds his property subject to be attached, and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express or implied, to deliver it to the owner. The law substitutes the delivery to its officers for a performance of his contract.

It is not a sound argument, therefore, to urge that these trustees should be discharged because otherwise they cannot perform their contract to deliver at Norwich. The necessary effect of every trustee process is, by diverting the property to the payment of the creditor, to prevent the trustee from strictly performing his contract with the defendant.

In the case at bar, the superior court has jurisdiction over the subject matter and the parties, the defendant having appeared. A judgment against him and against the trustees will be valid and binding, and by the provisions of our statutes will acquit and discharge the trustees from all demands by the defendant for all goods, effects or credits paid or delivered by them by force of such judgment. Gen. Sts. c. 142, § 37. We may reasonably presume that the same effect would be given to it in every other jurisdiction. *Whipple v. Robbins*, 97 Mass. 107.

This case is clearly distinguishable from *Edwards v. White Line Transit Co.* ante, 159. In that case, the property of the plaintiff, while in the hands of a common carrier, *in transitu*, was attached upon a writ against a third person. The attachment was clearly illegal, and the plaintiff thereby lost his property. The officer, though acting under color of legal process, was a mere trespasser; and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the goods out of their custody.

The case of *Clark v. Brewer*, 6 Gray, 320, cited by the trustees, is clearly distinguishable from the case at bar. In *Clark v. Brewer* the alleged trustee had no goods or effects of the defendant in his hands. He had contracted to deliver to the defendant in New York goods to a fixed amount at the market price; which goods would become the property of the defendant when delivered, and not before. The plaintiff sought to charge him as trustee by reason of this contract. But the court held that, as the provisions of the statute charging as trustee one who is bound by contract to deliver specific goods to the defendant at a certain time and place were not applicable to contracts for the delivery of goods at any place out of the state, the alleged

trustee could not be charged. There was no provision of the statute by which he was chargeable.

The case at bar is different. The trustees have in their hands goods belonging to the defendant; they are not chargeable by reason of any contract to deliver goods to the defendant, but because they have in their possession his goods and effects and are thus brought directly within the provisions of the twenty-first section of chapter 142 of the General Statutes. The fifty-fourth section of the same chapter does not apply to this case; but it comes within the provision contained in the fifty-second section, that, when a person is charged as trustee by reason of goods of the defendant which he holds, he shall deliver the same to the officer who holds the execution.

For the reasons we have stated, we are of opinion that the trustees must be charged. *Exceptions overruled.*

CHARLES D. FOSTER & others vs. THERON ROCKWELL.

A manufacturer in the interior of Massachusetts gave an order to brokers in Boston: "Send me twenty-five bags saltpetre at your earliest convenience." The order could not be filled in Boston at that time, and the brokers bought the saltpetre in New York, directed it to be delivered there to a common carrier for transportation, consigned to themselves to a town near the factory, and advised their employer of what they had done, by a letter to which he made no reply. They had bought like merchandise for him before, on similar orders, but always in Boston, and had forwarded it to him from Boston. But the merchant from whom they bought this saltpetre had no knowledge of this course of dealing. He delivered it to the carrier, as he was directed; and it was lost in course of transportation. On being advised of the loss, the manufacturer denied the brokers' authority to make the purchase in New York. *Held*, that the merchant might recover from the manufacturer the price of the saltpetre.

CONTRACT for the price of twenty-five bags of nitrate of soda, as goods sold and delivered to the defendant; submitted to the judgment of the court on facts agreed substantially as follows, "the court to draw all such inferences as a jury would be authorized to draw."

The plaintiffs were merchants in Boston; the defendant a manufacturer of gunpowder in Southwick. On October 19,

1868, the defendant wrote to the firm of Cushing, Porter & Cades, merchandise brokers in Boston, the following order: "You will please send me twenty-five bags nitrate of soda at your earliest convenience." This firm had, from time to time, for seven or eight years previously, as brokers, and for a commission, bought for the defendant nitrate of soda and other materials for manufacturing gunpowder; on each occasion the order for the purchase was substantially like the one quoted; and every such purchase was made in Boston, and the goods were forwarded to the defendant from Boston by the Boston & Albany and Canal Railroads. At the time of this order of October 19, 1868, so small a quantity of nitrate of soda as twenty-five bags could not be bought in Boston. On October 20, Porter, one of the firm of brokers, applied to the plaintiffs, to make such a purchase of them, and was informed that they had no nitrate of soda in Boston, but had some in New York. He told them that he would take it in New York, at the price sued for, and directed them to mark the bags T, and ship them from New York by propeller to New Haven, to be forwarded thence to Westfield, and there to be delivered to the order of his firm; and he wrote a letter to the defendant on the same day, which was mailed to the defendant the next day, as follows: "We have yours of the 19th. Nitrate here is very scarce and held at 5c. gold; and we should have to wait its arrival from New York, so we bought for you twenty-five bags at 4½c. gold, bag, &c., 35c. currency in New York, to be shipped *via* New Haven, marked T, and consigned to us, the carting and expense from New York not to be any more than from Boston. The carting here is 12c., and, as you know the freight to Westfield from here, you can easily tell whether it is cheaper or dearer than from New York. If it is any more from New York, you will deduct the difference when you remit." To this letter the defendant made no reply.

The plaintiffs directed their servant in New York to mark and ship the merchandise as directed by Porter, and it was marked "T, Westfield, Mass.," and shipped on board of the propeller Northampton, bound from New York for New Haven

on October 22, and the plaintiffs' servant took from the clerk of the propeller a receipt for it as deliverable to Cushing, Porter & Cades. This receipt he forwarded to the plaintiffs in Boston, who gave it to Cushing, Porter & Cades, but they did not send it to the defendant.

The propeller Northampton, with her cargo, including this merchandise, was sunk, by a collision, in Long Island Sound, on the night of October 22-23, on her passage to New Haven, and the merchandise was lost. On October 26, Cushing, Porter & Cades wrote to the defendant, stating that from the bill of lading in the hands of these plaintiffs they had "reason to think that the nitrate of soda bought of them for you was on board the propeller Northampton, which has sunk in Long Island Sound, and hope you took the precaution to have it insured;" and on October 27 they mailed to him the plaintiffs' bill against him for the price of the merchandise. On October 29 the defendant replied, acknowledging the receipt of their letter of the 26th, quoting its language, and adding: "I am surprised that you should have bought nitrate for me in New York without instructions to do so, and I do not see how you could expect me to insure your property without requesting me to do so." Cushing, Porter & Cades answered on October 31, expressing surprise at the contents of the defendant's letter, and stating: "You have several times told us that you would at any time as lief take nitrate in New York as in Boston, one eighth less in New York, as the expense was about the same, and your instructions to buy did not say buy in Boston, and as we were acting for you we wanted to buy as cheap as possible, and supposed we were doing the right thing for you in saving you one eighth by taking in New York, and expenses to be no more. We gave you immediate notice, and of our action, which you received some days before the nitrate could be shipped, and we had no doubt you would provide for insurance. To accommodate the seller, we had it consigned to us, as it had to be consigned to somebody and we did not wish parties in New York to know to whom it was going." On December 26 they wrote to the defendant again, giving him the address in New Haven

of an agent of the steamship company which owned the propeller, and adding: "We have a letter from this agent, that they are settling the bills against the company by giving their notes at one year from January 1. We have sent him duplicate of your invoice and informed him that the nitrate was yours. If you choose to settle on the terms proposed, you can write to him in regard to it." Neither party to the transaction ever made any claim on the steamship company; and the merchandise was not insured by any one.

It was further agreed, if testimony of the facts would be competent, that, at the time of making the purchase from the plaintiffs, Cushing, Porter & Cades made an entry of the transaction on their own books as a purchase made for the defendant; and that the plaintiffs also charged the merchandise to the defendant on their books.

H. C. Hutchins, for the plaintiffs.

M. B. Whitney, for the defendant.

COLT, J. The only question in this case relates to the authority of the agents to bind their principal in the purchase of the property, the price of which is sued for. If they had authority, then the sale was completed by the delivery of the merchandise in dispute to a common carrier in New York, and the risk of its loss was upon the defendant.

The agents employed were merchandise brokers living in Boston. On the 19th of October they received an order from the defendant for a specified quantity of nitrate of soda, to be sent at the earliest convenience, but without express limitation as to price or place of purchase. These same agents had, for several years, bought for the defendant materials for the manufacture of gunpowder, upon orders substantially like this. But every previous purchase had been completed by the delivery of the goods in Boston, whence they had been transported by railroad directly to the defendant. The state of the market was such that it was found impossible to fill the order in question in Boston, so as to have the goods sent from that city, and accordingly a contract of purchase was made with the plaintiffs in Boston for the delivery of the property to a carrier in New York

It is argued for the plaintiffs, that, in view of the increased facilities of modern times in the transaction of business between Boston and New York, and the fact that many merchants keep stocks of goods and maintain agencies or branch houses in both cities, there would be no abuse or excess of authority, as between principal and agent, in a purchase like this, under a peremptory and unlimited order, which from the state of the market it was otherwise impossible to fill at Boston; and that under such circumstances the previous course of dealing would not operate to place a limit upon the agents' power. It is not necessary to come to such a decision in this case, because the plaintiffs must have the benefit of that more liberal rule which applies to third parties dealing with an agent in good faith, and who may charge the principal for every act done within the scope of the authority with which the agent has been apparently clothed. The merchandise brokers in this case, though not the general agents of the defendant, were, by the order given, made agents for a particular purchase, with a general authority in regard to that transaction, not limited to any particular mode of doing the business. The plaintiffs had no notice of the previous course of dealing between the defendant and his agents, and are not affected by any implied limitation therefrom. Story on Agency, §§ 73, 127, 443. The defendant must be held to be bound by the contract of purchase made with the plaintiffs, on this ground alone.

There is another view of the case which is equally decisive in favor of the plaintiffs. On the 21st of October, a letter was mailed by these agents to the defendant, giving him definite information of the purchase and shipment, with all the particulars of the transaction. No reply was made to this letter; and the first expression of disapprobation on his part is contained in a letter to the agents dated the 29th of October in reply to one of the 26th, containing a suggestion that the property had been lost in Long Island Sound. We think there is sufficient evidence, in this conduct of the defendant, that he intended the original authority to cover the act, or that he then ratified and affirmed it

The duty of the principal at once to disaffirm an act done by another in his name, or on his account, when brought to his knowledge, is more imperative when the unauthorized act is the act of an agent, done in the execution of a power conferred, in a mode not sanctioned by its terms. Implied ratification from mere silence more readily arises when the act is in misuse or excess of authority given. In such cases, the principal has no right to delay, if he intends in any contingency to repudiate the conduct of his agent. He cannot lie by, and seize the benefit of it if profitable, or renounce it if otherwise, at his election. The defendant's silence on the receipt of the letter in this case cannot be accounted for on any other theory than that of his approval of the purchase. It is of no consequence that the letter did not give the information requisite to enable him to obtain insurance, or that it was not probably received until after the loss. The question is not affected by the fact that by the loss the plaintiffs' relation to the goods was changed, and their power to repossess them gone, before the defendant could have had time to disaffirm. If the transaction, when brought to his knowledge, was not seasonably disapproved, it is enough, and a ratification must be presumed, with all the consequences which follow, one of which is that the property vested in him, before its loss, by delivery to the carrier. 2 Kent Com. (6th ed.) 616 Story on Agency, § 258. *Brigham v. Peters*, 1 Gray, 147 *Thayer v. White*, 12 Met. 343.

A majority of the court are of opinion that, upon this statement of facts, with such inferences therefrom as a jury might properly draw, the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

JOEL H. HILLS & another vs. DAVID A. SNELL.

A warehouseman had on storage two lots of flour, one belonging to A., the other and more valuable to B. A baker ordered twenty-eight barrels of flour from C.; and C., to fill the order, bought from A. twenty-eight barrels of his flour, and took from him an order on the warehouseman for them. The warehouseman, by mistake, delivered to C. twenty-eight barrels of B.'s flour; and the baker received this flour from C. and consumed it, not knowing, supposing or believing that it was different from that which he ordered, and gained no benefit from the mistake. *Held*, that the baker was not liable to the warehouseman in contract for the value of it, or any part of its value; nor in tort for its conversion.

CONTRACT on an account annexed, dated December 13, 1867, for the price of twenty-eight barrels of flour at \$7 per barrel, making a total of \$196; with a count for the same cause of action, alleging that the plaintiffs "on December 13, 1867, by accident and mistake delivered to the defendant twenty-eight barrels of flour of a higher grade, quality and cost than that to which he was entitled; that the defendant well knew the kind and quality and cost of the flour he was entitled to and was to receive, and well knew that the flour received by him was of a higher cost and value than and not the flour he was to receive and was entitled to recover; and the plaintiffs thereafter demanded of the defendant the value of said flour or the amount of the difference in price; but the defendant has neglected and refused to deliver the same or pay the difference; wherefore the plaintiffs say they are entitled to recover the amount thereof, to wit, the sum of \$196, with interest."

The defendant answered, denying that the plaintiffs ever sold and delivered to him any flour at any price; and further, "that at or about the time alleged he did buy twenty-eight barrels of flour from certain flour-dealers, of whom he had been in the habit of buying, of a certain brand, and paid for the same the price agreed; that he received that number of barrels branded as the sample by which he purchased, and being in immediate and pressing need of the same in fulfilment of his contracts for bread, and without notice or knowledge of any alleged mistake, his agents and servants made the same into bread; that if the

flour was of a better quality than those of whom he purchased intended to send him, he is not responsible therefor, and has derived no benefit therefrom, and he is in no way or degree answerable to the plaintiffs, with whom he had no privity." The plaintiffs afterwards, on leave, amended their writ and declaration, so as to file a count in tort for the conversion of twenty-eight barrels of flour.

At the trial in the superior court, before *Morton, J.*, these facts appeared: "The plaintiffs were dealers in and warehousemen of flour; and in December 1867 had on storage two lots of flour, one stored by Jacob Greenough, marked D, and another stored by Morse & Company, also marked D. The first was a very low grade of flour, and worth in the market about \$6.25 the barrel, of too low a grade to be stamped by the inspectors; and had no other mark than D on the barrel. The other was a high grade of flour, had the inspector's brand or mark upon it, and was worth from \$13 to \$14 the barrel. One was a dark colored and coarse flour; the other white and fine. On December 11, 1867, the defendant ordered and bought of Kemble & Hastings twenty-eight barrels of flour; and, in order to fill the order, Kemble & Hastings bought of Greenough his flour, and received from him an order on the plaintiffs therefor. The teamster of Kemble & Hastings took the order to the plaintiffs, who by accident and mistake delivered to him twenty-eight barrels of the Morse flour; and the teamster carried the same to the railroad depot, whence it was forwarded to the defendant at New Bedford. The mistake was discovered about a month after the delivery."

"The plaintiffs introduced evidence tending to show that there was on the barrels actually delivered, besides the letter D, the inspector's brand, showing it to be one of the highest grades of flour; that, in appearance, there was a marked difference between the two; that the defendant was a baker, doing a very large business; and other evidence which he contended tended to show that he knew the flour which he received was in fact better than that which he purchased

"The defendant was a witness, and, under objection by the plaintiffs, testified that he did not know, suppose or believe, that the flour received by him was any way different from that which he purchased. The defendant also introduced testimony tending to show that he was accustomed to buy flour of Kemble & Hastings, and bought this flour without seeing it, ordering flour as good as the last he had bought of them; that he used it to fill a contract he had made to supply the school ship with bread, and received no benefit from the mistake of the plaintiffs; and that he did not know that the flour he received was different from the flour he had contracted for.

"The plaintiffs asked the judge to instruct the jury as follows: If the contract between the defendant and Kemble & Hastings was for a different grade of flour than that which was delivered, the defendant, by that contract, acquired no title to the flour which was in fact delivered. And if it was used by him, there being marks upon the barrels indicating that it was a different flour from that which he really bought, or if the general appearance was so different that any man of ordinary experience in the business might have seen that it was a different article than that which he bought, the plaintiffs may recover. The bargaining by the defendant for an article of one grade, and the delivery of an article of another and different grade by accident or mistake, the article delivered not being the property of the defendant's vendor, did not pass any title to the defendant; and, if it was used by the defendant under circumstances which satisfy the jury that the fact of the mistake must reasonably have been known to him, will entitle the plaintiffs to recover of the defendant for the value of the article so delivered. If the defendant has received property which never was that of his vendors, and which they never undertook to sell him, and which he never bought; and if he used it by himself or agent, even under mistake, so that he cannot return it, he, having had the beneficial use of it, is under obligation to recompense the true owner therefor. If the defendant actually received an article which he never intended to buy, nor his vendors to sell, and which they never had any title to, and used it, it is immaterial

whether the article he intended to buy would have been of greater or less value to him than that which he received; and therefore, if the plaintiffs are entitled to recover, they will be entitled to the fair market value of the article sent to and received by the defendant.

"The judge declined so to instruct them; but did instruct them that, if the plaintiffs delivered flour of Morse & Company instead of that of Greenough, by mistake, as claimed, and if the defendant received and used such flour, knowing that he had received flour different from that which he had bought; or if, from the marks on the barrels, the appearance of the flour, or other circumstances, he was led to believe that he had received flour different from that which he had bought, he would be liable to the plaintiffs for its value; but if the defendant was innocent in the transaction, and used the flour, supposing and believing it to be the flour he had bought, and receiving no benefit from the delivery of the wrong flour, he would not be liable." The jury found for the defendant, and the plaintiffs alleged exceptions.

E. Avery, for the plaintiffs.

A. A. Ranney, for the defendant.

WELLS, J. The defendant acquired no title to the flour delivered to him by mistake. He had no contract of purchase with the owner, nor with the plaintiffs, who were bailees of the owner. If he had received it with knowledge of the mistake, or used it after notice thereof, he would have been liable for the conversion. But, under the instructions of the court, the jury must have found that the defendant was not chargeable with notice or knowledge that the flour delivered was not the same he had bought; and that he used it in good faith, deriving no benefit from the plaintiffs' mistake. No demand appears to have been made upon him while the flour was in his possession. So that, if he is to be held responsible at all, it must be on the ground that he used the flour as his own, "supposing and believing it to be the flour he had bought" and paid for.

The declaration contains one count in contract, upon implied assumpsit for the price or value of the flour; and one in tort

for its wrongful conversion. The action is brought by the warehousemen, and is founded on their possession and special rights as bailees. But for all purposes of the defence the case stands precisely as if they were the general owners.

1. The facts will not support an implied assumpsit. There was no sale of the flour by the owner, nor by the plaintiffs. It was not delivered by the plaintiffs as upon any contract of sale with them, either as principal or as agents; but distinctly as a mere delivery to Kemble & Hastings under an order for other flour, of which they were also bailees for another principal. Both the sale and the delivery to the defendant were made by Kemble & Hastings. With them he had an express contract; and that is the only contract he can be held to have made in regard to the flour. There is no privity of contract established between the plaintiffs and the defendant. Without such privity, the possession and use or conversion of the property will not sustain an implied assumpsit. *Ladd v. Rogers*, 11 Allen, 209.

2. The elements of tort are also wanting. The unauthorized appropriation of personal chattels will generally be sufficient of itself to enable the true owner to maintain an action for their conversion. A purchase, in good faith, from one who has no title and no right to transfer the property, will not constitute a defence. Even an auctioneer or broker, who sells property for one who has no title, and pays over to his principal the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Coles v. Clark*, 3 Cush. 399. *Williams v. Merle*, 11 Wend. 80. *Hoffman v. Carow*, 20 Wend. 21; S. C. 22 Wend. 285. *Courtis v. Cane*, 32 Verm. 232. But this severe rule of law will not be applied when the act of appropriation can be justified as having been authorized in any manner by the owner of the property. Thus when, upon a conditional sale, the property is delivered and time given for compliance with the condition, one who purchases and resells the property before the right to perfect the title, by such compliance, has been terminated, is not liable for a conversion to the general owner who subsequently resumes his right to its possession. *Vincent v. Cornell*, 13 Pick. 294.

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When the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it, as is warranted by the authority thus given. *Strickland v. Barrett*, 20 Pick. 415. *Burbank v. Crooker*, 7 Gray, 158.

In this case, the plaintiffs delivered the flour to Kemble & Hastings as the flour purchased by them from Greenough. Against the plaintiffs, therefore, the delivery to Kemble & Hastings and the sale by them to the defendant was an authority to him to treat it as his own. That it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession; or to recover its value from one who had disposed of it with knowledge of the mistake. *Chapman v. Cole*, 12 Gray, 141. But they cannot take advantage of their own mistake to convert into a tort that which has been done in good faith in pursuance of authority given by themselves.

The instructions given to the jury were in accordance with these principles, and were sufficient. It is not necessary to consider in detail those prayed for. They do not reach the point upon which, in our view, the case turns.

Exceptions overruled.

GARDNER P. KINGSLEY & another vs. CHARLOTTE DAVIS.

Judgment recovered against one of two joint debtors by the creditor bars a subsequent action by him against the other.

If A., having made a contract with B. and sued him thereon, recovers judgment against him after ascertaining that he acted as agent only and all the facts, it is a bar to a subsequent action by A. against B.'s principal.

CONTRACT by brokers for commissions; submitted to the judgment of the court on these agreed facts:

"The plaintiffs on November 12, 1868, procured a purchaser for a house belonging to the defendant, who is, and was at that time, a married woman, and held the legal estate in said house

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in her own right. Previously, John J. Davis, her husband, in his own behalf, and also acting for her and in her presence, requested the plaintiffs to find a purchaser for the house; and in the conversation between the parties, at that time, the defendant also requested the plaintiffs to find a purchaser. On November 20, 1868, the defendant executed a deed of the house to the purchaser procured by the plaintiffs, her husband joining therein. The plaintiffs, at the time they performed said services, supposed that the legal title to the house was in John J. Davis; and they charged him therefor, on their books of account. On December 14, 1868, they commenced an action of contract against him in the municipal court for the city of Boston, in which they declared for the same cause of action for which they bring the present action. In said action, on December 29, he was defaulted; and on March 18, 1869, the plaintiffs, since said default, being informed of all the facts, and in particular of the fact that the house belonged to the present defendant at the time they procured the purchaser, caused judgment to be entered against said John J. Davis in said action, and subsequently took out execution against him. Said judgment now remains in force, and unsatisfied. After taking said judgment and execution, the plaintiffs brought the present action."

G. Morrill, for the plaintiffs.

J. Lathrop, for the defendant.

MORRIS, J. We are unable to see how, in any aspect of the facts of this case, the plaintiffs can recover. There is no evidence that the plaintiffs performed the services sued for upon the credit of the defendant, or that she entered into a several contract with them. The facts stated, if they show any contract by the defendant, show a joint contract by herself and her husband. Upon such a contract the plaintiffs could not maintain this action. The judgment which he has taken against one of the joint debtors is a bar to any future action against the other. *Ward v Johnson*, 13 Mass. 148. *Gibbs v. Bryant*, 1 Pick. 118.

But the true inference to be drawn from the facts stated undoubtedly is, that the plaintiffs contracted with, and gave credit

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to, John J. Davis; and they now claim that he was acting as the agent of the defendant and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle to their right to maintain this action. The general principle is undisputed, that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him, or to the agent with whom he dealt, at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar, it is admitted that the plaintiffs, after all the facts became known to them, obtained a judgment against John J. Davis upon the same cause of action for which this suit is brought. We are of opinion that this was conclusive evidence of an election to resort to the agent, to whom the credit was originally given, and is a bar to this action against the principal. *Raymond v. Crown & Eagle Mills*, 2 Met. 319.

Judgment for the defendant.

DAVID ELLIOTT & another vs. WILLARD B. HAYDEN & others.

Judgment against one joint trespasser without satisfaction does not bar an action against another.

A., owning goods attached as B.'s property on a writ in C.'s favor against B., sued the officer for their conversion, and recovered judgment, which remaining wholly unsatisfied, he then sued C. for the same conversion. *Held*, in the second action, that the facts, that C. paid the counsel fees for defending the officer in the first action, and afterwards made oath to a bill in equity which alleged that he placed the writ against B. in the officer's hands for service in order to prevent the goods from being taken away, and was liable to indemnify the officer against all loss on account of the attachment, were competent but not conclusive, evidence against C.

GRAY, J. This is an action of tort for the conversion of certain machinery belonging to the plaintiffs. The conversion complained of is an attachment of the machinery by a deputy sheriff as the property of one Waite upon a writ in favor of the defendants. These plaintiffs heretofore demanded the property

of the deputy sheriff, and, upon his refusal to give it up, brought an action for its conversion against him, and recovered judgment against him for \$1125 damages, upon which no execution has been taken out, and which is wholly unsatisfied.

The first question presented by the report is, whether that judgment is a bar to this action; and we are all of opinion that it is not. If these defendants directed the officer to attach the plaintiffs' goods on a writ against another person, the defendants and the officer were doubtless joint trespassers. But joint trespassers are liable severally as well as jointly, and may be sued in one or in several actions. The judgment against one joint trespasser in an action against him alone is a merger indeed of the cause of action against him, but not of the right of action against any one who was not a party to the suit in which the judgment was recovered; and does not, without satisfaction, transfer the property to the defendant. It cannot therefore bar a right of action against cotrespassers who were severally as well as jointly liable. This result is so clearly demonstrated upon principle, and shown to be in accordance with the weight of authority, in the unanimous judgment of the supreme court of the United States, delivered by Mr. Justice Miller, in *Lovejoy v. Murray*, 3 Wallace, 1, affirming *S. C.* 1 Clifford, 191, as to render further discussion superfluous, except to show that there is nothing in the previous decisions of this court to embarrass us in adopting this conclusion.

In *Campbell v. Phelps*, 1 Pick. 62, it was held, by a majority of the court, that one who had recovered judgment and sued out execution in trespass *de bonis asportatis* against a deputy sheriff could not afterwards sue the sheriff for the same cause. But Chief Justice Parker carefully avoided expressing an opinion upon the general question whether judgment against one joint trespasser, without satisfaction, would bar an action against another; and put the decision upon the ground that by reason of the peculiar relation between the sheriff and his deputy they were not joint trespassers, and that the plaintiff, having elected to hold the deputy who did the act complained of, could not afterwards proceed against the sheriff on the responsibility at-

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taching to him by law for the acts of his deputy. Justices Thacher and Wilde dissented; and asserted the view upon the general question, which we now affirm. In *Todd v. Old Colony & Fall River Railroad Co.* 3 Allen, 18, this question was treated as still an open one in this Commonwealth. In *Perveas v. Kimball*, 8 Allen, 199, the point decided was, that, whether the sheriff and his deputy were to be treated as joint trespassers, or the plaintiff must elect between them, in either view no action could be maintained against the sheriff upon a judgment against his deputy. In *Bennett v. Hood*, 1 Allen, 47, the first action against one joint trespasser was replevin; and it was only held that the plaintiff, having recovered judgment in replevin, (which restored to him the goods replevied,) could not afterwards maintain trespass for other goods, taken at the same time and by the same act, and which had not been destroyed or concealed or disposed of so that they could not have been replevied.

The judgment against the officer not being a bar to this action, the remaining question is, how far it is evidence against these defendants. It is argued for the plaintiffs that the defendants were the real parties in interest, directed the attachment, agreed to indemnify the officer, took sole control of the action against him, and had the property sold by agreement between him and themselves. If these propositions were sustained in fact, the judgment in that action would doubtless be conclusive in this; for, in order to make the judgment against the officer conclusive against these defendants, it is only necessary to prove that they were identified in interest with him, either by directing the attachment, giving him a bond of indemnity, or otherwise assuming the responsibility of his act, and that they had notice and opportunity to control the defence of the action against him. *Lovejoy v. Murray*, 3 Wallace, 1. *Robbins v. Chicago*, 4 Wallace, 657; *S. C.* 2 Black, 418. *Sprague v. Oakes*, 19 Pick. 455, 458. *Boston v. Worthington*, 10 Gray, 496. *Mannan v. Merrill*, 11 Allen, 582.

But the report states that all these propositions were disputed at the trial; and that the only facts proved were that these de

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defendants paid the counsel employed to defend that action, and afterwards made oath to a bill in equity against these plaintiffs and Waite, which, as the report states, "although filed, was not entered or proceeded with, but was withdrawn, as the defendants say, by leave of court, because it was claimed to contain errors of fact," and which alleged that, in order to prevent the property from being taken away, the plaintiffs (now defendants) placed the writ against Waite in the hands of the officer, and that they were liable to indemnify him against all loss on account of his attachment of this property. The payment of the counsel fees was admissible, though perhaps not of itself very strong evidence. As no action of the court was obtained upon the bill in equity, the statements therein, if they had not been made upon the oath of the plaintiffs, might have been considered as mere suggestions of the counsel and not competent evidence of admissions by the parties. *Boileau v. Rutlin*, 2 Exch. 665. *Combs v. Hodge*, 21 How. 397. *Church v. Shelton*, 2 Curtis C. C. 271. But, being upon the oath of the parties in whose behalf the bill was filed, they are competent evidence as solemn admissions by them in person of the truth of the facts stated — upon the same ground upon which sworn answers and pleas in chancery, or allegations concerning the substance of the action in a declaration at common law, have been held admissible in evidence in another suit. Taylor on Ev. (5th ed.) §§ 759, 1560. *Gresley Eq. Ev.* 303. *Central Bridge Co. v. Lowell*, 15 Gray, 106, 122. *Bliss v. Nichols*, 12 Allen, 443, 446, and cases cited. *Boston v. Richardson*, 13 Allen, 146, 162. It would of course be open to the parties to show that they were made under mistake.

The statements in the bill in equity, as well as the payment of counsel fees in the action against the officer, were therefore competent, though not conclusive, evidence against these defendants. And by the terms of the report, as the rights of the parties depend upon facts in controversy, the

Case must stand for trial.

T. L. Wakefield & F. V. Balch, for the plaintiffs.

B. Dean, for the defendants.

Harrington v. Weselowski.

JOHN H. HARRINGTON vs. MOSES WESELOWSKI.

On an issue between A. and B. whether money paid to a collector of internal revenue by B., who owed A. for the price of some liquors, was received by the collector in payment of a tax due from A. to the United States in respect to the liquors, the collector testified, as a witness for B., that he received it in payment of the tax, but had not yet paid it over to the United States because he had been summoned as trustee of A. in a suit against A. by the United States; and further testified that the suit was brought by his procurement. *Held*, that it was competent for A. to show that not the collector, but B. himself, was summoned as trustee in the suit.

CONTRACT for a balance of the price of spirituous liquors sold and delivered to the defendant by the plaintiff, doing business under the name of Boyden & Company. The defendant, in his answer, alleged that on the request and direction of the plaintiff he paid to the United States through William H. McCartney, collector of internal revenue for the third collection district of Massachusetts, \$2699.20, "which the plaintiff consented and agreed should be in full satisfaction of any balance claimed to be due from the defendant." Trial and verdict for the plaintiff, in the superior court, before *Putnam, J.*, who allowed a bill of exceptions substantially as follows:

"The only fact in dispute at the trial was, whether \$2699.20 paid by the defendant to McCartney May 4, 1867, (said McCartney being collector of internal revenue for the United States,) was or not paid over to the United States, through McCartney, by previous authority and consent of the plaintiff, at his request, and for his use. The defendant claimed he so paid it at the request, authority and consent of the plaintiff; and the plaintiff denied such claim, but insisted that it was paid over to McCartney without authority, and not in payment of taxes, but only as security, to prevent a threatened seizure on the defendant's premises, and to be refunded to the defendant if the government should not establish its claim for taxes.

"There was evidence offered by the defendant tending to show that, on or before May 4, 1867, Malachi Stagge was a detective for the United States, under the laws for the collection of the internal revenue; that the plaintiff and the defendant

each had a place of business in Boston, as liquor dealers, that on April 27, 1867, the stock of liquors of the plaintiff in his place of business had been seized by Stagge for not having paid the lawful duty due to the government; that on or before May 4, 1867, Stagge came to the defendant's place of business and threatened him that he would seize the liquors sold to the defendant by the plaintiff, the price of which is the subject of the present suit, and said that he, Stagge, knew as to all the liquors that had been sold as aforesaid, and that part of them were then in the defendant's store, and he knew where the defendant had sold the remainder, and unless the defendant paid over to the government \$2699.20, which Stagge said was due to the plaintiff for the sale of such liquors, he, Stagge, would seize said liquors wherever he could find them, on the ground that said liquors had never paid any excise duty or tax, but had been illegally taken from a bonded warehouse of the United States without the payment of such tax; that thereupon the defendant sent his clerk for the plaintiff to come to his store, and there, in presence of his clerk, told the plaintiff all that Stagge had told the defendant as aforesaid; that the plaintiff, after some talk about it, finally in substance told the defendant that under the circumstances he had better pay the sum of \$2699.20, and ordered him to pay that sum to McCartney, the collector, on the plaintiff's account, instead of paying it to Stagge; that the defendant did thereafter, on said May 4, pay said sum to McCartney, and took from him a notice to pay the amount to the government, and a receipt therefor, which was produced and read at the trial. And the defendant also testified that he understood from McCartney that it was to be paid over to the government.

"The defendant called McCartney subsequently as a witness, and he stated that said money was paid to him by the defendant May 4, 1867, and the receipt given; that he had not yet paid it over to the government, but that it stood charged to him on his bonded warehouse account; that it was an absolute payment, and he was responsible for it on his official bond; and that he was also charged for it as trustee in a suit of the gov-

ernment against said plaintiff, in which he had made answer. On cross examination he was asked if he had ever paid over said money to the United States, to which he replied that he had not. He was then asked why he had not paid it over to the government, if it was paid for taxes; to which he replied that the money was not received in the regular collection of the revenue; that there was no appropriate place for it on his books as collector; that he received large sums of money, at times, not strictly as taxes; that he received this money as money due on spirits for taxes belonging to the United States; and that in addition he had suggested to the assistant district attorney of the United States that he should be summoned as a trustee, and had been so summoned, in a suit where the United States was plaintiff and one Boyden defendant, (said Harrington doing and having done business under the name of Boyden & Company,) but that he had told the assistant district attorney not to have him charged as trustee, because he was charged for it on his warehouse account—that the government had charged him with it.

“The plaintiff, against objection of the defendant on the ground that it was collateral, was then permitted by the judge to show from the records of the United States court that McCartney never had been trustee in any case where the United States was a party, or Boyden or any one defendant, but that the defendant in this suit was so trustee in such action; and the plaintiff’s counsel pressed the fact that McCartney was not trustee, in his argument to the jury, on the credibility of said McCartney’s statement that it was an absolute payment to him by the defendant. The verdict for the plaintiff was for the full amount of his claim, and the defendant excepted to said direction and ruling, and the admission of said evidence.”

G. A. Somerby, for the defendant.

R. M. Morse, Jr., for the plaintiff.

MORTON, J. At the trial of this case, the principal question was, whether the sum of \$2699.20, paid by the defendant to McCartney, the collector of internal revenue, was so paid by the plaintiff’s request, and also whether it was received by

McCartney as a payment of taxes due by the plaintiff to the United States. The defendant called McCartney as a witness, who testified that he received it in payment of taxes due by the plaintiff. He also testified, on the direct examination, that the money had not been paid over to the government; and, to explain this fact, stated that he had been summoned as trustee in a suit brought by the government against the plaintiff. This testimony, that he had been summoned as trustee, was not objected to; and we are of opinion that, if it had been objected to, it could not have been excluded on the ground that it was collateral and immaterial. The main question was, whether he received this money in payment of taxes due by the plaintiff. The fact that he had not paid it over in the usual course of business would, if unexplained, have a tendency to throw doubt upon his testimony. It disclosed conduct of the witness inconsistent with his main statement. And the fact that he had been summoned as trustee would tend to explain this otherwise suspicious circumstance, and thus confirm his testimony upon the main question. These facts were not purely collateral; they were so connected with the chief transaction which was the subject of inquiry as not to be matters wholly foreign to the issue on trial. This being so, it was competent for the plaintiff to contradict the witness by showing that no such trustee suit had been brought as he testified to, but that the suit referred to by him was one in which the defendant in this action was summoned as the trustee of the plaintiff.

There is another view of the case, which leads to the same result. McCartney having testified that he received this money as an absolute payment of taxes due by the plaintiff to the government, it was competent for the plaintiff to show any acts or declarations of his which were inconsistent with this testimony. It appears, from the bill of exceptions, that the trustee suit, in regard to which both parties introduced testimony, was instituted at the request and by the procurement of McCartney. The fact that he procured the defendant to be summoned as the trustee of the plaintiff shows that he then understood that the defendant was indebted to the plaintiff, and is inconsistent with,

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and tends to contradict, his statement that the defendant had paid taxes on behalf of the plaintiff, which would extinguish his indebtedment. It seems, therefore, that the evidence excepted to was admissible upon this ground. *Exceptions overruled.*

DWIGHT F. FAULKNER vs. GEORGE H. HILL & another.

Partners, after pledging goods, with an invoice, as collateral security for a debt owed by them and payable on demand, dissolved the partnership, and, in consideration of the agreement of J. S. to pay its debts, conveyed to him all the property of the firm, made him their attorney to demand and receive all its effects and execute releases therefor as fully as they might do, and covenanted not to receive or release any demands of the firm or interfere with its affairs without his consent. The pledgee had notice of this contract, but never agreed to substitute J. S. as his debtor. J. S. then paid to him part of the debt, and took from him, with his consent, what, so far as he knew or as was shown by the invoice, was a proportional part in value of the pledged goods, though in fact it was a much more valuable portion. Subsequently (J. S. having died insolvent) he made demand on the pledgors for the balance of the debt, and then caused the rest of the goods to be sold by auction, bid them in himself, and rendered to the pledgors an account of the sale. *Held*, that, in respect to the goods delivered by him to J. S., he was not liable to account to the pledgors for any greater sum than J. S. paid to him. *Held, further*, that he was not entitled to disaffirm the sale of the rest of the goods and return them to the pledgors without their consent; but that he could recover from the pledgors only the balance of the debt after deducting the proceeds of the sale.

CONTRACT to recover a balance alleged to be due from the defendants to the plaintiff on an account annexed for "money advanced on paper collars;" submitted to the judgment of the court on a statement of facts agreed substantially as follows:

On May 8, 1866, the defendants, who were partners under the firm of Hill Brothers & Company, borrowed of the plaintiff \$2000, payable on demand with interest, and as collateral security for repayment delivered to him twenty cases, containing 148,060 paper collars, (then worth \$2886.12,) with an invoice specifying the number but not the sizes of the collars in each case

On June 1, 1866, the defendants dissolved their partnership and entered into an agreement in writing with George B. Lamb their former clerk, by which they sold and assigned to him all

their "right, title and interest of and in said copartnership, and all goods, wares, merchandise, moneys and effects thereto belonging;" and "the better to enable said Lamb to receive all said partnership effects for his own use and benefit," made him their attorney "to ask, demand, sue for, recover and receive of and from all and every person or persons whatsoever all the debts, goods, chattels and effects now due and owing or belonging to said copartnership, and upon the receipt of the same to sign and execute proper and sufficient releases and discharges for the same," as fully and effectually as they might do if personally present; and agreed "not at any time hereafter to receive, release, acquit or discharge any of the debts or demands due to said copartnership, or interfere or presume in any manner to exercise any control of the affairs thereof, without the consent of said Lamb;" and by which Lamb agreed "within thirty days from the date hereof to pay and discharge all debts and demands due and owing from said copartners on account of said copartnership, or which either of them shall or may be liable to pay or make good on account thereof, and to save them harmless and indemnify them and each of them from and against all costs and payments, charges and demands whatsoever, on account of said copartnership or any matter or thing relating thereto, and if he shall fail to pay and discharge all debts due from said copartnership within said thirty days, then it shall be lawful for said copartners to take possession of the effects of said copartnership, and pay and discharge the debts then due and unpaid, returning the balance remaining after such payment to said Lamb for his own use and benefit."

On July 11, 1866, the plaintiff had notice of the dissolution of the partnership, and of this agreement between the defendants and Lamb. The debt owing to him from the partnership was one of its liabilities, and the twenty cases of collars in the plaintiff's hands were a part of its assets at the time of the dissolution.

"Between July 11, 1866, and December 24, 1866, the plaintiff, without giving any notice to the defendants, at the request of said Lamb, delivered to him nine of said cases containing

in all 58,310 collars, and received from him at the several times of delivery substantially such a proportion of the debt as the number of collars taken bore to the whole number contained in said invoice. Lamb knew the contents of the several cases, and selected such cases as he chose out of the invoice. The plaintiff had no personal knowledge of the sizes of collars contained in the cases, or that the sizes varied; nor had he ever made any inquiry of the defendants in relation to the matter; and he permitted Lamb to make such selection, in ignorance that the remaining cases were rendered less valuable thereby. The nine cases selected by Lamb were the most valuable, and the remaining eleven cases, for a sale not in connection with the other sizes, were reduced in value upwards of thirty per cent. by the delivery of the nine cases, the assortment being thereby rendered less valuable.

“On April 2, 1867, Lamb died insolvent. Up to that time the plaintiff never notified the defendants that their debt to him was not paid, and never made any demand upon them for its payment; nor had the defendants ever inquired of the plaintiff whether the debt had been paid. After the death of Lamb, and in April 1867, the plaintiff demanded payment of the balance of this debt from the defendants, and offered to return said eleven cases of collars.”

“In June 1867, after giving notice to the defendants, the plaintiff offered said eleven cases of collars for sale at public auction, but, no one appearing to purchase, he bid them in himself and rendered an account of said sale to the defendants, and claimed the balance remaining after such credit as in said account of sales set forth, but gave no notice to the defendants of the fact of his having bid in said collars himself, nor had they ever any notice of this fact till several months after the answer was filed in this suit. The plaintiff now has said eleven cases of collars in his possession, and is ready to surrender the same to the defendants upon the payment of his claim; but the defendants seek to confirm the sale and to hold the plaintiff to the account of this sale as originally rendered.” A copy of the account of the sale was made part of the statement of facts.

If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for the plaintiff for such sum as the court should direct; otherwise, judgment to be entered for the defendants.

J. P. Converse & D. P. Kimball, for the plaintiff.

G. O. Shattuck & W. H. Towne, for the defendants.

GRAY, J. This is a very plain case. The defendants, after pledging goods to the plaintiff as collateral security for a debt, made an arrangement with Lamb, their former clerk, by which, in consideration of his agreement to pay and discharge all their debts, (including, of course, that to the plaintiff,) they conveyed to him all their partnership property, (including the goods pledged,) and, the better to enable him to receive the same for his own use and benefit, appointed him their attorney to demand, sue for and receive from all persons whatsoever all debts, goods and effects owing or belonging to the partnership, and upon the receipt of the same to execute releases and discharges therefor as fully and effectually as the defendants might do if personally present; and the defendants also covenanted not themselves to receive, release, acquit or discharge any of the debts or demands due to the partnership, or interfere with, or presume in any manner to exercise any control of, the affairs of the partnership without Lamb's consent. The plaintiff never agreed to substitute Lamb as his debtor instead of the defendants.

Under these circumstances, the plaintiff's delivery to Lamb of a portion of the property pledged, on receiving payment of a sum which was, so far as was known to the plaintiff or appeared by his invoice of the goods pledged, (though not in fact,) a proportional part of his debt, was not such a dealing with or disposition of his collateral security, as to make him liable to account with the defendants for any greater sum than that so received by him from Lamb.

But by the plaintiff's subsequent sale by auction and purchase of the rest of the goods pledged, his debt was paid and discharged to the extent of the sum bid by him and stated in his account afterwards rendered to the defendants. The bal-

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ance of his debt, after deducting this sum, he is entitled to recover in this action.

Judgment for the plaintiff accordingly.

INDEPENDENT INSURANCE COMPANY vs. GABRIEL E. THOMAS.

A specific judgment payable in gold coin is to be rendered for damages assessed for the breach of a contract for the payment of a sum in gold.

CONTRACT by a corporation under the law of this Commonwealth against an inhabitant of St. John in New Brunswick. The declaration was as follows: "And the plaintiffs say the defendant was intrusted by them to deliver policies of insurance to parties insured, and make collections of premiums on the same, and remit the same to the plaintiffs; that the defendant collected for the plaintiffs, and as money due to the plaintiffs, the sum of seven hundred and thirteen and $\frac{33}{100}$ dollars in gold, which said sum the defendant has neglected and refused to pay to the plaintiffs although often requested to pay the same; and the plaintiffs say the defendant owes them said sum of seven hundred and thirteen and $\frac{33}{100}$ dollars in gold, for which the plaintiffs claim special judgment in gold and specie." The defendant was arrested on mesne process, gave bail, and was defaulted.

In the superior court, the plaintiffs moved for an assessment of the damages, and requested the court to assess damages in gold and to order judgment in gold for the damages, and that the execution might run against the defendant to be levied in gold. But *Putnam, J.*, assessed damages in the sum of \$713.38 and interest, and ordered judgment "for the plaintiffs for \$713.33 and interest in currency." The plaintiffs alleged exceptions.

J. Nickerson, for the plaintiffs.

No counsel appeared for the defendant.

CHAPMAN, C. J. The supreme court of the United States has decided that, under the statutes of the United States, when it

appears to be the clear intent of a contract that payment or satisfaction shall be made in gold or silver, damages should be assessed and judgment rendered accordingly, and that the state courts of common law, as well as the courts of the United States, are bound to render such specific judgments. *Bronson v. Rodes*, 7 Wallace, 229. *Butler v. Horwitz*, Ib. 258. As that court has final jurisdiction in the matter, it is the duty of the courts of this Commonwealth to conform to its decision. In this case, the debt being payable in gold, a specific judgment should be rendered for gold coin, and execution should be issued accordingly.

Exceptions sustained

JAMES D. THOMSON vs. JULIA LUDINGTON & others.

A testator by his will gave his estate to his widow during her life or widowhood, and at her decease or marriage "to such of my children as shall then be living, share and share alike; the names of my said children are A., B., C., D. and E., to them and to their heirs and assigns forever." B. survived the testator, but died before the death or marriage of the widow, and left a child born in the testator's lifetime. *Held*, that this child had no interest in the estate.

CONTRACT against Julia, widow of Corbet Ludington, and George C., Lucy M., Francis H. and Caroline E. Ludington, their children, on the defendants' covenant of warranty of title and against incumbrances in their deed dated May 25, 1869, of a parcel of real estate in Boston to the plaintiff. Writ dated December 21, 1869. The case was submitted to the judgment of the court on the following statement:

"It is agreed that Corbet Ludington was seised in fee of the premises and died in 1852, leaving a will, duly proved, in which are the following provisions: 'I give, devise and bequeath to my present wife, Julia Ludington, all my estate, real, personal and mixed, to and for the uses and trusts following, to wit: In trust to use and enjoy the same as she now does, she taking care of and maintaining my children, so far as the same will maintain them during the period of her widowhood, and at her decease or marriage then further in trust to divide the same

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equally to and among such of my children as shall then be living, share and share alike; the names of my said children are George C., Ann L., Lucy M., Francis H. and Caroline E., to them and to their heirs and assigns forever.' The widow survives unmarried, and signed the deed, as did all the children named in the will, except Ann L., who died some years after the testator, leaving one child, Lucy C. Hapgood, who was born a few weeks before the testator's death. If said Lucy C. has any interest in the premises, judgment is to be for the plaintiff; otherwise for the defendants."

J. D. Thomson, pro se.

W. A. Herrick, for the defendants.

GRAY, J. The devise at the death or marriage of the widow "to and among such of my children as shall then be living, share and share alike," gives a contingent remainder to such of the children as shall be living when the contingency of such death or marriage happens. *Olney v. Hull*, 21 Pick. 311. In the next clause, the testator gives the names of "my said children," that is, of all those already described as "my children;" for he could not foretell which of them would be living at a future time; and this clause does not extend the effect of the previous one, by which such of them only as shall be living upon the happening of the contingency are to take. The further words "to them and their heirs and assigns forever" do not describe the devisees, but the quantity of their estate, or, in other words, merely show that the estate to be taken by virtue of the previous words is an estate in fee. The daughter who died after the testator and before his widow therefore took no estate, and none passed to her child.

Judgment for the defendants.

SARAH A. T. PEABODY vs. TIMOTHY H. PEABODY.

The mere neglect of a husband, with no circumstances of aggravation, to provide maintenance for his wife and children for fifteen years, during which she has supported the children from her own earnings, is not such gross or wanton and cruel neglect as will sustain a libel in her behalf on the Gen. Sts. c. 107, § 9, for a divorce.

LIBEL on the Gen. Sts. c. 107, § 9,* for a divorce from bed and board, for the gross or wanton and cruel neglect of the libellee to provide suitable maintenance for the libellant; heard at April term 1869, by *Gray, J.*, who reserved for the decision of the full court the question whether a divorce should be granted on the following facts:

"The libellee was a policeman; left the libellant a year before the filing of the libel; and never since, nor for some years before, contributed to her support or that of her children. She has supported herself and her children for fifteen years, and neither she nor her children have ever suffered, or been in danger or apprehension of suffering, for want of support; but they might have suffered if she had not supported them by her own earnings. Since he left her, she has never asked him for support, but has relied on her own earnings."

H. N. Sheldon, for the libellant. Whenever a husband is able to support his wife and children, and they have not means to maintain themselves, and are compelled by his default to rely on their own labor, a persistent neglect on his part to provide for them any support whatever is of itself sufficiently "gross or wanton and cruel." Such words of aggravation have of themselves no legal signification, and are merely vituperative epithets. *Willes, J.*, in *Grill v. General Iron Screw Collier Co.* Law Rep 1 C. P. 600, 612. *Denman, C. J.*, in *Hinton v. Dibbin*, 2 Q. B 646, 661. *Rolfe, B.*, in *Wilson v. Brett*, 11 M. & W. 113, 115,

* "A divorce from bed and board may be decreed for extreme cruelty, utter desertion, gross and confirmed habits of intoxication contracted after marriage, or cruel and abusive treatment by either of the parties; and on the libel of the wife, when the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her."

116. Cresswell, J., in *Austin v. Manchester, Sheffield & Lincolnshire Railway Co.* 10 C. B. 454, 474, 475. Curtis, J., in *Steamboat New World v. King*, 16 How. 469, 474, 475. Persistent neglect to comply with a moral duty which is also a legal obligation cannot be other than gross; and, when it compels a wife to work for the support of herself and her children, cannot be less than cruel. But under the words of the Gen. Sts. c. 107, § 9, no cruelty need be shown. A neglect either gross on the one hand, or wanton and cruel on the other, is sufficient. Cruelty being by the same section a ground of divorce, it cannot be supposed that this was intended to be either a repetition of that provision or a requirement of something additional.

Nor can a divorce be refused because this husband's neglect to provide for his wife's support did not cause her to actually suffer. There were but three courses open to her: to live in privation, until she should become a pauper; to appeal to the charity of friends, and become a genteel beggar; or to work, and support herself and her children as best she might by her own earnings. Because she had spirit and energy to choose the third course, and her exertions have been so far successful as to provide for her and her children, must she stand in a worse position than if she had sulked or mourned until she perished of inanition or became a pauper? To hold so is to suppose that the legislature intended to discourage industry, and hold out an inducement for idleness to women whose natural supporters might fail them.

Nor can it be refused because this wife, after fifteen years of continuous neglect of her husband to do his duty, made no demand upon him for support. It must be presumed that such a demand would have been unavailing. Besides, nothing more than neglect need be shown. The words of the statute are "refuses or neglects."

All the cases in which, under similar statutes, a divorce has been refused, have been decided either where the common law rule prevailed, that all the property and earnings of the wife were property of the husband, and therefore for her to support herself by her earnings was the same thing as for him to sup-

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port her from his means; or else upon the civil law doctrine of community of property between husband and wife, as recognized in Louisiana and California. Our statutes, making the earnings of a wife her sole and separate property, deprive such cases of all weight. See *Washburn v. Washburn*, 9 Cal. 475; 1 Bishop Mar. & Div. (4th ed.) §§ 820, 821.

No counsel appeared for the libellee.

COLT, J. The report in this case discloses mere neglect on the part of the husband to provide for the maintenance of his wife. This is not enough under our statute. The neglect must be "gross or wanton and cruel" on his part, he being of sufficient ability to provide. These words were used for the purpose of giving to the conduct of the husband, in this respect, the character which they imply, and are not to be disregarded.

The case finds, that, although the neglect of the husband commenced many years before the final separation, and continued down to the time of filing the libel, yet neither the wife nor her children had in fact suffered, or been in danger of suffering, from want of support. But, without asking support of him, since he left her, she had relied on her own earnings, which were in no way interfered with by him. This is not the neglect contemplated by the statute as a ground of divorce from bed and board. In *Bailey v. Bailey*, 97 Mass. 373, upon a full consideration of the whole subject, it was said, that, "when a divorce is sought on the ground of cruelty, whether it be cruel and abusive treatment, or cruelty in neglecting or refusing to provide suitable maintenance for the wife, a reasonable construction of the statute requires that it shall appear to be, at least, such cruelty as shall cause injury to life, limb or health, or create danger of such injury, or a reasonable apprehension of such danger."

It may be, that, under some circumstances, a sudden and continued refusal to provide the necessities of life to a wife, who is left thereby, with her children, to her own earnings, would be regarded, within the meaning of the statute, as "gross or wanton and cruel;" as where, from the previous habits, or mode of life, or state of health, or incapacity to labor from any cause

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such conduct would cause injury to health, or danger of such injury, or reasonable apprehension thereof. In the case at bar it was simple neglect, with no circumstances of aggravation.

Libel dismissed.

ELIZABETH A. FORD vs. JAMES M. FORD.

On a trial by jury of a libel for divorce for the cause of extreme cruelty, specified as consisting in blows inflicted on the libellant by the libellee upon a single occasion, evidence of similar acts of the libellee on other occasions is inadmissible to establish an independent ground of divorce; and it is within the discretion of the judge to exclude it also, if offered to show the disposition of the libellee on the occasion in question, or if attempted to be elicited on cross-examination of the libellee as a witness.

On the trial of a libel for divorce, a daughter of the parties was a witness for the libellant, and the libellee introduced evidence of remarks which she had made about him, for the purpose of showing that she testified under bias. *Held*, that evidence, offered by the libellant, to prove that the libellee had struck the witness before she made the remarks, was inadmissible.

The exclusion of remarks made by a witness, offered for the purpose of showing that he has testified under bias, without stating the nature of the remarks, is not ground of exception.

On the trial of a libel for divorce, in which the libellee has introduced evidence tending to show that the acts relied on to sustain the libel were induced by the libellant for the purpose of getting cause for a divorce, it is inadmissible for the libellant to prove, in refutation of this theory and as evidence of her intention, an unanswered letter subsequently written by her to the libellee, recounting her accusations against him and proposing terms for a separation.

A refusal to allow an amendment of the libel on a trial for divorce is not subject to exception.

To sustain a libel for divorce for the cause of extreme cruelty, there must be evidence of personal violence, intentionally inflicted, of such a character as to endanger the life, limb or health of the libellee or create reasonable apprehension of such danger.

LIBEL filed October 13, 1868, for a divorce from bed and board, the libellant alleging for cause, that the libellee had "been guilty of extreme cruelty towards her, and particularly on the 23d day of September last inflicted upon her person blows, and then and there did divers other acts of extreme cruelty, to her great injury." The answer denied that the libellee had ever been undutiful of his marriage vows or obligations, or ever treated the libellant unkindly in any manner whatever either by word or deed; and alleged that, on the contrary, he

had ever conducted himself in a kind, affectionate and gentle manner towards her. Trial by a jury, before *Morton J.*, who made the following report thereof:

"The parties have been married some thirty years, and have resided in Boston during that time, living together in a house belonging to the libellant, or standing in her name, for the last two.ve years, their family at home consisting of themselves, two daughters unmarried, aged eighteen and twenty-three years respectively, and a son aged thirteen years. The defendant is a jeweller; and the parties belong to the higher stations of life.

"The evidence of the libellant, coming from herself and the children, tended to prove, and was to the effect, in substance, and her counsel contended from her own evidence and that of the libellee himself upon the whole case, that the libellee on September 23, 1868, without provocation or justification, used cruel, abusive and threatening language toward her, and also inflicted blows and personal violence upon her person, in her own house and in the presence of the children. The occasion and substance of what she contended occurred was this: On the day named, the parties were in the front room, up stairs, in the house; he was about to clean a flue of a chimney, and was going to use for that purpose a brush of hers, and she objected to his using it; he thereupon flew into a passion, and began using abusive and violent language toward her; she said that she was too old to be talked to in that way, and left him with a view of going into the next room adjoining; he threatened her, that, if she shut the door, he would break it down, and that he would break every door in the house; she went into the next room and he followed her, continuing his use of abusive language; Elizabeth, their older daughter, came into the room, attracted by the noise, and remonstrated against his abusing her mother so, taking her mother from the back part of the room where she was standing and leading her forward, whereupon he stepped up and said to the daughter, 'I have wrung your nose before and I will do it again,' lifting up his left hand at the same time as if about to do so; the libellant raised up her left hand, in which she held a cap of her son, and put it between

his hand and the daughter's face to prevent the act; he thereupon dropped his left hand and immediately struck the libellant with his right hand and fist, knocking her down upon the floor. in the presence of said older daughter and said son; the other daughter then came into the room, from up stairs, hearing the noise, and in course of a conversation, upon her inquiry as to what occurred, and upon the older daughter saying that he had knocked her mother down, the libellee denied it and said if she said so again he would knock her down with the hammer; he took up the hammer and threatened to throw it at her; the children took the libellant into the other room; the libellee followed them, and kept going in and out at intervals, and continued the use of his abusive language toward the libellant; he there also struck a glass globe-shade with his fist, aiming at her, and knocking it in pieces with such violence that a piece of the glass flew across the room and hit her in the head, cutting it and drawing blood; and he also took up a vase, and was apparently in the act of throwing that, but desisted upon some remark or act of one of the daughters.

"The evidence of the libellant was, in substance and effect, that the language and manner of the libellee were very violent and abusive, and were kept up during all of said time; that he said that the libellant was a born fiend, an infernal devil; called her, in derision, the beautiful Mrs. Ford, the Miss Kingsbury that was; swore and used profane language towards her; said he hated her; had been cursing her for a half-hour; talked to her violently and harshly; tantalized her about money; said all she wanted was 'money, money, money,' that she should not have a cent thereafter except what she wanted or needed for drink, and that she was all wrapped up in her own virtue; and when the daughter Elizabeth said to the other daughter, upon her coming into the room and inquiring what had happened, that the libellee had knocked her mother down, he first denied it, then admitted it, and said he would do it again; and when he struck the shade, he said he would give her all the staying out nights and smashing of crockery which she wanted, and then struck her as before stated; that he ordered the said older daughter to leave

the house, and told the other to be careful how she made her bed, for as she made it so she must lie; that he himself left the house that night and did not return; and that the parties have not lived together since.

"The libellee gave a different version of the affair, stating, in substance, that he was provoked by the conduct and language of the libellant, and in a passion by reason of it; that he was also defied and called a coward by his daughter Elizabeth, and rushed towards her to put her out of the room; that the libellant came in between them, and against him, and went over; that he did not strike her, and his pushing her down, and his hitting and breaking the glass shade, were not intentional, but accidental; that he did swear and use profane language toward the libellant at the time; that he then recounted to her sundry charges of her previous misconduct, stating among other things that she had attempted to poison him, that one of his said daughters was no better than a common prostitute, that he had so stated and he knew it and could prove it, that the libellant had got his house and furniture and had turned her friends against him in order to put him down, and that her own crimes would come out. The libellee offered no proof of any previous misconduct or ill treatment on the part of his wife, save his own statements to her on said occasion in charging the same.

"The libellant offered evidence of previous similar ill treatment and misconduct of the libellee towards her on other occasions, as proof of the charges made against him, and as grounds of divorce, in connection with what was specifically alleged and proved; claiming that it was competent under the libel as drawn, for that purpose, or, if not, that it was competent as tending to show the *animus* and the hostile state of feeling on the part of the libellee, and as affecting his conduct in evidence on the particular day named, and that this conduct was not exceptional, and did not stand as an isolated instance, but was a repetition and a continuation of other similar bad conduct. But the judge excluded the evidence, as incompetent, under the pleadings, for any purpose.

"The daughter Elizabeth was a witness for the libellant, and testified to the conduct of the libellee on the particular occasion named and referred to. The libellee was allowed to introduce evidence, against the libellant's objection, that the witness, at different times, prior to said occurrence, had stated that she hated her father, or despised him; that she wanted to keep on the right side of her father so she could get money out of him; that he was a bad man, capable of doing anything, and ought to be hung; and also that the libellant, when the libellee was abroad, expressed a wish that he might be killed, and that she would be better off if he was dead, and stated what amount of property she would have in that event. The libellee also put in evidence tending to show that the libellant had represented that she had been trying to get rid of him for ten years, and been seeking some cause for divorce. There was no evidence that these statements, if made, were ever repeated to the libellee by the third parties to whom they were claimed to have been made. The evidence was offered and admitted as tending to show bias, and as affecting the credibility of the witnesses. The libellant offered to show that the libellee had previously knocked Elizabeth down and wrung her nose; but the judge excluded the evidence.

"John Ayling testified, for the libellee, to conversations in contradiction of the son of the parties, who had testified for the libellant. Ayling testified, in cross-examination, that he was equally the friend of both parties. The libellant offered in evidence a conversation of Ayling with her daughter Elizabeth, held after said occurrence, and his statement made in reference to the affair and the parties, no statement of what the conversation was being made in the offer; but the libellant claimed that it would show his bias and feeling against her, and in favor of the libellee. The judge excluded the evidence.

"The libellant offered to show, in the cross-examination of the libellee, that he had struck the libellant before, and wrung the nose of his daughter Elizabeth and knocked her down; and asked him whether he had not done so. But the judge excluded the question and evidence.

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"The libellee offered evidence tending to show, as he contended, that the libellant had been endeavoring, before, to get some grounds on which to found a claim for a divorce, and that the occasion in question had been induced by her for that purpose and the facts misrepresented or exaggerated by her. The libellant denied this, and offered in evidence, in refutation of this theory, and as evidence of her intention, a letter from her to the libellee, dated September 28, 1868, (after the separation of the parties,) which was produced by the libellee at the trial, on notice, and is copied in the margin.* The libellant contended that,

* "Boston, Sept. 29, 1868. *My Own Husband*: With a heart full of the deepest anguish, I now undertake the most difficult task of my life. For nearly thirty-one years we have lived together in the bonds of marriage. No one knows so well as yourself whether I have faithfully fulfilled those vows with which our young hearts and lives were bound together. I have taken this method of communicating with you, because I very well knew that any attempt on my part to have a verbal interview would only result in bitter recriminations and bursts of anger. After days of serious reflection, I have concluded to adopt my present course; and believe me that I am firm, when I tell you that the time has come when we must separate. You very well know that I have sufficient grounds for divorce; but unless I am obliged to, I shall not attempt to get a divorce, because I would wish to spare you as well as our dear children the disgrace which would come by making such evidence public. What I would like would be, for you to follow your often expressed wish of going into business in another city, which is not an uncommon thing for a merchant to do; then the public need not know of our domestic troubles, and I would have some heart to take care of my little family, if I was not in constant fear of these terrible scenes at home. In regard to the final settlement, I would suggest that I am willing to leave it to three referees — you choose your best friend, I will do the same, and let them in their turn choose the third one; and, if you are willing, I also will submit to their decision. Do not think me too hasty, for I have been looking back for the long period of twenty-two years that we have occupied our two last homes, almost every room of which is filled with the memory of some sad domestic scene, from the time when, nineteen years ago, I got on my knees and begged of you to treat me differently, for the sake of our unborn babe, (our sweet little Abby,) and you spurned me from you, until the events of the last two weeks, when you have not only knocked me down, but have also brutally knocked down our other daughter and wrung her nose, in two instances, for no other reason than that she could not stand by and see her mother abused without protecting her. Now I have arrived at an age when I can no longer bear up under such treatment; and I now appeal to

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if the whole of this letter was not admissible, portions were, for said purpose; but the judge excluded it.

"The libellant contended that the charge of cruel and abusive treatment was open to her under the libel as it stood, but in course of the trial, and after the evidence was in, offered, for safety, to amend, by adding the words, 'cruel and abusive treatment,' to the allegations of the libel, but introducing no other evidence upon the point. The judge declined to permit it, the libellant claiming a right to except and excepting.

"The libellant's counsel contended that it was sufficient if the conduct of the libellee was such as would cause injury to life, limb or health, or create a danger of such injury, or a reasonable apprehension of such danger upon the parties continuing to live together; or that mere words were sufficient, if they created a reasonable apprehension of personal violence, or tended to wound the feelings to such a degree as to affect the health of the party, or create a reasonable apprehension that it might be affected; or such causes as would produce deeply wounded sensibility and wretchedness of mind. The judge declined so to rule; and ruled that the libellant could prevail only on the ground of extreme cruelty; that any acts of personal violence of such a character as to endanger the life, limb or health, or as to create a reasonable apprehension of such danger, if intentional, constitute extreme cruelty; and that words and abusive language were not sufficient, but there must be personal violence, intentionally inflicted.

you in the name of the few bright spots in our lives; in the name of our dear daughters, just coming into active life and whose few short years have been so full of trouble; also in the name of our first-born son for whose defence you have caused me so much unhappiness these few past years; also for our own dear little Jimmy, who bears your name and who is such a kind and affectionate little child; also for the sake of our dear little grandchildren; to put an end to all this trouble. They are young and easily impressed, and it is not right that their hearts should be embittered in this manner; but leave them now in peace, and as we after death remember only the good which our friends have done, so may they, as well as myself, endeavor to look at the sunshine rather than the darkness with which our lives have been surrounded. That God may guide us in the future is the most sincere wish of your wife."

"The jury returned a verdict for the libellee; the libellant excepted; and the case is reported for the determination of the full court. If any of the above rulings are erroneous, there is to be a new trial; otherwise the libel is to be dismissed."

A. A. Ranney, for the libellant.

G. A. Somerby, for the libellee.

CHAPMAN, C. J. The libel alleges that the libellee "has been guilty of extreme cruelty towards her, (the libellant,) and particularly on the 23d day of September last inflicted upon her person blows, and then and there did divers other acts of extreme cruelty, to her great injury." In the ordinary language of pleading, this amounts to a specification of the infliction of blows, on a single occasion, under such circumstances and in such a manner as to constitute extreme cruelty. The parties went to trial before the jury upon this allegation and its denial; and the libellant was permitted to offer evidence of the infliction of blows on a single day, and of all the circumstances that occurred on that day, relating as well to the temper, language and manner of the libellee, as to the infliction of the blows. But evidence of previous similar, independent instances of ill treatment and misconduct on other occasions was properly excluded as an independent ground of divorce, because it was not pertinent to the issue which the libellant had chosen to offer by her allegations. The cause could not be tried upon allegations not made. It would not be in conformity with the rules of pleading, nor just to the libellee, who was entitled to have the matters relied upon set forth, at least by some general allegations, so that he could be prepared to meet them. If the allegations had been general, he might have moved for specifications, if necessary: but as the allegations were limited to a single specified act, he needed no further specifications, and was bound to meet merely that charge. As tending to show the *animus* and the hostile state of feeling on the part of the libellee, and as affecting his conduct in evidence on the particular day named, we think the judge had discretionary power to exclude it. Apparently the proof of previous similar ill treatment and misconduct, in instances not alleged might be very prejudicial to the

libellee, without giving him any opportunity to be prepared to meet it.

As the daughter Elizabeth had testified against the libellee, he had a right to prove that she testified under a bias, by proving what remarks she had made about him. *Day v. Stickney*, 14 Allen, 255. But proof that he had previously committed an assault and battery upon her would not tend to disprove the bias, and would merely introduce a collateral matter not pertinent to the issue. Such evidence was properly excluded.

As to what Ayling had said, the presiding judge had a right to know what the party proposed to prove, in order that he might judge of its pertinency; and such statement not being made, he properly excluded the evidence.

How far cross-examinations shall be extended into collateral matters depends so much upon the special circumstances of each case that a large discretion must be intrusted to the presiding judge. The cross-examination of the libellee must be like that of any other witness in this respect. The limitation of the cross-examination of the libellee in this case was of this character, as it related merely to collateral matters; and we cannot say it was erroneous.

The letter written by the libellant to the libellee after their separation, consisting, as it did, of her accusations against him, and of a proposition to agree on terms for a final separation, could not be evidence for her. It was inadmissible, upon the plainest principles of law.

The motion to amend was addressed to the discretion of the presiding judge, and his decision was not subject to exception.

The instructions to the jury were right. The question before them was, whether the libellee had inflicted blows upon the libellant, on a single occasion, which were such as to constitute extreme cruelty. The instruction that there must be personal violence, intentionally inflicted, and that it must be of such a character as to endanger the life, limb or health, or as to create a reasonable apprehension of such danger, was correct. The jury have found that there was no such violence.

Libel dismissed.

ISAAC SAMUELS vs. WILLIAM BORROWSCALE.

On the trial of a writ of entry, if the demandant, as part of his chain of title, puts in evidence an office copy of a deed of the premises, purporting to have been made from the tenant to a third person, the tenant may disprove his execution of such a deed by any evidence that would be competent had the demandants' proof been by the original instead of the copy.

Disseisin may be proved by evidence of open and exclusive possession, claiming title against all persons whomsoever, without proof of actual notice to the disseisee.

WRIT OF ENTRY, dated December 14, 1868, to recover land in Boston. Plea, *nul disseisin*.

At the trial in the superior court, before Lord, J., the demandant put in evidence an office copy, from the Suffolk registry, of a deed of the premises, dated January 19, 1861, purporting to have been executed and delivered by the tenant to John F. Augustus; and a mortgage deed of the premises, dated September 14, 1861, from Augustus to the demandant, to secure payment of a note for \$1000 in four months.

The tenant, in defence, was called as a witness, and asked by his counsel whether he had ever seen, signed or executed any such deed as that appearing from the office copy. The demandant objected to these interrogatories, contending that such inquiries could not be put to and answered by the witness, without first producing the original deed or properly accounting for its nonproduction; and the judge sustained the objection, and refused to allow the questions to be answered by the witness.

The tenant accordingly introduced evidence showing that Augustus was a prisoner in the Suffolk jail; and that two days before this trial he visited him in the jail for the purpose of finding and procuring this deed; and then proposed to prove by his own testimony that he inquired of Augustus, at this time, where the deed was, and what Augustus said in reply, but the judge, upon objection by the demandant, refused to permit him to do so. He then further testified that, after his visit to Augustus at the jail, he went to the house of Augustus, and with the wife of Augustus looked over and examined

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some papers shown to him as papers of Augustus, and was unable to find the deed.

"The tenant asked for and obtained a writ of *habeas corpus* by which Augustus was brought from the jai and put upon the stand as a witness; and his counsel asked Augustus if he had at any time seen a deed dated January 19, 1861, executed by the tenant to him; but the witness declined to answer the question, and, upon being asked why he so declined, replied, because the answer would tend to criminate himself. The tenant's counsel then put into the hands of the witness the office copy of the deed, and asked him when he last saw the original deed of that copy; and he replied that he did not know. The witness was asked where the original deed then was, and what he had done with it; and replied that he did not know, and then went on to say that all of his old papers, together with his clothing, were attached two years before that time, and sold by a certain constable to different parties, and whether this deed was among these papers he did not know, and that he had no papers at the present time but such as had accumulated since two years ago.

"The tenant's counsel then recalled the tenant as a witness, and again, after showing him the office copy of the deed, asked him whether he had ever seen, signed or executed the deed of which that was an office copy. The demandant again objected to the interrogatories, because the original deed was not produced and the nonproduction properly accounted for; and the judge sustained the objections of the demandant, and refused to allow the inquiries to be put to and answered by the witness, upon the ground that the testimony did not satisfy him, either that proper search had been made for the deed, or that the tenant could not produce it if he desired to do so.

"The tenant then testified that ever since 1860 he had lived in and occupied the premises as his own, claiming and using them as his own and not admitting the right or claim of any one else, paying the taxes upon the same; that he had never spoken with the demandant in his life, and that neither Augustus, nor the demandant, nor any other person, had, during that time, until the bringing of this action, interfered with his pos-

session, control of or claim to the estate. The counsel for the tenant thereupon asked the judge to instruct the jury that, if they believed the above testimony of the tenant, it showed that Augustus was disseised at the time of giving the mortgage to the demandant, and the mortgage deed given under such circumstances would be inoperative and void, and invalid to pass any title or estate in the premises to the demandant. But the judge refused so to rule, and did rule and instruct the jury that the office copy of the deed from the tenant to Augustus was evidence of the conveyance of the estate; that, if the tenant remained in possession afterwards, he was a tenant at sufferance to Augustus; and that there would be no evidence of a disseisin in this case, without proof, on the part of the tenant, that he gave notice to Augustus, before the mortgage was made, in some form, by act or word, that he was holding in defiance of, or repudiated the title of, Augustus."

The verdict was for the demandant, and the tenant alleged exceptions.

A. F. L. Norris, for the tenant.

T. H. Sweetser & F. W. Kittredge, for the demandant.

GRAY, J. The law is well settled in this Commonwealth, that a party relying on a deed made immediately to himself or the other party, or which is presumed to be in the custody of either, must produce the original deed, or lay a foundation in the usual manner for secondary evidence; but that of other deeds, acknowledged and recorded in accordance with the statutes, a certified copy from the registry is original evidence, instead of the deed itself, and of course dispenses with calling an attesting witness or other proof of execution. *Ward v. Fuller*, 15 Pick. 185. *Stetson v. Gulliver*, 2 Cush. 498. *Commonwealth v. Emery*, 2 Gray, 80. *Thacher v. Phinney*, 7 Allen, 146. See also *Brooks v. Marbury*, 11 Wheat. 78; *Dick v. Balch*, 8 Pet. 30. The deed from the tenant to Augustus, from whom the demandant derived his title, was not made to, or presumed to be in the custody of, either of the parties to this action. The demandant was therefore rightly permitted to prove it by an office copy.

But we are all of opinion that the learned judge who presided at the trial erred in refusing to allow the tenant to testify that he had never executed such a deed. The office copy of a deed in which neither party to the suit was grantee, and to the custody of which neither was entitled, was *prima facie* original evidence, of the same degree, though not perhaps of the same weight, as the deed itself, and was liable to be rebutted by any evidence which would have been admissible to disprove the execution of the original deed, if that had been produced. There was, to say the least, no more reason for requiring that the deed should be produced, or its nonproduction accounted for, by the tenant, who did not claim under the deed, and denied that he had ever executed such an instrument, than by the demandant, who asserted its genuineness and claimed title under it.

Upon the question of disseisin, also, the learned judge seems to us to have held the tenant to stricter proof than the law required. All that is necessary to constitute disseisin is actual, adverse and exclusive possession, so open and notorious that it may be presumed to have been known to the rightful owner. The testimony of the tenant would have warranted the jury in finding that at the time of the conveyance from Augustus to the demandant the tenant was in the open and exclusive possession of the land, claiming it as his own against all persons whomsoever. Special notice to the demandant, either by act or word, that the tenant held in defiance of or repudiated his title, was not necessary. If the tenant's possession was actual, exclusive, adverse, open and notorious, it was a disseisin, even if he did not know, (as his testimony tended to show that he did not,) that the demandant claimed any title in the premises. In *Poignard v. Smith*, 6 Pick. 172, 178, the disseisees were out of the Commonwealth and had no agent here; and it was argued that there was no disseisin, because they had no notice of any adverse claim; but the court overruled the objection, saying, "Acts of notoriety, such as building a fence round the land or erecting buildings upon it, are notice to all the world." See also *Parker v. Proprietors of Locks & Canals*, 3 Met. 100, 101

Dunbar v. Baker.

Miller v. Same, 5 Met. 33; *Cook v. Babcock*, 11 Cush. 206; *Bradstreet v. Huntington*, 5 Pet. 441, 445; *Ewing v. Burnet*, 11 Pet. 41.
Exceptions sustained.

CHARLES F. DUNBAR & others vs. CHARLES H. BAKER.

An order of the superior court that judgment should be entered for the plaintiff in an action as of the last day of the preceding term, in accordance with an order made by it at that term, cannot be revised by this court on the ground that, after the original order, but before the close of said term, the defendant petitioned to be adjudged a bankrupt, and filed a motion for the continuance of the case, if he failed to bring the motion to the notice of the court until after the end of the term.

CONTRACT. At October term 1869 of the superior court the defendant was defaulted, and, by consent of parties, the court ordered that judgment should be entered for the plaintiff at the end of the term. The term ended on December 18, but on December 16 the defendant filed in the clerk's office of the superior court the following writing: "And now before judgment, the defendant comes and suggests his bankruptcy, and alleges that proceedings therein are now pending against him, and moves that the case be continued to await said proceedings." No notice was given to the plaintiffs of the filing of this motion, and they did not know of it until after the close of the term. The matter of the motion was not brought to the attention of the court, and no order was passed by the court in the case subsequently to the order for judgment. The defendant filed his petition in bankruptcy on December 16. On December 20 he was adjudged a bankrupt, and the bankruptcy proceedings are still pending. The case was continued by the clerk without entering judgment; and at January term 1870 the plaintiffs filed a motion that the clerk be directed to complete the record by entering judgment for them as of the last day of October term 1869, *nunc pro tunc*. The superior court, to which the case was submitted on agreed facts in substance as above, allowed the motion, and the defendant appealed.

Cook v. Farrington.

B. E. Perry, for the defendant, was first called upon.

J. Lathrop, for the plaintiffs, was stopped by the court.

MORTON, J. The question presented in this case is a very narrow one. The defendant having been defaulted in the superior court at October term 1869, the court ordered that judgment for the plaintiffs should be entered at the end of the term. This order took effect on the last day of the term, and the plaintiffs were then entitled to judgment. The paper filed by the defendant in the clerk's office, not brought to the notice of the court and not acted on, could not operate to vacate the order of judgment, or to affect the duty of the clerk to enter the judgment of record. The order of the superior court at January term 1870, which is appealed from, was in substance an order directing its clerk to complete his record according to the original order of the court, and according to the facts of the case. It was not erroneous, and cannot be revised by this court. If the defendant has lost any rights, it is by his own laches in not properly presenting his motion for a continuance, and obtaining an adjudication thereon before judgment. *Judgment affirmed.*

EDWARD O. COOK vs. ISAAC H. FARRINGTON.

A mortgagee of personal property, who has proved his debt against the estate of the mortgagor in bankruptcy without disclosing his security, is not thereby estopped to claim the property against a subsequent mortgagee who has not proved his debt.

REPLEVIN of household furniture. Writ dated December 18 1868. At the trial in the superior court, before *Lord, J.*, the following facts appeared:

Charles H. Watriss, the owner of the furniture, mortgaged it in November 1866 to Joseph Willard, under whom the defendant justified; in December 1866 mortgaged it to the plaintiff, expressly subject to Willard's mortgage; and on February 28 1868, filed his petition in bankruptcy. On April 6, 1868, Willard proved his debt in full as a general creditor, setting forth that he held no security from the bankrupt. No assets were

ever received in the bankrupt's estate; only one other creditor, not the plaintiff, proved a claim; the bankrupt was discharged, and the estate closed; but the assignee never took any action with regard to the mortgaged property, and in June 1868 Willard took possession of it under his mortgage.

On these facts, the judge ruled that the action could not be maintained; and the plaintiff alleged exceptions.

C. C. Nutter & T. F. Nutter, for the plaintiff.

J. Willard, for the defendant.

WELLS, J. The plaintiff is second mortgagee, and Willard, the defendant's principal, is first mortgagee of the same personal property. Willard proved his debt against the estate of the mortgagor in bankruptcy, without reference to his mortgage. The plaintiff contends that this discharged Willard's mortgage, so that he cannot now set it up against the plaintiff, seeking to enforce his subsequent mortgage.

By § 20 of the bankrupt act, U. S. St. of 1867, c. 176, it is provided that a creditor, holding security upon property of a bankrupt, "may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt." The proof by Willard, without such release or conveyance, was contrary to the law; but it did not of itself operate to discharge the mortgage. It might prevent his setting up the mortgage against the assignee, claiming to hold the property as part of the assets of the estate. Equity might hold the creditor to do what he ought to have done, and subrogate the assignee to his rights in the security, if a release or discharge would not work the same advantage to the estate. But only the assignee can avail himself of the rights which those provisions of the bankrupt law are intended to secure. The plaintiff can derive no right or advantage therefrom.

Neither can the plaintiff set up those proceedings as an estoppel. There is a want of mutuality, as well as of privity. He has acquired no title from the assignee; he is not interested in the estate as a creditor having proved his debt in bankruptcy; he is in no way affected by the bankruptcy proceedings, either in his relations to the defendant or to the property.

Bornstein v. Lans.

There being no other objection to the validity of Willard's mortgage except the facts in regard to his proof of the debt in bankruptcy, the ruling of the superior court, that the plaintiff's action could not be maintained, was correct.

Exceptions overruled

DAVID J. BORNSTEIN vs. GARRETT A. LANS.

In an action for services in selling an estate for the defendant, it appeared that the defendant told the plaintiff that he would give him a certain sum if he would obtain a purchaser; that the plaintiff, who was not a broker, neither did nor said anything at the time to show that he accepted the offer, but within a few days told J. S. that the defendant wanted to sell, and took him to see, but did not find, the defendant; and that afterwards J. S. bought the estate, but the defendant did not know till after the sale that the plaintiff had done anything to aid it. *Held*, that there was evidence for the jury of a continuing offer, of an acceptance, and of a performance by the plaintiff of the contract thus formed.

CONTRACT to recover \$50 for selling an estate for the defendant. Trial in the superior court, before *Lord, J.*, who made a report of the case for the determination of this court, of which the material part was as follows:

"The defendant was owner and keeper of a bar-room which he was desirous of selling; the plaintiff was a salesman in a clothing store, and was in the habit of visiting the defendant's bar-room frequently to purchase liquors; and on one occasion, when several were present, the defendant said to the plaintiff, 'If you will obtain a purchaser for my place, I will give you \$50.' When the defendant made the offer, the plaintiff neither said nor did anything to show to the defendant that he accepted the offer, or would do anything to effect a sale. Within a few days after, the plaintiff told John Bower that the defendant wished to sell, and went with him to see the defendant, but failed to find him. Afterwards Bower found the defendant, and purchased the place for \$1200. The defendant did not know till after the sale that the plaintiff informed the purchaser that the defendant desired to sell, and the first information which he

had on the subject was after the sale, when the plaintiff called upon him to pay \$50 for finding a purchaser.

"Upon these facts, which were admitted by the parties, I ruled that the plaintiff, not being a broker, and not having in any manner signified his acceptance of the defendant's offer, and the defendant being wholly ignorant that he had done or attempted to do anything to aid in the sale till after the sale was completed, could not recover;" and the jury returned a verdict for the defendant.

C. Abbott, for the plaintiff.

D. F. Crane, for the defendant.

AMES, J. Upon the facts stated in the report, we think the plaintiff had a sufficient show of evidence to raise a question for the jury. It is true he was not a broker, and he did not in terms accept the defendant's offer, or say that he would attempt to do anything in aid of the proposed sale. That offer on the defendant's part was a mere proposition which he had a right to retract at any time before it had been accepted; but it must be taken, on the facts stated, and as it never was retracted, to have been a continuing offer, somewhat in the nature of an offer of a reward to be paid in a certain contingency. It was also not an absolute, but a conditional offer, and the plaintiff from the nature of the case was at liberty to judge whether he would undertake to fulfil the condition or not. It was a condition which he certainly was not required to fulfil upon the spot. It was an offer which necessarily implies the allowance of a reasonable time for the rendering of the service, and some degree of uncertainty whether the service will be rendered at all. Under the circumstances, the plaintiff could not be expected to promise absolutely to fulfil the condition. The question then would be, Can he show an acceptance of the offer by acts instead of by words? If he heard the offer, and acted upon it, and while it was yet open and unretracted fulfilled its condition, why did it not then become a good and valid contract, between him and the defendant, on a good and valid consideration? The evidence certainly tended to show that, after the offer was made, and in pursuance of it, he sought for and found a person

who was willing to buy; and that he went with that person to the defendant's place of business, for the purpose of putting the party who was inclined to buy in communication with the party who was inclined to sell. This attempt to introduce the two parties to each other was not successful on that day, as the defendant happened not to be at home; but afterwards, and there is nothing in the report to show that it was not the very next day, the intended interview did take place and resulted in a successful negotiation.

The case was evidently tried in the superior court upon the assumption that there was no valid contract between the parties, and that there was a mere proposition on the part of the defendant without any acceptance on the part of the plaintiff, so that their minds never met on the subject matter. But we think that an offer which is in its nature continuous and open for some period of time, and which is also conditional upon an event which may not immediately happen but must at all events be attended with some delay, becomes a valid contract on good consideration, if accepted in fact, and upon the fulfilment of the condition, within a reasonable time and before an actual retraction of the offer. In *Train v. Gold*, 5 Pick. 380, 384, the court (Wilde, J.,) say: "Nor is it necessary that the consideration should exist at the time of making the promise, for if the person to whom the promise is made should incur any loss, expense or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory. Thus if A. promises B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended; for until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but on the performance of the condition by the promisee, it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory." See also *Goward v. Waters*, 98 Mass. 596. The converse of the proposition is laid down in *Ball v. Newton*, 7

Costigan v. Lunt.

Cush. 599, in which case it was held that a written promise to pay certain fees is not binding and cannot be enforced in favor of a party who rendered the services without any knowledge of or reliance upon such promise.

On these grounds, it appears to us that the case was tried in the superior court upon an erroneous assumption, and was disposed of upon grounds that are not necessarily decisive of its merits.

Exceptions sustained.

EDWARD A. COSTIGAN vs. JACOB K. LUNT & another.

A contract by two persons with a boat-builder to pay for a boat to be built for them a certain sum, "each his one half," is several, not joint; but under the Gen. Sts. c. 129, § 4, they may both be sued thereon in one action, and separate judgments rendered.

CONTRACT against Jacob K. Lunt and John R. Cummings on the following agreement signed by the plaintiff and the defendants: "I, Edward A. Costigan, agree to build a pilot boat, as per model and specifications furnished, for John R. Cummings and Jacob K. Lunt. Jacob K. Lunt is to pay for one half said pilot boat. I will furnish good stock and good workmanship in said pilot boat, and finish her internal arrangements, and to be according to specifications and to the satisfaction of said John R. Cummings and Jacob K. Lunt; and I, Edward A. Costigan, of the first part, agree to furnish and finish complete the above pilot boat for the sum of \$5200; and we, John R. Cummings and Jacob K. Lunt, of the second part, agree to pay the said Costigan, of the first part, the sum of \$5200, each his one half, in instalments, as follows: We shall pay the said Costigan the sum of \$1500 when the above pilot boat shall be frame, and when she is planked up we will pay the sum of \$1500, when she is caulked we will pay the sum of \$500, and when she is launched and complete and delivered of all lien laws, we will pay the sum of \$1700, being the balance due on said contract." The declaration contained a count against both de

fendants for the amount of the first instalment, and also counts against each defendant for half of the first instalment.

At the trial in the superior court, before *Reed, J.*, the plaintiff's counsel, in opening the case to the jury, stated that he expected to prove "that the plaintiff, after the making of the contract declared upon, expended nearly \$3000 for materials and labor in the construction of the boat; had to the satisfaction of the defendants proceeded so far with it as to become entitled to the first instalment, as provided in the contract, and had various parts of the boat ready to go in, when sufficiently advanced to receive them; that the defendants declined to pay the instalment then due, and gave the plaintiff notice that they would not take the boat, and not to finish her for them or on their account; that the plaintiff, on the receipt of this notice, having no means to complete the boat, ceased to work upon her, and at the time of the commencement of this suit the frame and the other parts designed for the boat remained in the condition they were in when the plaintiff received the notice; that the boat was to be built for a special purpose, and such boats are not built and kept for sale; and that all the work done and materials prepared for the boat were of little or no value in the market or to the plaintiff."

Upon the facts as stated in this opening, the judge intimated an opinion that the defendants were not jointly liable on the contract, and that no action could be maintained against them jointly thereon; and, by the consent of the parties, he reported this question and the question of the measure of damages, if the plaintiff was entitled to recover anything upon these facts, for the determination of this court.

N. Morse, for the plaintiff.

D. E. Ware, for the defendants.

AMES, J. In opening the case to the jury the plaintiff offered to prove that he had, to the satisfaction of the defendants, proceeded so far in the construction of the boat under the contract as to become entitled to the first instalment; and that the defendants refused to pay that instalment. Upon this opening the presiding judge ruled that the defendants were not jointly

liable on the contract, and that no action could be maintained against them jointly thereon.

His contract was to build the boat for them, and when finished it was to belong to them, as tenants in common. But their promise to pay for it is several, and not joint. It is true that they express themselves in the plural number, and use the expression "we will pay," in reference to the several instalments that were to become payable at various stages, and upon the final completion, of the entire contract. But the terms of this promise must be considered as qualified by the stipulation that each of the defendants is to pay one half of the entire price, in instalments. Taking the whole instrument together, it must be interpreted as providing that each defendant shall pay one half of each instalment, as it becomes due, and no more. In a recent case in the court of exchequer, against two defendants jointly, upon a written promise substantially in these terms: "In consideration that you will sell to F." certain property "and will take F.'s acceptance for £400, and interest, payable at six months after the date, we undertake and guarantee that the said sum of £400 and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of £200 each," it was held that the defendants were severally liable in £200 each, but were not under any joint liability. *Fell v. Gerlin*, 7 Exch. 185. That was a stronger case for the plaintiff than the case at bar.

It is very plain that no judgment could be rendered against the two jointly for any instalment, without rendering them jointly and severally liable for the amount, and making each to that extent a surety for the other; and for that reason the plaintiff is not entitled to such a judgment. But it is expressly provided by the Gen. Sta. c. 129, § 4, that persons severally liable upon contracts in writing may all or any of them be joined in the same action. This statutory provision is more frequently applied to the case of bills of exchange and promissory notes, but is by no means confined to that class of cases. If the contract in this instance had been, as to the first instalment, to the effect that each defendant would pay seven hundred and fifty dollars, the

case would have been very plainly within the terms of the statute. The parties would have been severally liable on the same contract, and according to the statute it would have been proper to declare against both of them in a single count describing their several contracts; it being a case "when the same contract was made by each." The contract presented to us by the report is a promise by each to pay one half of the sum of fifteen hundred dollars, and is quite as clearly within the statute. Upon the facts stated by the plaintiff in his opening, therefore, there can be no doubt that he could lawfully join the defendants in the same action in a count properly describing their several contracts, and that it would be the duty of the court to enter judgment against them severally, according to their several contracts, and charging each of them with his half of the first instalment.

It is easy to see that under a contract so unskilfully drawn and so awkwardly expressed, many embarrassing questions may be raised, in the course of the trial. But it does not appear to us that the case, as reported by the presiding judge, has advanced so far as to raise any question other than that above considered. We do not think it expedient, or discreet, to pass in advance upon questions which may or may not be raised, and which if raised may be presented in some shape or mode which cannot be foreseen. To entitle himself to anything more than the first instalment, the plaintiff must prove either that he has fulfilled the contract so far as to entitle him to a further payment under it, or that he was prevented by them from such fulfilment. We are not prepared to say that mere refusal to pay the first instalment, and notice that they would not take the boat, would necessarily, under this contract, amount to a wrongful prevention of his completion of the work. That might depend upon circumstances not developed in this report.

Case to stand for trial.

JOHN E. CASSIDY vs. GEORGE HART.

A recognizance taken under the Gen. Sts. c. 124, § 10, after the passage of the St. of 1861, c. 112, is not invalid by reason of being conditioned that the debtor will deliver himself up for examination, "giving notice of the time and place thereof in the manner provided by the 124th chapter of the General Statutes," without referring to the St. of 1861.

CONTRACT against the surety in a recognizance entered into March 25, 1869, under the Gen. Sts. c. 124, § 10, by a debtor arrested on execution, that he would deliver himself up for examination. Trial in the superior court, before *Rockwell, J.*, and verdict for the plaintiff. The defendant alleged exceptions, the substance of which is stated in the opinion.

T. S. Dame, for the defendant.

L. W. Richardson, for the plaintiff.

MORTON, J. The only objection, urged by the defendant to the validity of the recognizance in this case, is, that the condition requires the debtor to give notice of the time and place of his examination "in the manner provided by the one hundred and twenty-fourth chapter of the General Statutes." He claims that by this condition a different duty was imposed upon him from that required by the laws in force when the recognizance was taken, and therefore that the recognizance is void as entered into under duress.

The thirteenth section of chapter 124 of the General Statutes provides that the notice shall be served "by giving to the plaintiff or creditor, his agent or attorney, an attested copy thereof, or by leaving such copy at the last and usual place of abode of the plaintiff or creditor, his agent or attorney, allowing not less than one hour before the time appointed for the examination, and time for travel at the rate of not less than one day for every twenty-four miles' travel."

The St. of 1861, c. 112, provides that whenever the notice "shall be served by leaving a copy thereof at the last and usual place of abode of the plaintiff or creditor, his agent or attorney, not less than twenty-four hours shall be allowed before the time appointed for the examination." The statute of 1861 does not

Abrahams v. Kidney.

affect the service of the notice when it is served personally upon the creditor, his agent or attorney. In the case at bar, the notice was served personally upon the plaintiff's attorney, who appeared at the time and place appointed for the examination. The service was according to law and gave the magistrate jurisdiction, and if the debtor had appeared and taken the oath for the relief of poor debtors, the creditor would have been bound by it. The recognizance was for the relief of the debtor, and was entered into by him voluntarily. He had the full advantage of it, and was discharged from arrest, although the magistrate may not have strictly followed all the directions of the statutes. The condition did not require of him more than he was by law bound to do. The direction as to giving notice is not essential to the validity of the recognizance. If it had been omitted altogether, it would not have avoided the recognizance. *Gilmore v. Edmunds*, 9 Allen, 379. The error in it, if any, was in favor of the debtor, and will not avoid the recognizance as given under duress, and thus defeat the rights of the creditor. *Whittier v. Way*, 6 Allen, 288. *Gilmore v. Edmunds*, 7 Allen, 360. *Exceptions overruled.*

FANNY ABRAHAMS vs. PATRICK KIDNEY.

A ruling that an action for seduction of the plaintiff's daughter cannot be maintained, unless the seduction was followed by pregnancy or sexual disease, is erroneous.

TORT for seducing the plaintiff's minor daughter, "whereby she became sick and unable to render service to the plaintiff." Trial in the superior court, before Lord, J., who allowed the following bill of exceptions:

"The declaration contained no allegation, and it was not contended, that the defendant's seduction of the plaintiff's daughter was followed by pregnancy or any sexual disease. Evidence was offered to show that, by reason of the seduction, and the general injury to the health of the daughter consequent thereon it became necessary for the plaintiff to send her to New York

for her health, and that, by so sending her, the plaintiff incurred great expense, together with the loss of her services. But the judge excluded this evidence, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant, which was done ; and the plaintiff alleged exceptions."

C. Cowley, for the plaintiff.

J. Nickerson, for the defendant.

MORTON, J. At the trial of this case, the plaintiff offered to show that, by reason of the seduction, and of the general injury to the health of the daughter consequent thereon, she lost the services of her said daughter. It having appeared that the defendant's seduction of the daughter was not followed by pregnancy or by any sexual disease, the presiding judge excluded the evidence, and ruled that the action could not be maintained. The bill of exceptions is very brief, and does not state the grounds upon which the ruling was based ; but we think that, upon a fair construction of it, the ruling was to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease. We are of opinion that this ruling was erroneous.

The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases, the master may maintain an action, because the loss of services

 Bassett v. Howorth.

is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 M. & W. 738. *Knight v. Wilcox*, 4 Kernan, 413.

In the case at bar, as the ruling appears to have been general, that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted.

Exceptions sustained.

EMMA A. BASSETT vs. WILLIAM L. HOWORTH.

In a bastardy process, a motion to dismiss the complaint, on the ground that the record shows that the defendant was arrested by a deputy of the constable of the Commonwealth upon a warrant directed to the sheriff or to the constable of a city, and does not show the special circumstances which would justify an arrest by a deputy of the constable of the Commonwealth, may be "for defect of form of process" only, and therefore no exception lies to its disallowance by the superior court unless the record shows some other ground for it.

BASTARDY PROCESS. In the superior court, the defendant moved to dismiss the complaint on the ground of insufficient service of the warrant, and in support of his motion produced the record, from which it appeared that the defendant was arrested by a deputy of the constable of the Commonwealth on a warrant issued from the municipal court of Boston and addressed to the sheriff of Suffolk, or his deputies, or to either of the constables of Boston; but *Devens, J.*, on inspection of the record, disallowed the motion, and the defendant alleged exceptions.

I. H. Wright, for the defendant.

No counsel appeared for the complainant.

AMES, J. The warrant upon which this defendant was arrested was served by an officer to whom it was not directed. It

was also served by an officer who has no legal authority to serve such warrants, even if it had been directed to him, except in a special and very limited class of cases; and even then it would be necessary, in order to render it strictly formal and regular, that it should appear on the face of the warrant that the special circumstances of the case were such that he could lawfully serve it. *Wood v. Ross*, 11 Mass. 271. *Brier v. Woodbury*, 1 Pick. 362. *Carlisle v. Weston*, 21 Pick. 535. Upon these grounds, a motion to dismiss the complaint was made in the superior court; and, that court having disallowed the motion, the case comes before us upon the defendant's exceptions.

Upon a motion to dismiss, the court can only look at such defects as are apparent of record. Defects not so apparent are more properly to be pleaded in abatement. It is true that the defects objected to in this case are so apparent, but it is very material to understand whether they are defects of form merely, or of substance, and upon this point the record gives no information. If the incapacity of the officer to serve this warrant consisted merely in the omission of the words appropriate to show that he was the proper officer to serve it, and that the case was one in which, with proper words of direction, he could lawfully have acted, the objection would be merely to the form of the process. It would present what may be described as a case of a good title, imperfectly stated; that is to say, a case in which he would have had a right to act, if the warrant had been made in conformity to the truth. There is a state of facts in which this warrant might have been directed to and served by a deputy state constable. If the defendant had been an alien passenger or a state pauper, he would have been a competent officer, under the St. of 1866, c. 292, § 2. We cannot know that such was not the true state of the facts in this case; and as a motion to dismiss is a matter of strict law, depending upon the record only, we do not feel at liberty to presume in favor of the motion either the existence or nonexistence of facts upon which the whole force of the motion depends, and upon which the record is silent. Upon a motion to dismiss "for defect of form of process, the decision of the superior court is

 Bancroft v. Bancroft.

final and without appeal. Gen. Sts. c. 115, § 7. There is nothing in the record before us to show that the defendant's objection in that court was not purely "for defect of form of process."
Exceptions overruled.



CLARA E. BANCROFT & others, executors, vs. SARAH H. BANCROFT & others.

A testator, in his will, gave a sum to his daughter absolutely, and another sum to trustees to pay the income to her for life, and on her death pay one quarter of the principal as she should by will appoint, and three quarters among her issue, if any, her surviving, as she should by will appoint; and directed that the bequests to her "or for her benefit, to be held in trust or otherwise, as aforesaid," should be preferred to other legacies. His estate was insufficient to pay both sums. *Held*, that they should abate *pro rata*.

BILL IN EQUITY by the executors of the will of Edward P. Bancroft, praying for instructions as to the payment and distribution of his estate in their hands. The case, as it appeared from the bill and answers, on which it was reserved by the chief justice for the determination of the full court, was as follows:

The testator, in his will, after making a bequest for the benefit of his wife, gave to his daughter the sum of \$50,000, "to have and to hold the same to her and her executors, administrators and assigns, to her and their use and behoof forever;" and also gave to his executors the sum of \$150,000, in trust to pay the income to his daughter during her life, free from the control of any husband, and upon her decease to pay three quarters of the principal among her children as she might by will direct, and one quarter to such persons as she should by will direct, and, if she died intestate, to divide it equally among her children; but if she died without leaving issue, then to pay one quarter as she should by will direct and three quarters to and among the testator's wife, and his brothers and sisters and their issue; and if, at his daughter's death, neither his wife nor his brothers nor sisters, nor any of their issue, should be living, then to pay the same to his daughter's heirs.

He then gave several legacies, and to his executors the residue of his estate "for the benefit of my said daughter, and upon the trusts hereinbefore created and set forth," and directed his executors, in case the estate should prove insufficient for the payment of all his legacies and bequests, to apply it first to the payment in full of the bequest to his wife; second, "to the payment in full of the bequests to my said daughter or for her benefit, to be held in trust or otherwise as aforesaid;" and third, to the payment to the other legatees of such proportion of their legacies as the residue, divided *pro rata*, should suffice for.

After payment of the testator's debts and the bequest to his wife, there remained in the plaintiffs' hands about \$70,000.

R. D. Smith, for the daughter.

H. W. Paine, for other legatees.

GRAY, J. The testator expressly directs that in case his estate shall prove insufficient to pay all his bequests and legacies, the bequests to and for the benefit of his daughter shall be postponed to the provisions for his wife, and be preferred to the legacies to other persons; and that those legacies shall share *pro rata* in the residue, if insufficient to pay them all. As between the absolute bequest of fifty thousand dollars to the daughter, and that of one hundred and fifty thousand dollars in trust to pay the income to her for life and the remainder to her issue and appointees, he neither directs nor indicates any preference, but includes in one class "the bequests to my said daughter or for her benefit, to be held in trust or otherwise as aforesaid." The residue of his estate, after fulfilling the provisions made for his wife, is insufficient to satisfy these two bequests. It must therefore be proportionally divided between them, one fourth paid to the daughter absolutely, and three fourths held in trust for her benefit according to the will. *Miller v. Huddleston*, 3 Macn. & Gord. 513, and Law Rep. 6 Eq. 65. *Coore v. Todd*, 7 De Gex, Macn. & Gord. 520.

Decree accordingly.

Brabrook v. Boston Five Cents Savings Bank.

ELIZA H. BRABROOK vs. BOSTON FIVE CENTS SAVINGS BANK.

A. B. deposited in a savings bank a sum in his own name, and a like sum in the name of "A. B., trustee for C. D.," who was his daughter; and always retained the pass-books in his own possession. In a suit by the daughter, after his death, against the bank, for the sum deposited by him as trustee for her, parol evidence was offered to show that both deposits were his money, and that one was made in his daughter's name because the amount of both exceeded the sum which the law allowed the bank to hold for a single depositor. *Held*, that the evidence was admissible, notwithstanding that a by-law of the bank, assented to by A. B., provided that any depositor might designate at the time of deposit for whose benefit the same was made, and should be bound by such condition; and that, upon the facts, the plaintiff could not recover.

CONTRACT for money had and received. The case was submitted to the judgment of the court on facts agreed as follows:

On July 10, 1860, David Knowles, the father of the plaintiff, then Eliza H. Knowles, but since married to George Brabrook, gave to John T. Dingley \$3000, to deposit with the defendants. "If it would be competent to prove by parol evidence, it is agreed that Dingley informed David Knowles that the by-laws of the defendants did not allow so large a deposit in the name of one person, but that he could deposit it in the names of his children for himself. Thereupon Dingley, by the direction of David Knowles, deposited the same, in equal proportions, in the name of David Knowles and his three children, one of whom was the plaintiff, took therefor four books from the defendants informed David Knowles of what he had done, and showed him the books, and he approved the same. The entry in the book of the defendants, and in the pass-books, was as follows: 'David Knowles, trustee for Eliza Knowles,' with the date and amount of deposit. The deposit remained with the defendants unchanged, except that sums from time to time were drawn on account of interest, by Dingley, by the direction of David Knowles, and paid to him, so as to keep the whole sum below \$1000, until the death of David Knowles. Dingley was appointed executor of the will of David Knowles, and as such claimed the funds in the defendants' hands as belonging to his estate. All four of the bank books remained in the possession

of Dingley until the death of his testator, and have since been in his possession as executor. The defendants' by-laws may be referred to if deemed material. If, upon these facts, the court should be of opinion that the plaintiff is entitled to said funds, judgment is to be entered for the plaintiff for the amount in the defendants' hands; otherwise the plaintiff is to become nonsuit."

The portions of the by-laws relied upon by the parties are quoted in the report of their arguments.

H. C. Hutchins, for the plaintiff. Unless the parol evidence is competent, the plaintiff is undoubtedly entitled to recover. *Farrelly v. Ladd*, 10 Allen, 127. *Hunnewell v. Lane*, 11 Met. 163. *Witzel v. Chapin*, 3 Bradf. 386. *Minchin v. Merrill*, 2 Edw. Ch. 333. Hill on Trustees, (4th Am. ed.) 482, 483. And the facts, if competent, do not affect her right to recover; the deposit was a perfected gift *inter vivos* to the plaintiff. Even if the gift was not consummated at the time of the deposit, it became so on the death of the depositor, the gift not then having been revoked. *Witzel v. Chapin*, 3 Bradf. 386. *Howard v. Windham County Savings Bank*, 40 Verm. 597. *Minchin v. Merrill*, 2 Edw. Ch. 333. *Astreen v. Flanagan*, 3 Edw. Ch. 279. *Ex parte Pye*, 18 Ves. 140, 148. *Gibson v. Minet*, 2 Bing. 7. The gift was at least valid as an executed trust, which the executor was bound to carry out in favor of the plaintiff. *Witzel v. Chapin*, 3 Bradf. 386. *Neilson v. Blighi*, 1 Johns. Cas. 209. *Cumberland v. Codrington*, 3 Johns. Ch. 229. *Collinson v. Pattrick*, 2 Keen, 123, 134. *Thorpe v. Owen*, 5 Beav. 224. Story Eq. §§ 972, 1045. The entries in the books of the defendants and in the pass-book of the depositor, and the defendants' by-laws, which are signed by the depositor, constitute a written contract between the depositor and the bank. Article 12 of the by-laws provides that "any depositor may designate, at the time of making the deposit, the period for which he is desirous that the same shall remain in the bank, and the person for whose benefit the same is made; and such depositor, and his legal representative, shall be bound by such conditions, by him voluntarily annexed to his deposit." *Farrelly v. Ladd*, 10 Allen, 127.

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Wall v. Provident Institution for Savings, 3 Allen, 96, and 6 Allen, 320. *Cummings v. Webster*, 43 Maine, 192, 197. The parol evidence is inadmissible; for it would annihilate, not explain, the written contract. *Timberlake v. Parish*, 5 Dana, 345, 351. *Nourse v. Finch*, 1 Ves. Jr. 344. *McLean v. Longlands*, 5 Ves. 71, 78. *Rachfield v. Careless*, 2 P. W. 158. *Hill on Trustees*, (4th Am. ed.) 196, 197. 1 Greenl. Ev. §§ 275-277. The Gen. Sts. c. 57, § 141, provide that a savings bank shall not hold at the same time more than \$1000 for one depositor, and the by-laws contain a provision conforming to this provision of the statute. Evidence is held inadmissible to show a deposit made to prevent an attachment by creditors, and is *a fortiori* inadmissible to defeat the general law of the Commonwealth. *Wall v. Provident Institution for Savings*, 3 Allen, 96. *White v. Franklin Bank*, 22 Pick. 181. *Wheeler v. Russell*, 17 Mass. 258, 262. *Mills v. Western Bank*, 10 Cush. 22.

J. P. Healy, for the defendants. The plaintiff's father showed no intention to part with the money. The by-laws provide that "no person shall receive any part of his principal or interest without producing the original book, that such payments may be entered therein." Even if the plaintiff has any interest, she cannot enforce it in this action.

WELLS, J. The plaintiff shows no right to hold the money deposited with the defendant by David Knowles. It was not money that belonged to her originally, as was the case in *Farrelly v. Ladd*, 10 Allen, 127, and *Hunnewell v. Lane*, 11 Met. 163, relied upon by the plaintiff's counsel. The money belonged to David Knowles in his own right. He was not in fact trustee for Eliza Knowles, otherwise than by the form of the deposit. He was under no previous obligation to pay the money to her, or to hold it for her benefit. The voucher for the deposit, without the production of which, according to the conditions under which it was made, it could not be withdrawn, was never delivered to her, but retained exclusively in his own hands. *Wall v. Provident Institution for Savings*, 3 Allen, 96. The whole transaction was his own voluntary act, to which she was in no way a party or privy. There was no declaration made to

her, or to be communicated to her, of any intention that the money should be hers. Even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title. Knowledge of the gift, on the part of the donee, at the time it is made, is not essential, it is true, in order that it may take effect. If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient. But there must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass. This principle is distinctly recognized in the case of *Minchin v. Merrill*, 2 Edw. Ch. 333, cited by the plaintiff's counsel. In that case, as well as in several others of those cited, there was a complete delivery of the subject of the gift to a third party, in whose hands it was charged with the trust, the donor having parted with the possession and control. In none of them is there a denial of the principle above stated. In *Howard v. Windham County Savings Bank*, 40 Verm. 597, the deposit was made directly to the credit of the intended donee, making it a completed gift. The deposit by Knowles was entered in his own name and to his own credit. The legal title, and right to draw money so deposited, remains with the depositor. There was no direction or authority for the bank to pay it to the plaintiff. The form of the deposit does not imply such an intent; nor any obligation or right, on the part of the bank, so to pay it over. The declaration of trust is evidence that Knowles, the depositor, held the fund in some manner for the benefit of the person named as *cestui que trust*. But it did not, of itself, transfer to her the possession, nor the right of possession; nor constitute a legal title in her. A deed, executed and put on record by the grantor, does not pass the title without some further act of delivery and acceptance. *Maynard v. Maynard*, 10 Mass. 456. *Samson v. Thornton*, 3 Met. 275. But if the grantor intend that the grantee shall receive it from the register, or if there be a previous agreement that the deed when made shall be so delivered at the registry, it will be effectual as

a delivery. *Shaw v. Hayward*, 7 Cush. 170. So if there be an actual trust, and an obligation to make the transfer for the security of that trust, the continued possession of the instrument by the person who executed it, being also its proper custodian for the *cestui que trust*, is consistent with an assignment completed by delivery; and a legal delivery to pass the title will be inferred from very slight evidence. *Moore v. Hazelton*, 9 Allen 102. But there must be delivery or some equivalent act with intent to pass the title. *Chase v. Breed*, 5 Gray, 440. When the instrument is in fulfilment of a legal obligation, the intent may be inferred from that fact. Perhaps the same would be true of a moral obligation, such as provision for wife or child. *Astreen v. Flanagan*, 3 Edw. Ch. 279. We presume the decision in *Witzel v. Chapin*, 3 Bradf. 386, cited by the plaintiff, was made upon some considerations of this nature. That decision recognizes that it is a question of intent. See also *Granfiac v. Arden*, 10 Johns. 293; *Goodrich v. Walker*, 1 Johns. Cas. 251. Assuming in this case that the deposit and declaration of trust was a sufficient act of delivery to pass the title, if such were the intent, we think the facts agreed show clearly that such was not the intent of the depositor. On the contrary, it would appear that it was the intention of Knowles to deposit the whole money as his own; and that the form of deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes, limiting the amount that could be received from any one depositor to one thousand dollars.

1. The plaintiff contends that the written declaration of trust is conclusive, and objects to the competency of evidence to prove the facts relied on in defence; first, because it violates the rule excluding parol evidence to contradict or vary the terms of a written instrument. But that is a rule which applies to suits upon the instrument and between the parties to it. 1 Greenl. Ev. § 279. The plaintiff is no party to the contract between David Knowles and the defendant. She could maintain no action upon it. If she can recover at all, it is because the money belongs to her, and the trust, being a mere naked trust for her benefit, is terminable at her pleasure. The contract of deposit is

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collateral to her title, which depends upon her relations with David Knowles. As to her and her claim, whether upon the bank or upon David Knowles, the contract is merely evidence by way of admission, subject to be controlled by any competent evidence as to the actual facts. In *McCluskey v. Provident Institution for Savings*, 103 Mass. 300, a deposit in the plaintiff's own name was controlled by proof that the money deposited belonged in fact to the estate of her deceased husband.

2. For similar reasons the plaintiff cannot set up, as an estoppel against the defendant or against David Knowles, the by-law of the bank providing that "any depositor may designate, at the time of making the deposit, the period for which he is desirous that the same shall remain in the bank, and the person for whose benefit the same is made; and such depositor, and his legal representative, shall be bound by such conditions, by him voluntarily annexed to his deposit." She is a stranger to that contract. She does not claim under it as his legal representative, but by a superior right, of which the contract is the evidence. There can be no estoppel where there is no mutuality or privity. 1 Greenl. Ev. §§ 189, 204, 211. *Merrifield v. Parritt*, 11 Cush. 590, 598. *Sprague v. Oakes*, 19 Pick. 455, 458. *Worcester v. Green*, 2 Pick. 425. *Braintree v. Hingham*, 17 Mass. 432. If, upon due presentation of the book, the money had been paid to her, this provision in the contract of deposit might have availed the bank as a defence against the depositor or his legal representatives. But it can have no force as an estoppel, except when so set up by the bank.

3. Neither can the plaintiff avail herself of the fact that the alleged purpose of David Knowles, in making the deposits in the form he did, was an evasion or violation of law. Whatever effect any illegality on the part of Knowles might have upon his right to recover against the bank, it cannot operate to confer any title or legal right upon the plaintiff. The effect of illegality is to create a disability to sue, or to derive any legal right from the transaction affected by it. The plaintiff's right to recover depends upon proof of an intent to make an absolute gift of this money to her. The defendant is not precluded from

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disproving that intent because the evidence by which it is to be disproved tends also to show an unlawful act or purpose in a transaction between the defendant and David Knowles.

We have not considered the technical question whether any action could be maintained between these parties, for money so deposited, because that question seemed to be waived by the submission upon agreed facts, providing for a judgment for the plaintiff if the court shall be of opinion that she "is entitled to said funds."

Upon the facts stated, we are of opinion that she is not so entitled; and, according to the agreement, the plaintiff is to become

Nonsuit.

WILLIAM H. H. ANDREWS & another vs. WILLIAM A. FRYE
& another.

One who has agreed with another to assume and pay a claim against him, but has neglected for two years to do so, may be sued by him on the agreement without a demand from him for the payment.

The refusal of a party to a suit, when testifying as a witness, to answer a material question, on the ground that it might criminate himself, is competent evidence against him.

On an issue between seller and purchaser of intoxicating liquors, whether the sale was in violation of a statute which forbids the sale of such liquors except by the manufacturer or a person having a license, and except to municipal officers, or for medical, mechanical or manufacturing purposes, or for sacramental uses, or made from fruit grown within the state, the refusal of the seller to testify whether he had a license, on the ground that his answer might criminate himself, and evidence that the liquors were part of his stock in trade as a druggist, and that the subject of the sale was the entire stock, will warrant a jury in finding that the sale was illegal.

CONTRACT on an agreement made by the defendants October 11, 1866, with the plaintiffs, to assume and pay certain demands against them. Writ dated September 4, 1868.

At the trial in the superior court, before *Putnam, J.*, the plaintiffs introduced evidence tending to show that among said demands was a promissory note against them, held by Pecker & Company; that the holders had frequently called on them, before this suit was begun, to pay the note; and that they had paid it on the day of the trial. The defendants introduced evidence tending to show that Pecker & Company never called upon them to pay the note, and that the plaintiffs paid it without

their knowledge; and they asked the judge to rule that the plaintiffs could not maintain the action without a demand on them before the service of the writ; but he ruled that no demand was necessary. Other questions raised in the case are stated in the opinion. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

N. Morse, for the defendants.

R. M. Morse, Jr., for the plaintiffs.

GRAY, J. The agreement of the defendants was absolute and unconditional, to assume and pay certain demands against the plaintiffs, one of which was the claim of Pecker & Company, which there was no evidence to prove illegal, and which the defendants had omitted for nearly two years to pay. No demand was necessary before suing them for this breach of their agreement.

The consideration of the agreement was a sale, in the state of Maine, of the plaintiffs' stock in trade as druggists, consisting of drugs and medicines and spirituous and intoxicating liquors. If any part of the consideration was liquors sold in violation of law, the agreement was wholly void. *Perkins v. Cummings*, 2 Gray, 258. *Hay v. Parker*, 55 Maine, 355. The burden of proving such illegality was doubtless, according to the well settled rule of evidence in this Commonwealth, upon the defendants. *Pratt v. Langdon*, 97 Mass. 100, and cases cited.

The laws of Maine, at the time of this transaction, declared all sales of spirituous and intoxicating liquors to be void, except by the manufacturer, by a city or town agent appointed by the mayor and aldermen or selectmen, or by the state commissioner appointed by the governor and council, and to municipal officers authorized to purchase, or for medical, mechanical or manufacturing purposes, or for sacramental uses, or made from fruit grown within the state. Sts. of Maine of 1858, c. 33; 1862, c. 130.

The defendants at the trial introduced evidence tending to show, as the plaintiffs admit, that the plaintiffs had not been appointed town agents. But this was not all. One of the plaintiffs, having offered himself as a witness in their behalf, was

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asked by the defendants on cross-examination whether the plaintiffs had a license to sell intoxicating liquors, and declined to answer the question upon the ground that it might have a tendency to criminate himself. This refusal to answer, like any other refusal to produce evidence in his own power, was competent evidence against him and his partner. A party offering himself as a witness in his own behalf stands differently in this respect from a third person brought into court to testify in a case in which he has no interest. The fact that the subject of the sale was the entire stock of the plaintiffs as druggists was also evidence which the jury might rightfully consider as tending to show that the sale was not made to municipal officers, or for any of the purposes permitted by the statutes, or by the plaintiffs as agents of the town or the state, and that the liquors were not all manufactured by themselves or from fruit grown within the state.

The ruling of the superior court, that the defendants had not offered sufficient evidence to prove that the sale was in violation of the laws of the state of Maine, was therefore erroneous, because it withdrew from the jury a matter which was proper for their consideration, and upon which they would have been warranted by law in finding that the defendants had sustained the burden resting upon them of proving that the sale was illegal.

Exceptions sustained.

GEORGE P. CARTER & others vs. CAMBRIDGE AND BROOKLINE
BRIDGE PROPRIETORS & others.

A statute empowering commissioners to assess on one county part of the expense of repairing a portion of a bridge which lies in another county is constitutional.

Commissioners empowered by statute to make and report to this court such orders as they may deem expedient for rebuilding a bridge, and to order that the expense thereof shall be paid and borne by certain counties or towns, any or all of them, as they may deem just, may order a town to rebuild the bridge, and two of the counties to pay to the town, in respect to its expenses in the rebuilding, certain gross sums, to be due and payable immediately on the acceptance of their report, without requiring the town to give security for the proper employment of said sums.

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PETITION by George P. Carter and others for the appointment of commissioners under the St. of 1869, c. 161, which provided that the Cambridge and Brookline Bridge should become a public highway upon the acceptance by this court of the report of commissioners to be appointed by it to assess the damages to any person or corporation by reason of laying out the highway, after giving due notice to the counties of Suffolk, Norfolk and Middlesex, the town of Brookline and the city of Cambridge; that such damages, and the expense of executing the statute, should be paid "to the parties entitled thereto, by the said counties, or by such of them, or by such cities or towns therein, as the said commissioners shall determine, taking into view the uses made of said bridge and the condition thereof;" and that the commissioners might make such orders as to them should seem expedient "for the future maintenance and rebuilding of said bridge and for operating the draw therein," and might "order that the expense thereof should be paid and borne by said counties, cities or towns, any or all of them, as to the said commissioners shall seem expedient and just, taking into view the uses made of said bridge and the condition thereof." Commissioners were appointed and made their report, in which they assessed \$7500 as the damages to be paid to the proprietors of the bridge, two thirds by the county of Middlesex and one third by the county of Norfolk, and awarded that Cambridge and Brookline should rebuild or repair the bridge so as to render the same reasonably safe and convenient for public travel, and forever after maintain the same, Cambridge to rebuild or repair and maintain the bridge north of the dividing line through the centre of the draw, and Brookline to rebuild or repair and maintain the bridge south of said line; and that "in respect to the expenses to be incurred by the town of Brookline in carrying out the above award and order, so as to render" the bridge "reasonably safe and convenient for public travel," there should be paid to the town \$5750, two thirds by the county of Middlesex, and one third by the county of Norfolk, to be "due and paid by them respectively to said town of Brookline on the acceptance of this report."

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The county of Middlesex objected to the acceptance of the report; and the case was reserved by the chief justice for the determination of the full court.

J. J. Storrow, for the petitioners.

D. H. Mason, for the county of Middlesex.

C. T. Russell, for the bridge proprietors.

CHAPMAN, C. J. Pursuant to the provisions of the St. of 1869, c. 161, which makes the Cambridge and Brookline Bridge a public highway, and apportions the expense of rebuilding and maintaining the same, the commissioners appointed by this court have made a report, to which the county of Middlesex objects. The city of Cambridge in the county of Middlesex, and the town of Brookline in the county of Norfolk, are required to rebuild the bridge and keep it in repair; the north half being assigned to Cambridge, and the south half to Brookline; the division line between them, which is also the division line of the counties, passing through the centre of the draw. The sum of \$5750 is ordered to be reimbursed to the inhabitants of Brookline, and of this sum two thirds is to be paid by the county of Middlesex and one third by the county of Norfolk. Of course the money is to reimburse them for rebuilding that part of the bridge which is situated in the county of Norfolk. It is objected that this requirement is illegal. It is not denied that the terms of the statute are broad enough to sanction the decision of the commissioners; but it is objected that the legislature has no power to provide that one county shall be compelled to contribute towards erecting or maintaining a bridge in another county. But a similar objection, in behalf of a town which was required to contribute towards the expense of erecting a bridge within the limits of another town, has been held to be invalid. *Commonwealth v. Newburyport*, 103 Mass. 129. And the same principle must apply to a county.

The general rule, that bridges and highways shall be maintained by the counties and towns within which they are situated, originated in the legislature; and the power that established it may repeal or modify it. As a general rule, it may be substantially convenient and equitable; and either convenience or

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justice may require that it shall not be inflexible. The discretionary power of the legislature in the distribution of public burdens of this character has been for a long time recognized by this court. *Norwich v. County Commissioners*, 13 Pick. 60. *Attorney General v. Cambridge*, 16 Gray, 247. *Hingham & Quincy Bridge & Turnpike Co. v. Norfolk*, 6 Allen, 353, 359. *Salem Turnpike & Chelsea Bridge Co. v. Essex*, 100 Mass. 282.

It is further objected that a specific sum is ordered to be paid by the county of Middlesex to the town of Brookline, while it does not appear what sum it will cost the town to rebuild its portion of the bridge, nor is any security required that the money shall be expended in the work. The sum is to become due on the acceptance of the report, and the bridge is not to be rebuilt till a later period. But the legal liability of the town to build the bridge is itself a security that it will be properly done. The exact expense of the work cannot be known until it is built, or at least contracted for; and an estimate of the commissioners was practically a convenient method of determining the matter. We think there can be no reasonable objection to their report.

Report accepted.

ATTORNEY GENERAL vs. TUDOR ICE COMPANY.

This court has no jurisdiction in equity of an information by the attorney general against a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely on the ground that they are not authorized by the act of incorporation and are therefore against public policy.

INFORMATION in equity by the attorney general, on behalf of the Commonwealth, and at the relation of Richard Price, to restrain the defendants from engaging in or carrying on any business other than the cutting, storing and selling of ice. Hearing, on a motion for an injunction, before the chief justice, who reported the case as follows:

"The company was organized in 1861, under the Gen. Sta. c. 61, for the purpose of cutting, storing and selling ice. Its

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capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice so far as was proper, and completing the cargo by purchasing and exporting kerosene oil tobacco, rosin and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed and tea. It has also erected buildings, and placed machinery in them, which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason. I report the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated."

S. Bartlett, for the Attorney General.

C. B. Goodrich & H. W. Paine, for the defendants.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a

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suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason." No case is therefore made, upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney General v. Utica Insurance Co.* 2 Johns. Ch. 371 Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the supreme court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.* 15 Johns. 358. Similar proceedings may be had at law in this Commonwealth in a proper case. *Goddard v. Smithett*, 3 Gray, 116, 122, 123. *Attorney General v. Salem*, 103 Mass. 138. *Boston & Providence Railroad Co. v. Midland Railroad Co.* 1 Gray, 340. Gen. Sts. c. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney general, at the relation of several freemen of the Weavers' Company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had op-

pressed the freemen, &c., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, &c., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto*; and as to the other parts, the plaintiffs had remedy by *mandamus*, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." *Attorney General v. Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were *Attorney General v. Norwich*, 16 Sim. 225, *Attorney General v. Guardians of Poor of Southampton*, 17 Sim. 6, and *Attorney General v. Andrews*, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord Westbury, in *Stockport District Waterworks v. Manchester*, 9 Jur. (N. S.) 266, said that he should "probably not hesitate" to act upon the information of the attorney general, was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from *Liverpool v. Chorley Water Works Co.* 2 De Gex, Macn. & Gord. 852, 860, and *Ware v. Regent's Canal Co.* 3 De Gex & Jones, 212, 228, were but *dicta* that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and

could only be checked on an application to the court by the attorney general.

The case of *Attorney General v. Great Northern Railway Co.* 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of *Attorney General v. Oxford, Worcester & Wolverhampton Railway Co.* 2 Weekly Rep. 330, was the case of the opening of a railway line in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case, in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is *Attorney General v. Great Northern Railway Co.* 1 Drewry & Smale, 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice Chancellor Wood, two years later, in *Hare v. London & Northwestern Railway Co.* 2 Johns. & Hem. 80, 111.

In *Attorney General v. Mid Kent Railway Co.* Law Rep. 3 Ch. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the attorney general might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney general, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7. *Attorney General v. Galway*, 1 Molloy, 95, 103. However that may be, by

our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate and complete remedy at law, as well in suits by the Commonwealth as in those brought by private persons. Gen. Sts. c. 113, § 2. *Commonwealth v. Smith*, 10 Allen, 448. *Clouston v. Shearer*, 99 Mass. 209, 211, and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the Commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, *post*, 555.

The only cases in which informations in equity in the name of the attorney general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. *District Attorney v. Lynn & Boston Railroad Co.* 16 Gray, 242. *Attorney General v. Cambridge*, lb. 247. *Attorney General v. Boston Wharf Co.* 12 Gray, 553. *Rowe v. Granite Bridge Co.* 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *County Attorney v. May*, 5 Cush. 336. *Jackson v. Phillips*, 14 Allen, 539, 579. *Attorney General v. Garrison*, 101 Mass. 223. Gen. Sts. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

Information dismissed.

DENN'S CRONAN *vs.* AMANDA C. COTTING.

In the provision of the bankrupt act of 1867, c. 176, § 33, excepting from the effect of a bankrupt's discharge debts created by him while acting in any fiduciary character, the phrase "fiduciary character" does not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it and apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, to pay over to the debtor a balance of the proceeds of the sale remaining after such satisfaction; but, it *seems*, implies a fiduciary relation existing previously to or independently of the particular transaction from which the excepted debt arises.

CONTRACT for money had and received; to recover the balance of the proceeds of accepted bills of exchange delivered by the plaintiff to the defendant with directions to collect them and apply to the payment of debts owing from him to the estate of her husband, of which she was administratrix, so much of their proceeds as should be necessary for that purpose. Trial, and verdict for the plaintiff, in the superior court, before *Brigham, J.*, who allowed exceptions which were argued and overruled in this court at March term 1868, as reported 99 Mass. 334.

After the argument of the exceptions, and before the judgment overruling them was entered in the superior court, the defendant filed her petition in bankruptcy, under the bankrupt act of 1867, c. 176, in the district court of the United States for this district; and thereupon, on her motion, the superior court ordered a continuance of the case to await the result of the bankruptcy proceedings. In those proceedings a discharge was granted to her in due course of law; which discharge she then pleaded in bar of judgment in this action.

The question whether this plea was valid was submitted to the superior court on facts agreed substantially as above stated, and ruled in favor of the defendant; and the plaintiff appealed.

J. G. Abbott & B. Dean, for the plaintiff. 1. The bankrupt act of 1867, c. 176, provides in § 33, that a discharge under the act shall not release the bankrupt from debts created while he was "acting in any fiduciary character." The question is, whether the defendant's debt to the plaintiff falls within this exception.

2. The defendant had no interest in the bills of exchange, except as trustee to appropriate the proceeds to pay the debt due to her intestate, and pay over the balance, if any, to the plaintiff. The relation between them was that of pledgor and pledgee. A pledgee is trustee of all the proceeds over and above the amount necessary to pay the debt for which the pledge is made; and his relation to those proceeds is to be governed by the principles of law regulating the relation of trustee and *cestui que trust*. *Stevens v. Bell*, 6 Mass. 339, 343. *Middlesex Bank v. Minot*, 4 Met. 325. See also Story on Bailments, §§ 310, 319; *Farnam v. Brooks*, 9 Pick. 212; *Hatch v. Hatch*, 9 Ves. 292; Jeremy Eq. 142, 143; *White v. Platt*, 5 Denio, 269; *Taylor v. Bates*, 5 Cowen, 376; *Rathbun v. Ingalls*, 7 Wend. 320; *Kingsland v. Spalding*, 3 Barb. Ch. 341; *Duguid v. Edwards*, 50 Barb. 288.

3. Such being the relation created between the parties, it follows that the debt sought to be recovered was created by the defendant while she was acting in a fiduciary character. The phraseology of the bankrupt act of 1841, c. 9, § 1, was as follows: All persons "owing debts, which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," shall be entitled to the benefit of the act. Under that statute this court, and the supreme court of the United States, held that a debt due from a factor for the proceeds of goods consigned was not within the exception, and so was discharged. *Hayman v. Pond*, 7 Met. 328. *Chapman v. Forsyth*, 2 How. 202. But the supreme court of the United States put their decision entirely upon the phraseology of the act. Such being the established construction of the statute of 1841, congress, in enacting the corresponding provision of the present statute, instead of enumerating particular cases of express trusts, provided generally that any debt created by the bankrupt while acting in any fiduciary character should not be discharged; and under this statute several of the district courts of the United States have decided that a debt created for the proceeds of goods consigned to a commission merchant is of a

fiduciary character within its meaning. *In re Seymour*, 1 Benedict, 348. *In re Kimball*, 2 Benedict, 554. *A fortiori*, a debt created for the balance of the proceeds of pledged property, after paying the debt for which it was pledged, is within the exception of the present statute.

R. M. Morse, Jr., & J. O. Teele, for the defendant.

WELLS, J. The provision of the bankrupt act of 1867, upon which the plaintiff relies, is "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged," &c. It is argued that the deposit of the securities made the defendant a trustee for the owner; first, to apply the proceeds, so far as required, to the payment of the debt due to the estate of which she was the administratrix; second, to return the balance, if any, to the depositor; and that this trust constituted a fiduciary relation, such as the statute contemplates. This would require an interpretation so broad that almost all pecuniary obligations, especially those implied by law, would be included in the exemption.

We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to or independently of the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase "while acting," &c., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust.

The debt, in this case, arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the nonpayment of the balance due to the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded that default.

It is due from the defendant personally, and not as administratrix. Towards the plaintiff she sustained no "fiduciary char-

acter," while acting in which this debt was created by her. It is simply a debt by contract, like any other which results from the rightful possession of money that belongs to another. We are of opinion, therefore, that this debt does not come within the meaning of the clause of the bankrupt act above quoted.

It is a question of construction of an act of congress, which can be finally settled only by the supreme court of the United States. That court have given a construction to the phrase "while acting in any fiduciary capacity," as it occurs in the bankrupt act of 1841, which would exclude the debt now in controversy from the class of fiduciary debts. *Chapman v. Forsyth*, 2 How. 202, 208. It is true that in the act of 1841 the phrase followed an enumeration of certain trusts of a marked character; and the association was regarded as an indication of the intent of congress in the use of that phrase. But, that intent having been ascertained and declared by a judicial construction of the act, the language thenceforth bore a legal significance, in accordance with that construction. When the same, or substantially the same language was subsequently used, for a similar purpose, in the bankrupt act of 1867, it is to be presumed that it was so used in view of the construction and legal import which had become attached to it by the interpretation of the proper constitutional tribunal.

The argument that the omission, in the act of 1867, of the specific trusts named in the act of 1841, by removing the reason, or one of the reasons for the construction given to the earlier act, indicates that "fiduciary character" was used in a different sense in the later act, does not strike us as entitled to much weight; notwithstanding the reasoning, and the consideration due to the judgment of so highly respectable a court as the district court of the United States for the southern district of New York, supported, as we understand it to be, by the affirmance of the circuit court for that circuit. On the contrary, it appears to us that the inference is quite as legitimate that congress omitted the enumeration of specific trusts for the very reason that the term "fiduciary capacity" had, by judicial construction, received a fixed definition; and with intent that the phrase

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should carry that definition into the new act. The specific enumeration was omitted because all were included in the general expression, "fiduciary." The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent, having been ascertained, has been affixed to the general term, and become legal construction. *Commonwealth v. Hartnett*, 3 Gray, 450. *Tucker v. Ozley*, 5 Cranch, 34, 42. If congress had intended to adopt a different test of fiduciary debts, we may presume that the intent to change the previous judicial construction would have been indicated by some distinct provision to that end, rather than left to inference from the mere omission of associate words, which had ceased to be of any importance as affecting the scope of the provision. Such omission could be expected to have no effect other than, at most, to render this whole branch of the provision undefined, and without means of definition otherwise than by a new judicial construction. We cannot suppose that congress directed its legislation so vaguely.

Our conclusion is, that this provision of the bankrupt act of 1867 was framed in view of, and with the intent to adopt, the construction which the supreme court of the United States had put upon the similar clause in the bankrupt act of 1841. We adhere to that construction as applicable to the act of 1867 until the same court shall declare otherwise. The result is, that the judgment of the superior court in favor of the defendant must be

Affirmed.

CHARLES HOWARD & others vs. SILAS E. CHASE.

A, having given a mortgage of goods to B. which provided that if A. should attempt to sell them B. might take immediate possession, made, and delivered simultaneously, three mortgages of them, to C., D. and E. severally, each containing a clause that "this mortgage is of the same date, given at the same time, and to be recorded with" the two others, "all of which are alike in time, and neither is to have precedence of the other, but to be alike security to each," and each expressed to be subject to B.'s mortgage. *Held*,

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1. that C., D. and E. took title under these mortgages as tenants in common, and might join in one action for a conversion of the goods; 2. that the title which they took was in the right of A. to redeem the goods from B.'s mortgage, and hence they were estopped by the Gen. Sts. c. 151, § 1, to contest its validity on the ground of an omission to record it; and 3. that the execution of their mortgages gave B. a right to take possession of the goods, and to maintain possession against them in the absence of any payment or tender of the amount due on his mortgage.

TORT by Charles Howard, William Leavitt and Jacob Gross, for the conversion of the tools and fixtures of a machine shop.

At the trial in the superior court, before *Lord, J.*, the plaintiffs claimed title to the property under three mortgages thereof made to them severally by the firm of Thomas Leavitt & Company, one of the partners in which lived in Malden; and the defendant justified, under a prior mortgage of the property to himself from that firm, his alleged acts of conversion of it, and his refusal to comply with a demand of the plaintiffs for its surrender to them. The other material facts are stated in the opinion.

With the consent of the parties, the judge withdrew the case from the jury and reported it for the determination of these questions: 1. Whether the plaintiffs could thus unite in one action. 2. Whether their mortgages had precedence of the defendant's mortgage. 3. If not, then whether the action could proceed without a tender to the defendant of the amount due on his mortgage. 4. Whether it was material that there should have been a breach of the condition of the defendant's mortgage. If the court "should be of opinion that the plaintiffs are entitled to maintain the action, then the case is to be remitted to the superior court to determine the validity of the plaintiffs' mortgages, and the value of the property demanded from the defendant, or of such part thereof as is not covered by the defendant's mortgage; if the mortgage of the defendant should have priority over those of the plaintiffs; and if the question of there being an existing breach of condition of mortgage at the time of the defendant's foreclosure of his mortgage is found to be material, then that the jury may decide that question also."

G. H. Gordon, for the plaintiffs.

S. C. Darling, for the defendant.

MORTON, J. This case comes before us upon a report under the St. of 1869, c. 438. We can consider only the questions of law raised in the report.

1. The first question is, whether the plaintiffs can unite in this action. The three mortgages to the plaintiffs are of the same date, were delivered simultaneously, and each contains the provision that "this mortgage is of the same date, given at the same time, and to be recorded with" the two other mortgages, "all of which are alike in time, and neither is to have precedence of the other, but to be alike security to each." We cannot doubt that the rights of the mortgagees are the same as if they had been made parties to one mortgage, to secure to each his separate debt, and that the three mortgages are to be treated as substantially one conveyance. This being so, the plaintiffs were tenants in common of the property conveyed by the mortgages. *Hubby v. Hubby*, 5 Cush. 516. *Burnett v. Pratt*, 22 Pick. 556. As such tenants in common, they may join in an action of tort for the conversion of the property. *Phillips v. Cummings*, 11 Cush. 469. *Gilmore v. Wilbur*, 12 Pick. 120. *Sherman v. Fall River Iron Works Co.* 5 Allen, 213.

2. The second question is, whether the mortgages of the plaintiffs have precedence over the previous mortgage given to Chase, the defendant. The plaintiffs claim that, as the mortgage to Chase was not, at the date of their mortgages, recorded in Malden, where one of the mortgagors resided, it is invalid as to them. This would be true, if the plaintiffs had taken a conveyance of the property itself, although they had notice of the prior unrecorded mortgage to Chase. *Bingham v. Jordan*, 1 Allen 373. *Travis v. Bishop*, 13 Met. 304. But the mortgages to the plaintiffs, reasonably construed, are conveyances to them, not of the property, but merely of the right which the mortgagors had to redeem it from the Chase mortgage. Each of the mortgages contains the provision that the property is "subject to a mortgage to Silas E. Chase for about \$10,000;" and it is admitted that the parties understood the mortgage, referred to in this clause, to be the same mortgage under which the defendant claims in this action. The Chase mortgage, though not

duly recorded, was valid against the mortgagors. They could not, without a fraud upon him, convey anything more than the equity of redemption. It seems to us clear that by the mortgages to the plaintiffs the mortgagors did not intend to convey, and that the plaintiffs did not understand that they were purchasing, the property itself, but merely the right to redeem. The legal effect of the conveyances is the same as if they had been, in terms, of the right of the mortgagors to redeem the Chase mortgage. Such construction carries out the clear intentions of the parties. This being so, the plaintiffs take no greater rights than the mortgagors had, and therefore cannot deny the validity of the Chase mortgage. They stand in the place of the mortgagors, having the same rights, and thus come within the exception of the statute which provides that unrecorded mortgages "shall not be valid against any person other than the parties thereto." Gen. Sts. c. 151, § 1. *Tuite v. Stevens*, 98 Mass. 305. *Green v. Kemp*, 13 Mass. 515. We are of opinion, therefore, that the mortgages to the plaintiffs do not take precedence of the mortgage to the defendant.

3. The third question is, whether the plaintiffs can maintain this action, having made no tender to Chase of the amount due on his mortgage. It is clear that the plaintiffs cannot maintain this action for the conversion of the property included in the Chase mortgage. The mortgage to Chase provides that, if the mortgagors shall attempt to sell the property, or any part thereof, or remove any part thereof, without the written assent of the mortgagee, he may take immediate possession of the property. Under this provision, the sale to the plaintiffs gave the defendant the right to take possession; and it follows that the plaintiffs had no right of possession which would enable them to maintain this action without a payment or tender of the amount due the defendant. But the plaintiffs claim that the defendant took possession of certain goods included in their mortgages, but which were not included in his mortgage. If this be so, his taking of such goods was unlawful, and they can maintain this action to recover the value thereof

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4. As the defendant was rightfully in possession of the mortgaged property, as stated above, it is immaterial whether there was any other breach of the condition of his mortgage.

According to the terms of the report, the case must be tried in the superior court, to determine the validity of the plaintiffs' mortgages, and the value of the property, if any, taken by the defendant, which was not covered by his mortgage.

Case to stand for trial.

RICHMOND LINDSAY & others vs. AMOS F. CHASE.

If the payee of a promissory note indorses it in blank, and delivers it, before maturity, as collateral security, to his creditor, who transfers it, overdue, to a third person, the latter, while the debt which it was pledged to secure remains unpaid, may maintain an action on the note against the maker.

CONTRACT, by Richmond Lindsay, William H. Young and Henry P. Rich, partners under the firm of Lindsay, Young & Company, on a promissory note made by the defendant March 18, 1868, payable in six months to the order of Henry E. Carlton, and by him indorsed in blank. Writ dated September 30, 1868.

At the trial in the superior court, before *Lord, J.*, the making of the note by the defendant was proved; and it appeared that on May 30, 1868, Carlton indorsed it in blank to the firm of Kimball, Lindsay & Company, (of which the plaintiff Lindsay was a member,) as collateral security for a debt of Carlton to that firm; that it matured in the hands of Kimball, Lindsay & Company, without the debt of Carlton to them being paid; that on the day next after the note matured the firm of Kimball, Lindsay & Company was dissolved, and Lindsay, with his co-plaintiffs, formed the new firm of Lindsay, Young & Company, "to which new firm the note passed;" and that the debt of Carlton, which the note was pledged to secure, remained unpaid.

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The judge refused a request of the defendant for a ruling that the evidence would not sustain the action, and directed a verdict for the plaintiffs. The defendant alleged exceptions.

N. C. Berry, for the defendant.

S. J. Thomas, for the plaintiffs.

BY THE COURT. Carlton, the payee of the note in suit, indorsed it in blank and delivered it to Kimball, Lindsay & Company. They could then maintain an action against the defendant, as indorsees. When they dissolved, and Lindsay, with the other coplaintiffs, formed a new firm and took the note, they became the indorsees, they being the owners and holders, and the indorsement being still in blank. The instructions were correct.

Exceptions overruled.

CHARLES L. THAYER & another vs. DANIEL A. DWIGHT
& others.

A pledgee with power to sell the goods and apply the proceeds on the debt does not forfeit his lien by employing the pledgor as agent to make the sale, allowing him to contract for it in his own name, and delivering the goods on his order to the purchaser.

CONTRACT by the assignees of the bankrupt estate of Jenkins, Brother & Chipman, for a balance of the price of cotton sold to the defendants. At the trial in the superior court, before *Rockwell, J.*, the facts appeared as follows:

Before December 7, 1868, the firm of Jenkins, Brother & Chipman pledged to Charles Hulbert, in several lots, 155 bales of cotton as collateral security for money which he lent to them to the amount of more than \$17,088.14. All these contracts of pledge were expressed in writings of the same purport with the following, which was the contract in reference to 100 of the 155 bales:

"Boston, December 2, 1868. Mr. Charles Hulbert: Sir, for value received, you are hereby authorized and empowered to hold the following described merchandise, now on storage in the Union Wharf Warehouses, to wit, One Hundred Bales of

Cotton | Marks, various | as security for the payment of the following described promissory note, by whomsoever held, to wit, | Promisor, Jenkins, Brother & Chipman, | Order of Ourselves, | Date, Dec. 1, 1868, | Time, 2 months, | Amount, \$10,000, | and in trust, and with full power to sell the said merchandise, or any part thereof, without notice, at public auction or private sale, altogether or in parcels, and at such time or times as you may see fit, on or after the nonpayment at maturity of the said note, and to receive the proceeds of such sales and apply the same, 1st, to the payment of the expenses of the sales; 2d, to the payment of charges on the merchandise for storage or otherwise; 3d, to the payment of the said note to the holder or holders thereof, with interest; 4th, to pay over the surplus, if any, to ourselves or our order.

“Jenkins, Brother & Chipman.”

Hulbert was a warehouseman, and had often received from Jenkins, Brother & Chipman cotton in pledge, and occasionally delivered to them, on orders similar to those hereinafter mentioned, lots of the pledged cotton to enable them to fill orders for the purchase of cotton, permitting them to substitute other cotton instead, sometimes after a short interval; and he received and kept in his warehouse these 155 bales, until he delivered them to the defendants in the following manner.

On said December 7 Jenkins called on Hulbert and said that he (Jenkins) could sell the 155 bales to the defendants for cash; that the firm had no other cotton to substitute; and that Hulbert might bill them to the defendants, or the firm would do so and bring to Hulbert the proceeds of the sale. Hulbert replied that the firm might bill them in its own name, as a matter of courtesy, on condition that Jenkins would collect the price and pay it over towards extinguishment of the debt for which the cotton was pledged; to all which Jenkins assented. Later in the same day Jenkins, Brother & Chipman negotiated through brokers a sale of the 155 bales to the defendants for \$17,088.14, and Jenkins gave Hulbert two orders, signed by the firm, the first for the delivery of 54 bales, and the second of 101 bales, to the defendants, on which orders Hulbert delivered, and the

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defendants received, the cotton, that day and the next. These orders were each entitled "Delivery Order for the Union Wharf Warehouse," requested "Mr. Charles Hulbert" (without other description of his capacity) to "please deliver" to the defendants the number of bales of cotton named in each, specified the marks and numbers of the bales, and were stamped by Hulbert with his warehouse stamp before he made the deliveries under them. Jenkins gave the defendants a bill of the cotton in the name of his firm; and on December 8 the defendants, after receiving the cotton, gave him, in part payment of the price, their check on a bank for \$15,000 payable to the order of the firm, which check he immediately indorsed with the firm name, and delivered to Hulbert. In all these transactions, neither the brokers who negotiated the sale, nor the defendants, knew, nor was it disclosed to them, that any person other than the firm had any interest in or claim on the cotton.

The firm stopped payment on December 8, after the indorsement and delivery of the check by Jenkins to Hulbert. Hulbert first learned of their failure on December 9; and on December 10 he gave notice to the defendants "that he held said cotton in pledge," and demanded of them, in writing, payment to himself of the balance of \$2088.14 of the price of it, stating in the demand that this balance belonged to him, the cotton sold being held by him as collateral security. The defendants paid Hulbert \$2088.14 on February 6, 1869, taking from him a bond of indemnity; and it is this amount which was the subject of this action. Jenkins, Brother & Chipman filed their petition in bankruptcy December 26, 1868; and the plaintiffs were appointed their assignees in bankruptcy January 19, 1869, and shortly after their appointment, and before February 6, made demand on the defendants for the payment of the amount to themselves. In the schedules which the firm filed on December 26, 1868, with their petition in bankruptcy, it was stated that Hulbert held as security for their debt to him a claim against the defendants for \$2088.14 as a balance due on the price of cotton sold and delivered to the defendants which Hulbert had held for his security.

The judge ruled that these facts would not sustain the action, and directed a verdict for the defendants. The plaintiffs alleged exceptions.

R. D. Smith, for the plaintiffs. To constitute a valid pledge, possession must be in the pledgee, and when it is relinquished all his rights are gone. *Kimball v. Hildreth*, 8 Allen, 167, 168. Story on Bailments, § 287. This pledgee parted with the cotton by a redelivery or surrender upon an order from the pledgor, (making thereby the only delivery a warehouseman ever makes,) and relinquished his possession, trusting to the pledgor's word that he would bring him the proceeds of a sale. If he could let the cotton pass to the pledgor's appointee on this promise, he might have left it at the pledgor's shop, to be sold on his account and the proceeds transmitted to him as received. *Boddenhammer v. Newsom*, 5 Jones (No. Ca.) 107.

J. D. Ball, for the defendants, was not called upon.

WELLS, J. The facts reported do not show a waiver of his lien by Hulbert; nor such an abandonment of possession as would discharge or destroy the lien. By the terms of the pledge, he was authorized to make a sale of the property, and apply the proceeds to the payment of his debt. He could do this through agents, as well as personally. There was nothing in the nature of the transactions, or the relations of the parties, to prevent his employing the debtors themselves as such agents. By allowing them to contract in their own names he took the usual risks of such an authority; and if the purchasers had paid the agents in full, he could not have reclaimed the goods nor recovered the price, but would have been compelled to look only to his agents for the proceeds. He also retained the rights of a principal; and, by notifying the purchaser of those rights, became entitled to receive the unpaid purchase money in preference to his agents.

We do not understand that a pledgee loses his lien by permitting the pledgor to have possession or control of the property for a special and limited purpose, consistent with the enforcement of the lien, and not for his own use merely. *Walker v. Staples*, 5 Allen, 34. The general owner may be the depositary

of his own pledgee. Story on Bailments, §§ 58, 230. The formal possession of the depository or agent is the legal possession of the depositor or principal.

The plaintiffs rely mainly upon the case of *Kimball v. Hil-dreth*, 8 Allen, 167. The general language of the opinion in that case requires to be understood with some qualification, as suggested in the previous case of *Walker v. Staples* cited in its support. But the point decided does not conflict with the position of the defendants here. The judgment could not determine the rights of the pledgee, who was not a party, as against his pledgor, under the several contracts between them. It may be questioned whether anything was decided except that the obligations of the defendant, as depository or borrower, precluded him from setting the possessory claim of a pledgee, who was a stranger to the bailment out of which the suit arose, against his depositor or lender, who was also the general owner. Story on Bailments, §§ 110, 266. Edwards on Bailments, 83, 87. For the purposes of that suit, and as affecting that contract of bailment, the previous pledge was held to be ineffectual by reason of the temporary surrender of possession to the general owner, by whom it was made. In that case the property had been redelivered to the pledgor, apparently for his own purposes and use. At least, we think the court must have so understood or assumed the fact to be, from the answer of the defendant. The loan of the property to the defendant was not a contract in which the pledgee could intervene as principal, on the ground that the plaintiff was his agent in making it. In both these particulars the present case differs from that. Hulbert has never redelivered the property to the pledgers, nor relinquished to them his possession, except for the single purpose of the sale, which was contemplated by the contract of pledge. Having asserted his rights as principal in that transaction, received the price, and discharged the defendants from their liability on account of their purchase, they cannot thereafter be held to pay the same again to those who were his agents in making the sale. The verdict was therefore rightly ordered for the defendants.

Exceptions overruled.

ADDISON Q. FISHER vs. BENJAMIN BROWN & others.

A broker who buys stock on an order from another broker, knowing or having reason to know that this broker is acting as agent only, and the purchase is in fact made for an unnamed principal, has no right, in consequence of the omission to name the principal, to presume that he has authorized the agent to pledge the stock for his own debt; and cannot hold the stock by virtue of such a pledge unauthorized or unratified by the principal.

A, holding stock of B. as collateral security for a debt of B. to him, sold the stock without authority and appropriated the proceeds to his own use. B. then demanded the stock, and offered to pay his debt, but did not tender any money. A., without objecting that money was not tendered, refused the demand, on the pretence that he had a right to hold the stock in pledge for the debt of a third person. *Held*, that B. might recover from A. the market value of the stock on the day of the demand, with interest, less the amount of his debt, without any further demand or tender.

CONTRACT for the value of 250 shares of stock in the Boston Water Power Company, alleged to have been bought by the defendants, who were brokers in Boston, for the plaintiff, who was an inhabitant of Providence in Rhode Island, and who paid the defendants for the shares, but to whom they refused to deliver them on demand.

At the trial, before *Gray, J.*, without a jury, the plaintiff introduced evidence tending to show that on July 26, 1866, he employed Henry C. Whittaker, a broker in Providence, to procure the purchase of 500 shares of the stock for him, and Whittaker the same day gave the defendants by telegraph and letter an order to make the purchase; that the defendants bought 200 shares for cash, and 50 shares on a ten days' buyer's option, and on July 26 and August 6 respectively drew on Whittaker for the cost of them, which Whittaker paid (the plaintiff reimbursing it) and left the stock in their hands; that the other 250 shares were bought by the defendants on a thirty days' buyer's option; that of these, before the end of the thirty days, on orders received through Whittaker, they called in and paid for 150 shares, a certificate for 50 of which they sent to Whittaker (the plaintiff having reimbursed their cost) and sold 100 at a loss of \$661; that three days after maturity of the option on the other 100 shares the defendants took and paid for them, and after-

wards tendered them to Whittaker, who declined the tender, he having notified the defendants, before they took them, that his principal was unwilling to accept them by reason of their non-delivery within the term of the option; and that on September 26 the plaintiff came to Boston and made demand on the defendants for the 250 shares which were paid for on July 26 and August 6, and offered to pay the loss on the 100 shares sold, but the defendants refused to deliver the 250 shares to him, denied any knowledge of him in the transaction, and claimed a right to hold them as security for sums owing to themselves from Whittaker on account of purchases of other stocks. The other material facts appear in the opinion.

The defendants offered to show the state of their account with Whittaker on September 26; that he was then greatly in debt to them on account of these other purchases; and that they made them relying on the 250 shares of Water Power Company stock for security. But the judge excluded the evidence; and ruled and found that the plaintiff was entitled to recover the market value of the shares on September 26, the date of his demand for them, with interest from that date, deducting the loss on the 100 shares sold; and reported the case to the full court, to be sent to an assessor to fix damages, if the ruling was correct; otherwise, a new trial to be granted.

H. C. Hutchins, for the defendants.

G. O. Shattuck & W. A. Munroe, for the plaintiff.

COLT, J. The plaintiff employed a broker in Providence to order the purchase for him of certain shares of stock in Boston, part to be bought for cash, and part on time at the buyer's option. The order was transmitted to the defendants by letter, which, though it contained no information that the purchase was for the plaintiff by name, yet plainly disclosed that the broker in Providence was acting only as agent, and that the purchase was to be made for the account of a third person. The defendants were therein told that another order might be given on the next day, "if the parties so decided;" and that the cash stock then ordered would probably be left in their hands "as margin for our buyer." The stock was in fact left in the defend-

ants' hands according to this suggestion. Trial by jury was waived; and the court must have found, as matter of fact, that the defendants knew, or had the means of knowing, that their correspondent was acting only as agent, and that the stock belonged to his principal. Under such a state of facts, the defendants cannot hold the stock, or its proceeds, to secure the payment of a balance due them from the Providence broker.

The defendants rely upon the familiar doctrine which protects a party in transactions had in good faith with one who is acting in his own name, but who it afterwards appears was in fact the agent of an undisclosed principal. In such case, it is said, when sued, he is to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been in fact the real contracting party. But this rule is not applicable to the facts of this case. Here there was an unnamed, not an undisclosed, principal, in the sense of the rule. The defendants knew, or had reason to know, that this stock, when bought, belonged to another party, and they had no reason to suppose that he was willing to have it used to pay the debts of his agent and broker. They could not, in good faith, so apply it. And it was wholly immaterial that they were not informed who the real owner was. It was subject to a trust in their hands, upon these facts.

The case of *Shaw v. Spencer*, 100 Mass. 382, is in point. It was there held, that, if a certificate of stock issued in the name of "A. B., trustee," is by him pledged to secure his own debt, the pledgee is by the terms of the certificate put upon his inquiry, and *prima facie* there is no right to pledge it. It was said that the effect of the word "trustee," in the certificate, was the same as if it had been "A. B., trustee for C. D.:" "It means trustee for some one whose name is undisclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known." See also *Bank of Metropolis v. New England Bank*, 6 How. 212; *Brandao v. Barnett*, 1 M. & G. 908; 6 M. & G. 630; 12 Cl. & Fin. 78; *Fish v. Kempton*, 7 C. B. 687.

Martin v. Adams.

The evidence offered by the defendants was rightly rejected as immaterial in this view of the case.

The court also rightly ruled that the plaintiff was entitled to recover the market value of the shares on the day they were demanded of the defendants, with interest, deducting the loss on the shares which had been sold at a loss in pursuance of orders. At the time the stock was demanded, the plaintiff offered to pay this loss. No objection was made that it was not accompanied with a tender of the money. The defendants refused to accede to the plaintiff's claim, on the ground that they had a right to appropriate the stock to their own debt; and they had in fact already sold it and appropriated the proceeds. There was no need of further tender under these circumstances.

Case to be referred to an assessor.

RICHARD MARTIN vs. DAVID A. ADAMS.

A writing, in which A. "agrees to sell" to B. chattels of A. then being, and described as being, in B.'s possession, for a sum payable on or before a certain day, and B. "agrees to purchase the above named articles as above stated, and pay for the same as fast as he can," and pay the sum before the specified day or return the chattels in good condition, free from any debts contracted by him, is an agreement for a present sale.

Tort against a deputy of the sheriff of Hampden for the conversion of a horse which he attached on September 26, 1868, as property of John Malone.

The case was submitted to the judgment of the court on agreed facts, which raised the sole issue whether the following agreement, dated June 10, 1868, and signed that day by the parties named therein, was an agreement for a present sale of the horse, which was then in Malone's possession.

"This agreement between Ira L. Benton and Richard Martin, of the first part, and John Malone, witnesseth, that said Benton and Martin, of the first part, agree to sell to said Malone the following described property: one white horse," and

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other chattels specified, "all of the above named articles and property being in the possession of said Malone, for the sum of three hundred dollars, payable on or before the 15th of October next. And the said Malone, of the second part, agrees to purchase the above named articles as above stated, and pay for the same as fast as he can, and to pay the three hundred dollars before the 15th of October 1868, or return the same all in as good condition as the same are now in, free from any debts contracted by said Malone."

C. W. Turner, for the plaintiff.

C. E. Allen, for the defendant.

CHAPMAN, C. J. Although, in the written agreement, Benton and Martin "agree to sell" the property to Malone, and he "agrees to purchase" it, for a sum named, to be paid "on or before the 15th of October next," yet as the property was already in the possession of Malone, and nothing remained to be done by the vendors, and there is nothing to indicate that the title is not to pass till the happening of a future event, we think the fair interpretation is, that it is an agreement for a present sale.

The agreement of Malone to make the payment at the stipulated time, or return the property in good condition, free from debts contracted by him, is executory, and does not imply that he is to have no title in the mean time.

Judgment for the defendant.

CATHARINE MCGLYNN *vs.* EDWARD MAYNZ.

An agreement to convey land "in fee simple, by good and sufficient deed of conveyance with full covenants of seisin, warranty and freedom from incumbrances," is not satisfied by a conveyance of the land, sufficient otherwise, but subject to conditions prescribing the size, height, materials and position of any building to be erected or maintained on the land, and limiting the occupation of such building, for a term of years, to the purposes of a dwelling-house and certain mercantile purposes.

CONTRACT for breach of an agreement signed by the parties January 25, 1869, for the sale by the plaintiff, and purchase by

the defendant, of a parcel of real estate abutting on Concord Street in Boston.

The case was submitted to the judgment of the court on agreed facts, by which it appeared that a deed of the premises, tendered by the plaintiff to the defendant, the refusal of the defendant to accept which was the alleged breach of the agreement, was made subject to conditions expressed therein as follows :

"The front line of the building which may be erected on the lot shall be placed on a line parallel with and six feet back from Concord Street. The building which may be erected on the lot shall be of a width equal to the width of the front of the lot. No dwelling-house or other building, except the necessary out-buildings, shall be erected or placed on the rear of the lot. No building which may be erected on the lot shall be less than three stories in height, exclusive of the basement and attic, nor have an L of more than two stories in height, nor shall said building or said L have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose, or in any other way, than as a dwelling-house, dry goods', grocery, provision or apothecary store, for the term of twenty years from May 1, 1860. The building now standing upon the premises has been erected in conformity with the foregoing conditions."

The other material facts are stated in the opinion.

J. P. Treadwell, for the plaintiff, cited *Estabrook v. Smith*, 6 Gray, 572.

J. D. Long, for the defendant, cited *Mead v. Fox*, 6 Cush. 199; *Stone v. Fowle* 22 Pick. 166; *Dykes v. Blake*, 4 Bing. N. C. 463; *Flight v. Booth*, 1 Bing. N. C. 370; *Hughes v. Parker*, 8 M. & W. 244.

CHAPMAN, C. J. By the terms of the agreement referred to, the plaintiff agreed to sell to the defendant the land described. and to convey the same "in fee simple, by good and sufficient deed of conveyance with full covenants of seisin, warranty and freedom from incumbrances," &c., "on the following conditions, viz: ten thousand dollars to be paid on delivery of deed and the balance according to the conditions of a mortgage for five thousand dollars now on said estate."

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Within the time stipulated the plaintiff tendered to the defendant a deed properly executed, and complied with the terms of his agreement in other respects. But the deed was by its terms made subject to two mortgages; one, to Isaac Kendall for four thousand dollars with interest, to run ten years from November 27, 1860, and assigned to Mary Elizabeth Kendall, a minor; the other to Kendall for one thousand dollars with interest, to run ten years from September 1, 1861. The deed was also made subject to certain restrictions, which are referred to, prescribing the size, height, materials and position of buildings that might be erected upon the land, and the manner in which the buildings might be occupied.

There is much force in the defendant's objection that there were two mortgages instead of one, which were to mature at different times, subjecting the defendant to deal with two creditors instead of one, to double payments of interest, double costs of discharge, and double liability to proceedings for foreclosure. But it is not necessary to discuss these objections; for the restrictions upon the title are very material, and by the terms of the agreement the defendant was entitled to a deed without such restrictions.

Judgment for the defendant.

GEORGE W. AMORY vs. JOHN A. LOWELL & others.

A testator died, leaving a daughter and two sons, and in his will gave his dwelling-house and farm, and all the personal property in use in or about them, to J. S., in trust, "after defraying all expenses of repairs, taxes and insurance, then to permit the daughter to occupy, use and improve said real and personal estate" during her life, and on her death "to permit" the sons successively "to have the use and improvement of the same" during their respective lives. In a subsequent clause of the will, after disposing of property besides the foregoing, he gave the residue of all his estate, real and personal, to J. S., in trust until the death of the last survivor of the three children, "to take suitable care and charge of the said real estate aforesaid," and "after deducting all necessary expenses for repairs, taxes, public charges, and also any expense incurred in insuring the premises against fire," to divide "the net income of said estates" equally among them and such persons as either of them dying should by will appoint. J. S. assumed the trusts; permitted the daughter to occupy the dwelling-house and farm, either personally, or by tenants who paid rent to her; paid annually out of the income of the residuary fund the taxes and

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insurance on the dwelling-house and farm; and for twenty-three years presented to the three children annual accounts showing these payments, which they returned to him with their signatures under the word "approved." The twenty-fourth account of the trustee the younger son declined to approve, on the ground that such payments were a misapplication of the income of the residuary fund; and filed a bill in equity to restrain the trustee from defraying them out of that fund, and to recover one third of the amounts previously paid, (alleging that he approved the previous accounts under a mistake of his rights,) and to compel the making of repairs on the dwelling-house and farm. *Held*, that repairs, taxes and insurance on the dwelling-house and farm should be defrayed from rents and profits of the dwelling-house and farm, and were not proper charges upon the residuary fund or its income; but that the accounts of the trustee which the plaintiff had approved were not open to revision in this respect.

BILL IN EQUITY filed July 8, 1869, by one of the children of Francis Amory, against the trustee and other persons interested under his will.

The bill alleged that Francis Amory died in July 1845, leaving three children, Cornelia, Francis and the plaintiff, and leaving a will, which was duly proved and allowed in the probate court for Norfolk, and, after certain devises and legacies immaterial to this case, contained four successive items, the material parts of which were as follows:

"*Item 12.* I give, bequeath and devise to John A. Lowell, Henry Codman, Francis Amory, Jr., and George A. Goddard, and to the survivor and survivors of them, his heirs, executors and administrators, the dwelling-house and farm, situate in Milton aforesaid, now occupied and improved by me, containing about two hundred acres, more or less, as may appear by the title deeds; together with all the produce, stock, farming utensils, and other personal property in and upon the farm, and also all the furniture, plate, carriages, pictures, stoves, and other personal property, whether more or less, in the dwelling-house and buildings upon the same, to have and to hold the same in trust; and, after defraying all expenses of repairs, taxes, and insurance, then to permit my daughter, Cornelia Goddard, wife of George A. Goddard, to occupy, use and improve the said real and personal estate, during the term of her natural life; and at the decease of my said daughter Cornelia, then in trust to permit my son, Francis Amory, Jr., to have the use and improvement of the same for and during his natural life; and at the decease of

my son Francis, then in trust, to permit my son George W. Amory to have the use and improvement of the same for and during his natural life; and lastly, at the decease of the survivor, to grant, surrender, and deliver over to the children of my said sons and daughter before named, who shall then be living, the trust property last aforesaid, to be equally divided among them, share and share alike."

"*Item 13.* I give and devise to John A. Lowell, Henry Codman, Francis Amory, Jr., and George A. Goddard, and to the survivor and survivors of them, their heirs, executors and assigns, all the rest, residue and remainder of the estate, real, personal and mixed, of whatever name or nature, kind or sort, of which I shall die seised and possessed; to have and to hold the same, as joint tenants, to and upon the following uses, trusts and purposes: that for and during the life of the children of the said Francis Amory, living at his decease, and during the life of the survivor of them, the said trustees, their heirs and assigns, shall and will take suitable care and charge of the said real estate aforesaid, and from time to time make such leases of the premises, or any part thereof, upon such terms, time and conditions as they shall think proper and most beneficial for my children; and, after deducting all necessary expenses for repairs, taxes, public charges, and also any expense incurred in insuring the premises against fire, the net proceeds or net income of said estates they will divide equally among my children, towards their support and maintenance;" "provided, however, it is understood that whenever any of my said children shall decease, their share of said income, during the life of said survivor, shall be appropriated in such way and manner, to such uses, as by any last will and testament, or by any appointment in writing revocable as a will, they may order and direct, and if there be no children and no will or appointment, the same shall enure as on a strict settlement, and with like limitations, to the use of my surviving child or children."

"*Item 14.* And said devise is on this further use and trust, that, from and after the decease of my surviving child, the said estate hereinbefore devised to my said trustees shall be equally

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distributed and divided among the children of said sons and daughter, share and share alike ; or if any such will or appointment shall have been made by my said children, the disposal, order and direction of such will or appointment touching the said reversion shall be observed and followed ;" "and if there be no children as aforesaid, nor any will or appointment concerning the premises, then on strict settlement as aforesaid, and under the same limitations, in trust for my surviving child and his and her heirs."

"*Item 15.* I do hereby declare that if only one of my said trustees before named shall be willing to accept the trust, the foregoing devise is hereby made to him only, his heirs and assigns, in trust, to and for the uses, trusts and purposes aforesaid."

The bill further alleged that the defendant Lowell alone, of the four trustees named in the first two items above quoted, accepted the trusts in said items declared ; that he continued ever since in the execution thereof ; that all of the real estate and personal property named in item 12 came into his possession, and had ever since continued therein ; that he was making no such use of said real estate as to secure any income from it to defray the expenses of repairs, taxes and insurance thereon ; that he had permitted various acts of waste thereon, in the improvident cutting of wood and otherwise, and had suffered the land to deteriorate for want of proper husbandry, and the dwelling-house, farm buildings and fences to become dilapidated for want of proper repairs ; that he had paid out of the residuary fund created by item 13 the expenses of taxes and insurance on said real estate named in item 12, during the whole past term of the trust ; that on April 17, 1869, the plaintiff, having during the month previous been informed for the first time of the duty and liability of the trustee in the premises, requested him to cause the needful repairs to be made, and to refund to the plaintiff one third of the amounts so paid for taxes and insurance, with interest ; but that he declined to comply with these requests, and pretended that he was under no duty or liability to make repairs or cause them to be made on the dwelling-house

and farm, and that he had a right to defray the expenses of taxes and insurance thereon out of the residuary fund; wherefore the bill prayed for a decree to compel the trustee to refund the sums demanded by the plaintiff, and that the trustee might be instructed and directed as to his duty in all the premises, and for general relief; and the testator's daughter Cornelia and son Francis, together with the grandchildren living, and a guardian *ad litem* of persons not in being to whom contingent interests might be devised by the will, were joined with the trustee as defendants.

All the defendants appeared and answered; and in their answers admitted the plaintiff's allegations of the provisions of Francis Amory's will, and submitted themselves to the judgment of the court.

Lowell, in his answer, denied that the real estate named in item 12 of the will could have been managed by him so as to yield an income to pay the expenses of repairs, taxes and insurance thereon, and at the same time have permitted the testator's daughter to occupy, use and improve it, or that it could be leased for a rent equal to those expenses; alleged that it was the testator's intention that those expenses should be defrayed from the income of the residuary fund, and that the plaintiff had acquiesced in that course of payment as to taxes and insurance, and had approved accounts rendered by the trustee in which they had been so charged; alleged, as to the personal property in and about the dwelling-house and farm, that he had permitted the testator's daughter to hold and use it; denied the plaintiff's allegations of waste and neglect in the management of the farm, but admitted that some of the buildings needed repairs; and prayed for instructions whether he should make such repairs and pay for them out of the income of the residuary fund, as the testator's daughter sometimes claimed that he should do.

The testator's daughter admitted that she was holding the personal property referred to in item 12 of the will, and ever since the testator's death had occupied the farm herself, or taken the rent of it; denied the plaintiff's allegations of waste in its management: alleged that she had spent the greater part of the

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rents she derived from it, in improvements and keeping it in good condition; denied that any of the buildings had been suffered to remain without repairs, except such as were not needful for the proper conduct of the farm; alleged that the proceeds of whatever wood had been cut and sold from the farm had been applied by her towards expenses she had incurred in repairing and altering the other buildings; admitted that the dwelling-house and principal barn were now in need of repairs; and prayed that the trustee might be directed to make such repairs and charge them to the residuary fund, and also reimburse to her out of that fund the excess of her own disbursements for repairs over the amounts received by her from the sale of wood as aforesaid.

Issue was joined on the answers, and the case heard by *Colt, J.*, and reported substantially as follows:

The total of the appraisement of the testator's estate, real and personal, in the inventory returned by the executor, was \$203,800, all of which except \$7,325 was appraised on real estate; and the debts amounted to \$60,000. The dwelling-house and farm in Milton were appraised at \$10,000. The farm contained a hundred and seventy acres, and on it, besides the dwelling-house, which was built of wood, were a wooden barn and other wooden buildings, useful and necessary in carrying on the estate as a farm, some of which were of considerable age. All the real estate left by the testator has greatly increased in value since this appraisement.

Ever since assuming the trust, the trustee has allowed the testator's daughter to occupy the dwelling-house and farm, and, when not personally occupying them, to collect and retain the rents of them. He has paid out of the income of the residuary fund the taxes and insurance on the dwelling-house and farm, and presented yearly accounts to the plaintiff and the other children of the testator, in which those expenses were charged against that income, and which the children returned with their signatures under the word "approved." She has paid for all the repairs and improvements which have been made on the dwelling-house and farm during her occupancy; and the barr

and some of the other buildings are in need of extensive repairs.

"The defendants offered evidence that said Milton estate could not have been so managed and occupied by the testator's daughter as to produce income sufficient to pay taxes, insurance and repairs. The plaintiff offered evidence to the contrary; and also to the fact of waste in the improvident cutting of wood and neglect of buildings and fences, and contended that the trustee was responsible therefor. The plaintiff further offered evidence that he assented to the accounts of the trustee under a mistake of his rights, and that the last account of the trustee, covering a time anterior as well as subsequent to the filing of the plaintiff's bill, was not assented to by him; and he contended that the taxes and insurance on the Milton estate should have been paid out of the income thereof, and not out of the income of the residuary fund. Without going into a hearing of the evidence offered, I reserve the case, with the above offers of proof, for the consideration of the full court, for such order thereon as law and justice may require."

W. E. Parmenter & A. G. Browne, Jr., for the plaintiff.

C. W. Loring, for the trustee.

H. W. Holland, for some of the grandchildren.

AMES, J. It is manifest that it was not the expectation or intent of the testator, that any part of the income which, by the terms of the will, was to be divided among his children, should in any event be derived from the dwelling-house and farm in Milton. On the contrary, that portion of his property was set apart for the exclusive enjoyment of his daughter Cornelia during her life, and after her decease for that of each of his sons, in succession. It is equally manifest also, that he intended that all the income which the trustees, under such management as they should think most beneficial for the testator's children, should derive from all the "residue and remainder" of his property, should be divided equally among them, "towards their support and maintenance," after deducting all necessary expenses for repairs, taxes, public charges and insurance. The fund which the will describes as divisible from time to time among them is

spoken of as the net proceeds, or the net income, of the estates which the trustees are required to manage and take charge of, and of which they are to make such leases, upon such terms, time and conditions, as they shall think proper and most beneficial for the parties in interest. We find nothing in the will that affords any support to the claim that any portion of that income was to be given or appropriated by the trustees to the purpose of improving the estate at Milton described in the twelfth section of the will, or to the payment for any repairs or other charges upon that estate. The net income spoken of in the thirteenth section can only mean the amount of rents and profits remaining after the payment of taxes, insurance and repairs chargeable against the property from which those rents and profits are to be derived, that is to say, the property described in the thirteenth section. With regard to the dwelling-house and farm at Milton, the trustees are to hold the title, and, after the termination of all the intervening life estates, are to divide the property among the testator's grandchildren; but it does not appear that they are to have anything to do with the use and occupation in the mean time. The twelfth section directs the trustees, after defraying the expenses of repairs, &c., to permit his daughter to occupy, use and improve that portion of the estate during her life. But, taking this clause of the will in connection with the obvious meaning of the thirteenth section, we do not interpret it as a direction to the trustees to pay these expenses themselves, or as signifying that funds from any other portion of the property shall be used to pay them, but as intending that the occupant of that dwelling-house and farm shall bear the burden of these charges. The result is, that the trustees, in paying any portion of these charges out of the income derived from the property described in the thirteenth section, would be acting under an erroneous interpretation of the will, and would have no right to charge any such payment in their accounts with the children of the testator.

We are equally clear, however, that all the accounts heretofore presented by the trustee, to which this plaintiff has assented by his signature under the word "approved," must be

considered as no longer open to revision or objection. The plaintiff does not suggest that he was misled by any conduct on the part of the trustee, or that he labored under any mistake of fact. The mistake was mutual, in a case where all the parties had equal means of knowledge as to their relative rights and duties; and there seems to be no ground of law or equity for the interference of the court, for the purpose of disturbing a long series of deliberate and fair settlements.

Our conclusion therefore is, that the annual charges of taxes, insurance and repairs, upon the farm and homestead in Milton, are to be paid from the rents and profits of that estate, and that there is no other fund in the hands of the trustee upon which those expenses are a legitimate charge. The payment of those expenses appears to us to be one of the burdens which the testator has connected with the occupation of that part of the estate. The life tenant is under no obligation personally to occupy it, but is at liberty to rent it upon such terms as she can. If, as suggested in the answer, it cannot be rented on such terms as to keep down those expenses, the remedy for that inconvenience is not to be found in appropriating funds which by the terms of the will are not subject to that kind of charge.

In the actual posture of the case, it must be sent to a master, to inquire and report what is the condition of the estate in Milton, and to what extent are repairs and renovations necessary; what is its capacity to produce an income; and whether the rents and profits that it is capable of producing are sufficient to defray the expense of taxes, insurance and repairs; whether wood and timber have been cut down and removed since the probate of the will, and whether to such an extent or under such circumstances as to amount to waste; and what amount, if any, the trustee has diverted from the share of the income payable to the plaintiff, and expended upon the farm at Milton since the rendition of the last account upon which the plaintiff indorsed his approval. And all further directions in the case are reserved till the coming in of his report.

Ordered accordingly

STEPHEN D. CAIRNS vs. WILLIAM B. COLBURN & another.

▲ husband cannot establish a resulting trust in a house and land bought by his wife with money supplied by him and the deed taken in her name, upon allegations, taken together, that he sent her the money from a foreign country with directions to buy the house and land and take the deed in her name so that in event of death or accident to him abroad she and their children might have a house to live in, but that she was but a nominal purchaser and acted really as his agent, that the property was bought for and belonged to him, and was always treated by them as his and not hers, that she made no claim to it, and that he did not intend to give her any beneficial interest in it except as his trustee.

BILL IN EQUITY filed June 26, 1869, to establish a resulting trust in favor of the plaintiff in a surplus of the proceeds of the sale of a house and land by a mortgagee, after deducting the amount due on the mortgage and the charges of the sale; which house and land were bought by the plaintiff's wife in 1863, when the plaintiff was in Cuba, with money which he sent to her, and the deed taken in her name subject to the mortgage. She became insane; and Edward P. Brown was appointed her guardian. Issue was joined on the answers, and the case heard by *Wells, J.*, who ruled that on the pleadings and evidence no resulting trust was established, and reported the case, which is stated in the opinion.

F. A. Perry, for the plaintiff.

E. P. Brown, pro se.

BY THE COURT. The plaintiff alleges in his bill that he sent the money from Cuba to his wife, directing her to purchase a house and land in Boston and to have the deed made to her and in her name, so that, in case of accident or death to him while in Cuba, his wife and children might have a house to live in. The additional averments are, that she was but a nominal purchaser of the house and was acting as agent of her husband; that the property was purchased for him, and belonged to him, and was always treated by him and his wife as his property and not hers; that she did not make claim to it, and that he did not intend to give her any beneficial interest except as his trustee. Taking all these averments together, they do not establish a re-

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sulting trust; and the evidence shows that the plaintiff directed his wife to take the conveyance to herself, one of the reasons he assigned being that she might thereby be enabled to mortgage the property.

Bill dismissed.

ASHLEY A. VANTINE *vs.* SAMUEL H. MORSE & others.

Executors are chargeable as trustees of a legatee, on a trustee process against him, for shares in the stock of a corporation, specifically bequeathed to him in the will, which are not required to pay the testator's debts, and stand in the testator's name on the books of the corporation, and of which they hold the certificate in that name; and when so charged, upon final judgment against the legatee, it is their duty, upon demand by the officer, to transfer the shares, in such manner as the by-laws of the corporation may require, into the name of the legatee, so that they may be taken on the execution.

BILL IN EQUITY filed February 12, 1869, under the Gen. Sts. c. 113, § 2, against Samuel H. Morse, the National Revere Bank and the executors of the will of Eliza Morse, to reach, and apply in payment of a debt due from Samuel H. Morse to the plaintiff, and as property of the debtor which could not be come at to be attached or taken on execution in a suit at law against him, five shares in the capital stock of the bank, which were specifically bequeathed to him by the testatrix.

The bill alleged that Eliza Morse died December 19, 1868, leaving a will, which was duly proved and allowed January 11, 1869, and made said bequest to Samuel H. Morse; that the executors "possessed themselves of the personal estate of said deceased, and of said shares of stock, and the certificates or other evidences" thereof; that the National Revere Bank was a corporation doing business in Boston, and the shares were standing on its books in the name of the testatrix, and no transfer of them was ever made by the executors, but the executors and the bank were holding them in trust for Samuel H. Morse; that the personal estate of the testatrix was more than sufficient to pay all her debts and funeral expenses, without applying these shares thereto or subjecting them to contribution; and that Samuel H. Morse owed the plaintiff \$237.31.

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The defendants demurred, on the ground that the facts alleged did not bring the case within the statute, and it was thereupon reserved by *Gray, J.*, for the determination of the full court.

G. O. Shattuck & W. A. Munroe, for the defendants.

J. Lathrop & E. H. Abbot, (*L. A. Jones* with them,) for the plaintiff.

AMES, J. It is well established that a legacy in the hands of an executor may be attached on a trustee process in favor of a creditor of the legatee, without the necessity of waiting for the expiration of one year from the appointment of the executor. Gen. Sts. c. 142, § 22. For the protection of the executor, the court, whenever it should be necessary, would order the continuance of the case, until the estate was so far settled as to render it certain that the legacy would be paid from the assets. *Hoar v. Marshall*, 2 Gray, 251. We know no reason why the same rule should not apply where the legacy, as in the present case, takes the form of a gift of shares in a corporation, having a pecuniary value. It has been settled that shares in a corporation may be attached on a trustee process. *New England Insurance Co. v. Chandler*, 16 Mass. 275.

The case finds that the shares in question were not required for the payment of the debts of the estate. They stood upon the books of the bank in the name of the testatrix, and the certificate in her name, which is the evidence of her title, is in the hands of the executors. No transfer can be made except by them, but the beneficial interest in the shares belongs to the legatee, and he was entitled, certainly after the expiration of the year from the date of their appointment, to demand such a transfer to himself. But this transfer was a mere duty, in relation to which nothing was left to their discretion. It was reduced to a mere ministerial act, which they were bound to perform on demand. In other words, they owed him these shares, and they hold them for him. We think that his interest in them could have been attached in an ordinary trustee process, and that upon such a process the executors could be charged as his trustees. When so charged, it would be their duty, on being

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called upon by the officer to whom the execution should be committed for service, to give up the shares so that they could be taken on the execution. The mode of doing so would of course not be the same as in the case of chattels susceptible of manual or literal delivery, or of money to be paid over. It would be their duty, however, to divest themselves of the formal title, and to make such a transfer as the by-laws of the corporation might require, in order to place the shares, on their books, in the name of the legatee, in which event the officer would proceed to levy the execution upon them in the manner prescribed by statute. Gen. Sts. c. 123, § 59.

The plaintiff's bill, having been founded upon the erroneous assumption that the property of the debtor, under these circumstances, cannot be come at to be attached or taken on execution, must therefore be

Dismissed, with costs.

ELIZABETH S. AIKEN *vs.* ASA P. MORSE & another.

Two commissioners, appointed to take proof of claims against the estate of a deceased person, which had been represented insolvent by the administrator, allowed some claims but never made return. Several years after the death of one of them, the administrator procured the appointment of another commissioner, and filed a bill in equity to redeem land mortgaged by the intestate and in which the mortgagee had acquired the title of the widow and heirs. The commissioners then again took proof of claims, and finally returned a schedule of the debts of the intestate. *Held*, in the suit in equity, that, as against the mortgagee holding the title of the widow and heirs, in the absence of any allegation or evidence on the subject, there was no presumption that the administrator did not give legal notice of his appointment; nor, in a like absence of allegation and evidence, any presumption that claims, allowed by the second board of commissioners additional to those allowed by the first board, were ever presented to the first board.

The institution of proceedings in insolvency against the estate of a deceased person does not suspend, in favor of the creditors, the special statute of limitations of actions against the administrator, Gen. Sts. c. 97, § 5, nor prolong his lien on the real estate of the intestate for the payment of debts.

BILL IN EQUITY filed March 7, 1868, against Asa P. Morse and George W. Blood by the administratrix of the estate of Calvin Aiken, who died in Boston December 25, 1860, to redeem

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land on Essex Street in Boston from a mortgage made in 1857 to Morse by the intestate and of which he died possessed of the equity of redemption. The case was reserved by *Ames, J.*, for the determination of the full court, on the bill, answers and agreed facts, and is stated in the opinion.

C. A. Welch & W. P. Walley, for the plaintiff.

R. M. Morse, Jr., & R. Stone, Jr., for the defendants.

WELLS, J. This is a bill in equity to redeem certain lands of the plaintiff's intestate from mortgage. It was brought before the expiration of three years after the entry of the mortgagee to foreclose. The administratrix is authorized to bring such a suit, as well as the heirs or devisees of the deceased mortgagor. Gen. Sts. c. 140, § 32. When the suit is brought by an administrator, the redemption secured thereby will enure exclusively to the benefit of the widow and heirs, or their assigns, unless the land is required to be sold for the payment of debts with which it is chargeable, as assets of the estate. If there are no such debts, or if there are other sufficient assets, the right of the administrator to redeem must rest upon the interests of the widow and heirs; and will be defeated or discharged by whatever will defeat or discharge those interests.

In this case, the widow has released all her interest in the land to the mortgagee. The heirs have also conveyed their title, and the same is now held in trust for the mortgagee, by the other defendant, Blood. The right of redemption is therefore gone, so far as it can be released by the widow and heirs. The administratrix cannot maintain a bill in equity to redeem land for the benefit of the legal title which Blood holds in trust for the mortgagee himself.

In order therefore to maintain this suit, the administratrix must show that there was a subsisting lien, in favor of creditors of the estate, which would entitle her to make a sale of this land, by license of court, for the purpose of converting it into assets for the payment of those debts. This she fails to do.

The only debts, shown to be outstanding against the estate, are those contained in a list reported by commissioners in May 1869, more than eight years after the plaintiff's appointment as

administratrix. The original representation of insolvency was made at the end of one year from her appointment, nameiy, February 10, 1862. The commissioners, then appointed, made no return, and one of them died in December 1862. At the time of commencing this suit, March 7, 1868, application was made by the administratrix to the probate court for the appointment of another commissioner to fill the vacancy; and one was appointed November 9, 1868. The plaintiff contends that the report of the commissioners is conclusive of the existence of the debts reported; and, as the insolvency superseded or suspended all other means of enforcing their claims, that the lien of the creditors remains.

The report is not conclusive against the heirs, nor against the defendants, having purchased the interest of the heirs, to show that the lien for those debts still subsists against the real estate. *Allen, petitioner*, 15 Mass. 58. *Heath v. Wells*, 5 Pick. 140. *Hudson v. Hulbert*, 15 Pick. 423. *Thayer v. Hollis*, 3 Met. 369. *Bascom v. Butterfield*, 1 Met. 536. So far as it may affect them collaterally, they are entitled to meet it by such facts as will show that it cannot operate to charge their estates. *Downs v. Fuller*, 2 Met. 135. *Leonard v. Bryant*, 11 Met. 370. From the testimony and agreed facts, it appears that all the claims that were proved and allowed before the commissioners first appointed have been purchased and discharged by the defendant Morse.

The plaintiff contends that the other debts, now outstanding, may have been presented before the commissioners and not allowed; so that the claimant would be precluded from bringing any suit thereon under the Gen. Sts. c. 99, §§ 20, 25, and could only appeal after the final return of the commissioners, under § 8. *Merriam v. Leonard*, 6 Cush. 151. If the fact were so, presenting the claims to the commissioners would be the commencement of proceedings for their final allowance on appeal, as effectual to take them out of the statute of limitations, Gen. Sts. c. 97, § 5, as if they had been allowed by the commissioners. But against the heirs, and against these defendants having their interest, we are not to presume the existence of so important a

fact, in the absence of any allegation in the bill, or evidence to establish it. Its omission from the agreed statement, which contains the testimony of the surviving commissioner, Torrey, as to the claims proved and allowed by them, affords a strong presumption against its existence as a fact. The burden is upon the administratrix to show all the necessary facts upon which to charge the real estate with these debts. *Bascom v. Butterfield*, 1 Met. 536. The same consideration applies to the suggestion that it does not appear that notice of her appointment was given by the administratrix. Her neglect to give the notice will not be presumed in her own favor, to sustain proceedings for the disturbance of rights apparently absolute. If, in fact, the notice had not been given, and the administratrix were therefore still liable for these debts, her neglect might deprive her of the right to be indemnified by a sale of the land after so material a change in the condition of the estate; especially when she herself took part in effecting that change, and participated in the benefits derived therefrom. *Forward v. Forward*, 6 Allen, 494.

But aside from the question of discretion in the court, in case of laches, there is no jurisdiction or authority to order a sale, if the debts are in fact barred by the statute. Neither this proceeding nor the license to sell, if obtained and executed, will preclude the heir from defeating the sale by showing that in fact the lien had expired; nor will it entitle the administratrix to pay, or the creditor to receive payment of his debt. *Heath v. Wells*, 5 Pick. 140. *Hudson v. Hulbert*, 15 Pick. 423. *Lamson v. Schutt*, 4 Allen, 359. *Alden v. Stebbins*, 99 Mass. 616. Whoever seeks the action of a court in his behalf must show all facts upon which the power invoked depends. As the redemption, sought in this case, is required and justified only for the purpose of a sale under license of court, the petitioner should be held to the same proof as would be necessary to warrant a decree for such a sale.

Regarding these claims, then, as having been presented to the commissioners for the first time after the new appointment in November 1868, the question is, whether they were barred by

the statute limiting suits against executors and administrators, Gen. Sts. c. 97, § 5, so that no lien remained upon the real estate, which would enable the administratrix to make a valid sale under license, and to have redemption for that purpose. The plaintiff contends, that, as proceedings in insolvency suspend, and in the event of actual insolvency ultimately appearing absolutely bar the prosecution of all claims otherwise than through those proceedings, they must also suspend the statute of limitations and preserve the lien upon real estate, in favor of all debts which shall be allowed by the final return of the commissioners, or upon appeal therefrom. This would be in effect to hold the representation of insolvency and the appointment of commissioners as the commencement of proceedings in behalf of all creditors, without regard to the time when the individual creditor should commence his suit by presenting his claim for proof. But it is clear from the statutes that such is not the intent of the provisions relating to insolvent estates of persons deceased. Those provisions change the mode in which the creditor may prosecute his claim; but do not in any way relieve him from the limitation which restricts his right to proceed and to hold the administrator to answer, to the period of two years from the giving of the bond. The presentation of his claim to the commissioners by the creditor is the commencement of his proceedings or suit for its enforcement against the estate; and the statute applies to a proceeding in that mode as well as to a suit at law. *Guild v. Hale*, 15 Mass. 455. *Freeman v. Ward*, 16 Pick. 201. *Hunt v. Spaulding*, 18 Pick. 521.

The provision for allowance of further time for creditors to present and prove their claims, in Gen. Sts. c. 99, § 4, and St. 1863, c. 217, and that for the appointment of a new commissioner and a still further allowance of time, in St. 1868, c. 327, do not necessarily imply an extension of time beyond the two years to which the liability of the administrator is limited. It may sometimes be necessary that the time for investigating claims presented, completing the proofs and making the return thereof, should extend beyond the two years; but there is nothing in these provisions which indicates an intention that the creditor is

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to be relieved from his obligation to commence his proceedings, either at law or before commissioners, within the two years prescribed by the general statute limitation; except in case of contingent claims provided for in Gen. Sts. c. 99, § 6, and in case of further assets, § 21. The provision of § 25, which revives the right to sue at law, at the end of eighteen months from the appointment of the administrator, notwithstanding the pendency of proceedings of insolvency, (with precautions to protect the estate from the disturbance of its distribution in case it proves to be insolvent in fact,) is an indication or recognition that the running of the statute of limitations is not interrupted by the representation of insolvency and the appointment of commissioners. Under the St. of 1868, c. 327, a new commissioner may undoubtedly be appointed, (even after the expiration of two years,) and the commission will be open for the purpose of "taking proof of claims and making returns thereof." But the powers and duties of a commissioner, under such an appointment, are only the same "as if he had been originally appointed." The right of a creditor to commence the prosecution of a claim by presenting it for the first time before such a commission, after the time of the statute limitation has expired, is not given by this statute, nor by any of the provisions for the allowance of further time to the commissioners. We are of opinion that in no case can a claim be allowed, which is first presented after the two years have expired, unless authorized under the Gen. Sts. c. 99, §§ 6, 21.

The allowance of these claims was too late, even as debts originally contingent; and the real estate in question is not "further assets" in the sense of the statute, § 21. *Alden v. Stebbins*, 99 Mass. 616. *Chenery v. Webster*, 8 Allen, 76. The case of *Ostram v. Curtis*, 1 Cush. 461, relied on for the plaintiff, establishes the principle, that, when a commission has been opened upon the ground that further assets have "come to the hands" of the administrator, and the commissioners receive proof and make return of additional debts, upon appeal from their allowance it is not open for the administrator to object that there were in fact no "further assets;" nor that the claims had been

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barred by the statute of limitations against executors and administrators. But in this case the commission was not opened on the ground of "further assets," but merely to enable a new commissioner to join in taking the proofs and making the return. And even in a case of "further assets," the claims offered for proof are not taken out of the operation of the statute of limitations for general purposes, but only in respect to such new assets; as in case of solvent estates. *Gen. Sts. c. 97, § 6. Holland v. Craft, 20 Pick. 321. Chase v. Redding, 13 Gray, 418.*

As the administratrix fails to show the existence of any debts for which there remained a lien upon real estate of the intestate, and which would authorize her to convert it into assets for their payment, she fails to show any right to deal with the equity of redemption adversely to the interests of the heirs and their assigns. *Lamson v. Schutt, 4 Allen, 359.* She is therefore not entitled to maintain this bill for its redemption.

Bill dismissed.

HARRIET C. GOULD & others vs. GRATIA MATHER.

A testator, in his will, named an executrix and an executor, and gave them all his estate in trust to accumulate for his children for ten years, paying meanwhile the expenses of their support out of the income and investing the balance thereof. In a separate clause he provided that "if it shall be found necessary or expedient to dispose of any of my real property for the benefit of the estate, in the judgment of my executrix and executor, I hereby give them full power to do so and invest the sums so received for the benefit of my children." *Held*, that this power was given to the executrix and executor as an incident of their office, and upon the resignation of one of them the other might exercise it singly.

CONTRACT on the defendant's covenants of seisin and warranty in a deed dated January 10, 1867, by which she, describing herself in the granting clause as "executrix of the will of Ozias H. Mather, late of Boston, deceased," and signing as "executrix," for the consideration of \$13,000 conveyed a parcel of land in Boston to Mary H. Cutts for life and on her death to

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the plaintiffs, and covenanted that the grantor was seised thereof in fee simple, and that the premises were free from all incumbrances. The case was submitted to the judgment of the court on agreed facts, of which the following are all that are material

Ozias H. Mather died in November 1864, seised in fee simple of the land in question, leaving a widow, (the defendant,) three sons and a daughter; and left a will, of which the first four clauses were as follows :

" First. I do hereby constitute and appoint my wife Gratia Mather to be my executrix and Henry N. F. Marshall to be my executor of this my last will and testament.

" Second. I hereby direct my executrix and executor to pay out of my estate all of my funeral charges and my just debts.

" Third. I give, devise and bequeath unto my said executrix and executor all of my real, personal and mixed estate, to be held by them in trust for the use and benefit of" the four children (naming them) "and their legal representatives, for the following purposes, to wit: During the term of ten years the said executrix and executor are to cancel and discharge, out of the personal estate or income, all sums of money that may be due or become due upon any and all mortgages of real estate that they may deem expedient and for the interest of all concerned; and from the balance of income that may be left after paying said mortgage debts, and from year to year, the said executrix and executor are to reserve therefrom such a sum of money as they may deem necessary for the support of said executrix, not exceeding her right in and to the estate. During the said ten years the said executrix and executor are to receive out of the personal estate or income such sums as in their judgment may be found necessary for the support of my said daughter and sons, and pay the same over to them, reserving the balance of their yearly proportional part of the income and investing the same for their future benefit and use, to be paid to them at the expiration of the said ten years, or to their legal representatives, said yearly proportional part of each child being one fourth part of the income that shall remain after deducting the expenses of

the estate and the wife's yearly interest. At the expiration of the said ten years, all the real, personal and mixed estate then remaining is to be divided equally between my said daughter and sons, after deducting therefrom the dower of my said wife, to have and to hold the same to them, my said daughter and sons, their heirs and assigns, to their use and behoof forever. And this final division of my estate is not to be made until each child shall have been paid his or her portion of the yearly income invested as aforesaid.

"*Fourth.* If it shall be deemed necessary or expedient to dispose of any of my real property for the benefit of the estate, in the judgment of my executrix and executor, I hereby give them full power so to do, and invest the sums so received for the benefit of my children or their legal representatives."

"This will was duly admitted to probate; and the defendant and Henry N. F. Marshall named therein were duly appointed executrix and executor on November 11, 1864, and severally gave their separate bonds for the due performance of the duties of said trust. In April 1865, Marshall resigned his said office and trust as executor, and his resignation was accepted by the probate court, and no person has since been appointed in his place and stead, but the defendant has ever since performed alone all the duties of said office, and made conveyances of real estate and managed the property of the estate. No person has ever been appointed trustee under the will. It was in fact expedient, and for the benefit of all parties interested in the will and the estate, that the land in question should be sold as it was in this deed; and the sum received, to wit, \$13,000, was an adequate consideration, and was applied by the defendant to the benefit of the estate of said Ozias H. Mather. After the death of the testator, his daughter died without issue, and left all her property, by will, to her husband, the said Henry N. F. Marshall; and afterwards, and before the defendant's conveyance to the plaintiffs, the said Marshall, and Henry M. Mather, one of the testator's sons, being of full age, released to the defendant, by deed of quitclaim, all their right, title and interest in and to the land in question."

"If the conveyance and deed of the defendant is valid and good, and the defendant had authority and right to convey in manner and form as therein set forth, then judgment is to be for the defendant; if said deed and conveyance is not good and valid, and the plaintiffs have not thereby a good and valid title to the estate, judgment is to be for the plaintiffs, and the case sent to an assessor to ascertain damages."

J. B. Richardson, for the plaintiffs, cited *Barber v. Cary*, 1 Kernan, 397; *Bartlett v. Sutherland*, 24 Mississippi, 395.

H. C. Hutchins, for the defendant, cited *Shelton v. Homer*, 5 Met. 463, 465; *Houell v. Barnes*, Cro. Car. 382; *Bonifaut v. Greenfield*, Cro. Eliz. 80; *Brassey v. Chalmers*, 16 Beav. 223, 235 note; *Byam v. Byam*, 19 Beav. 58, 66; *Peter v. Beverly*, 10 Pet. 532, 563; *Jackson v. Ferris*, 15 Johns. 346; *Zebach v. Smith*, 3 Binn. 69; *Miller v. Meetch*, 8 Penn. State, 417; *Warden v. Richards*, 11 Gray, 277; *Putnam v. Emerson*, 7 Met. 330; *Franklin v. Osgood*, 14 Johns. 527; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Tainter v. Clark*, 13 Met. 220; *Gibbs v. Marsh*, 2 Met. 243; *Blake v. Dexter*, 12 Cush. 559; *Whiting v. Whiting*, 4 Gray, 236; *Lane v. Debenham*, 11 Hare, 188; *Niles v. Stevens*, 4 Denio, 399; *Watson v. Pearson*, 2 Exch. 581; *Brown v. Higgs*, 8 Ves. 561, 569; *Greenough v. Welles*, 10 Cush. 571, 576; *Oates v. Cooke*, 3 Burr. 1685; *Doe v. Woodhouse*, 4 T. R. 89; *Warneford v. Thompson*, 3 Ves. 513; *Going v. Emery*, 16 Pick. 107, 113; *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Pick. 328; *Dascomb v. Davis*, 5 Met. 335; *Nash v. Cutler*, 19 Pick. 67; *Treadwell v. Cordis*, 5 Gray, 341, 358; *Minot v. Cushing*, 2 Cush. 377; *Tobias v. Ketchum*, 32 N. Y. 319; *Chandler v. Rider*, 102 Mass. 268.

AMES, J. The testator, by his last will and testament, appointed his wife to be the executrix, and Henry N. F. Marshall to be the executor; and in the next clause, he directs his executrix and executor to pay out of his estate all of his funeral charges and his just debts. In the third clause, he gives, devises and bequeaths unto his "said executrix and executor" all of his real, personal and mixed estate, to be held by them in trust for his four children and their legal representatives, for cer-

tain purposes, which he proceeds more specifically to define. The trust is not expressed with the highest degree of technical accuracy and skill; but its general purpose may be said to be, to delay the final distribution of the estate for the term of ten years; to require the executrix and executor, in the mean time, out of the personal estate and income, to make such payments, upon any mortgages of real estate, as "they may deem expedient and for the interest of all concerned;" to provide for the necessary support of the executrix "from the balance of income that may be left after paying said mortgage debts, and from year to year," not exceeding her right in and to the estate; and to provide for the support of his four children "out of the personal estate or income," and for the investment and accumulation of their portion of the yearly income, not required for their support. There is nothing in the language of the trust to indicate that the testator expected that any part of the real estate would be sold, or needed, for the payment of any of his debts, (whether due upon mortgage or otherwise,) or for the support of his wife or his children. On the contrary, her support is made a specific charge upon the income, or so much as may be left after the payment of such mortgages as may be paid under the discretionary power given to the executors; and the support of the children, though expressed to be chargeable upon the personal property or income, is provided for in a manner which indicates that the testator supposed that the income would be more than sufficient for that purpose. So far as the third clause of the will goes, it furnishes no authority for the sale of real estate of the testator for the purpose of raising funds for the payment of debts, or in fact for any purpose whatever. The only authority given to the executors to sell any portion of the real estate is contained in the fourth clause of the will, and although it is there expressly given, in the most general terms, it is given only for the purpose of changing the form of investment for the benefit of the testator's children, and can only be exercised in pursuance of that purpose. They can sell only for the purpose of reinvesting the proceeds for the benefit of the children

The case finds that the sale made by the defendant was not only believed by her to be, but was in fact, expedient and for the benefit of the estate; that an adequate consideration was received; and that the proceeds have been applied to the benefit of the estate; that is to say, as we understand the agreed facts, the sale was in fact made for the purposes, and its proceeds were applied in the manner, prescribed in the will. The question is, whether the executrix (after the resignation of her associate has been offered and accepted, and he has been discharged from his trust) can lawfully execute the power alone, or whether it is a joint power, in the exercise of which both must unite. Is it a power which the testator has seen fit to annex to the office of executor as one of its incidents; or is it a power given to two specified persons in their individual capacity, and on the ground of special and peculiar confidence in their personal judgment?

Upon this question, it is urged on the one hand that the power is purely discretionary, inasmuch as the will gives no positive direction to sell, and does not even express a preference on the part of the testator that there should be a sale; that the will refers the question whether there shall be a sale or not to the decision of two persons selected by the testator, as if he meant that the question should be decided by their concurrent judgment; and that it is a power, the exercise of which is not necessary, or at any rate is very far from being indispensable, to the proposed settlement of his estate. And it may be urged that there is nothing in the case to show that the contemplated distribution, at the expiration of the ten years, could not be made without such a sale.

But it is to be observed that the power is not conferred upon the two, by name, as individuals. The testator does not in that clause even speak of them as "*my said executors*;" a form of expression which has sometimes been held to be a designation of persons, as well as a description of office. They are designated only by their official titles as "*my executrix and executor*." The will, although it postpones the settlement of the estate for a term of years, makes no express provision for the contingency

which must have seemed probable, and which has in fact occurred, that one of the persons charged with the administration of the estate might cease to act in that capacity. But we must assume that the testator did not intend that such an event should prevent the general course and mode of administration, which he had seen fit to adopt, from being fully carried out. On the contrary, the entire estate is devised and bequeathed to the executors, in order that for the term of ten years the control and management of it shall be wholly in their hands. The object which the testator apparently had in view was, that the administration of his estate should be so conducted that the property should increase, by means of the accumulation and investment of all of the income not consumed or expended in the support of his wife and children. The power of sale in question, it is true, may not be, in the literal sense of the word, indispensable to the final distribution of the estate, but it is manifestly subservient and auxiliary to the execution of the trusts, which he has seen fit to connect with the administration of his will. It is certainly appropriate to, and in entire harmony with, the mode of administration which he has pointed out, and the functions which he has thought proper to connect with the office of executor. It is a part of the executorship, and is coupled with the title to, and control over, the property, provided for by the will, appropriate to the execution of the trusts, and evidently considered by the testator as likely to be found convenient to the successful management of the property. At the end of the ten years, the distribution of the estate, with all its accumulations and changes of investment, is to be made by the person or persons who may legally occupy the position, at that time, of executor or executors of the last will of the testator. Upon the resignation of her associate, he parts with all control over the estate; and the administration, with all the attendant and incidental trusts connected with the executorship, would devolve upon the executrix. After that event, he could hardly be supposed to have, or at any rate is in a position in which he would not be likely to have, that minute and detailed information about the condition of the estate that would qualify

him to judge correctly as to the expediency or necessity of making the sale.

Upon these grounds, it appears to us that the power is granted *ratione officii*, as one of the incidents of the executorship, and intended to secure the more convenient and successful administration of the trusts which the testator had in view; and that it is conferred upon the executors in their official capacity, and not as a mere personal trust in them as individuals. If so, and the vacancy had occurred in consequence of the decease of one of the executors, the power could well be executed by the survivor. The authorities cited by the defendant's counsel are full and explicit upon this point. The rule seems to be the same also, if one of the executors had refused to accept the trust. *Bonifant v. Greenfield*, Cro. Eliz. 80. "If a man maketh his will, and maketh two executors, and willeth that his executors shall sell his land, and dieth, and one of them will not intermeddle, and the other executor taketh the administration upon him and payeth the debts, the sale made by him alone is good." Perkins, § 545. It is difficult to see why a vacancy occasioned by the resignation of one of the two, which is simply a refusal to "intermeddle" or be concerned with the trust thereafter, can stand upon any different ground. The power seems to be not a mere naked authority, but is coupled with the trust of administration, as one of its incidents, and its exercise is a matter of duty and not of mere arbitrary discretion, whenever the necessity for its exercise may arise. "A power is considered as coupled with an interest, where the trustees have a right to the possession of the legal estate, or have a right in the subject over which the power is to be executed." 2 Washb. Real Prop. (3d ed.) 473. The executors in the case before us appear to stand in that position.

Whether, on the assumption that the power to sell remained in the executrix after the resignation of her associate, the deed which she gave is a valid and sufficient execution of the power, is purely a question of intention, and the intention is to be gathered from the whole instrument. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. I

is sufficient that it shall appear by words, acts or deeds, demonstrating the intention. Story, J., in *Blagge v. Miles*, 1 Story, 426. She in this deed professes to convey land which belonged to the estate of Ozias H. Mather. She does it in the capacity of executrix of his last will, which is equivalent to saying that she is acting under his last will and refers to that will as containing the authority under which she acts. The deed purports to convey what she would have no right to convey except by virtue of the power. It is true that in the same deed she enters into the usual covenants contained in warranty deeds, and that these covenants are binding upon her personally, and not as executrix; but this fact does not change the character in which she conveys. She certainly would have a right, by a separate instrument, to reinforce her conveyance by any personal covenants that she saw fit to make, and there seems to be no incompatibility in doing the same thing by a single instrument. Her deed would at all events operate as an estoppel, to prevent her from reclaiming the one undivided half of the estate conveyed to her by the deeds of Henry H. Mather and Henry N. F. Marshall.

Upon these considerations, and in pursuance of the agreement, there must be

Judgment for the defendant.

GILES PEASE vs. JOHN N. BROWN & others.
JOHN N. BROWN & others vs. GILES PEASE.

A and B. agreed in writing, concerning a tract of land belonging to A., which was occupied by squatters, as follows: that if the claims of the squatters could be extinguished by compromise for a reasonable sum, A. should extinguish them within sixty days after B. should pay him \$5000, but if it should be impracticable to settle with the squatters on reasonable terms, A. should eject them by legal process, and in such case B. should pay him such sums as might be needed for the purpose, not exceeding in all \$2000, and further, if A. should find that he could effect a settlement with them, and should wish for said \$5000, or any part thereof, for that purpose, B. should pay him said \$5000, or such part thereof as he might desire, within thirty days after notice from him; that A. should convey the tract to B. when B. should finish paying him \$50,000, including the \$5000; but that B. should not incur any personal liability for payment of the \$50,000, or any part thereof "except the aforesaid \$5000 or the aforesaid \$2000 as the case may be." A.

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thereupon proceeded to compromise with some of the squatters: and paid C., one of them, \$800 for a release of his claim in the tract, and as part of the bargain agreed to purchase from him for \$1000 a lot of land outside of the tract. Then, having effected no final settlement with the squatters, he made a supplemental written agreement with B., modifying the terms of sale of the tract in certain particulars not relating in any material clause to the squatters, and concluding thus: "This modification of the agreement is made with the understanding that B. is to pay A. \$1500 on said contract within sixty days hereof, according to the terms of his promissory note of even date herewith, and also the farther sum of \$1000, if A. shall require, within sixty days from this date, for the purpose of settling with said squatters, provided A. shall give him thirty days' notice of his requiring the same. If such payment or payments shall not be so made, this modification is to be void." *Held*, 1. that B. did not agree to pay A. \$5000 absolutely, but only such part thereof as A. should desire and need to effect a settlement with the squatters; 2. that the \$1500, paid by B. on his promissory note of even date with the modification of the original agreement, was not paid as the consideration of said modification, but to be applied by A. towards the \$5000 or such part of the \$5000 as was needed to settle with the squatters; 3. that A. could not charge against the \$5000 the sum which he promised to pay C. for land outside of the tract; and 4. that any part of the \$5000 which B. paid A. in consequence of A.'s representations that he needed it to settle with the squatters, but which in fact was not needed or used for that purpose, could not, without B.'s consent, be retained by A. and applied as a part payment of the contract price of the tract.

B., having agreed with A. to buy a tract of mining land, belonging to A. but occupied by squatters, and to pay A. so much, not exceeding a certain amount, as should be needful to settle the squatters' claims, and having paid sums to A. on account of this amount, and incurred other expenses relating to the land, sued A. in tort for deceit, and alleged that A. obtained the agreement from him by false statements of the value and minerals of the tract; that said sums were paid under and in consequence of the agreement thus obtained, and because A. assured him that they were needed and to be used to settle the squatters' claims, when in fact they were neither so needed nor used, but misappropriated by A. to his own use; and that in consequence of said misrepresentations the other expenses were incurred; and he joined a count in contract, alleged to be for the same cause of action, which set forth the agreement and his payment of said sums to A. under it, alleged that he paid them in consequence of the false representations and statements set forth in the first count, and sought to recover them as money had and received by the defendant to the plaintiff's use. At the trial, B. gave notice that he did not seek to recover anything from A. by reason of any alleged statements of A. touching the value or minerals of the land. *Held*, that, after striking out all such allegations, either count still set forth a good cause of action.

On the trial of an action on counts in tort for deceit, and contract for money had and received, to recover sums paid under an agreement of the plaintiff to pay them to the defendant to be applied by him to a certain purpose if he should need and desire them for it, facts agreed showed that the whole amount of them was not needed or used by the defendant for that purpose, and the plaintiff testified that he paid them because the defendant represented to him that they were needed for it. In relation to one of the sums, the defendant requested a ruling that it could not be recovered if the jury should find that the parties believed that it was paid with the impression, created by the phraseology of the contract or otherwise, that it was not to be applied to that purpose; and on the whole case, he requested a ruling that there was no evidence to sustain the action. The judge refused the second request; declined to rule in the terms of the first request; and submitted the case to the jury with instructions which required them to find, in order to return a verdict for the plaintiff, that the payments made by him were made for the

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purpose named, and that he was induced to make them by false representations of the defendant that they were needed for it. *Held*, that the defendant had no ground of exception.

On the issue between A. and B., whether B. was induced to pay A. money by false representations of A. that it was needed for a certain purpose, if A. contends that B., when he made the payment, did not understand that the money was to be used for that purpose but for another purpose, it is competent for B. to testify that he paid the money supposing that it was to be applied to the first purpose.

THE FIRST CASE was an action of contract against John N Brown, Abiel Abbott, John S. Abbott and William A. Abbott. Writ dated September 18, 1868. The first count of the declaration alleged that the plaintiff, on July 15, 1863, (and ever since,) owned a tract of four hundred and seventy acres of land in West Virginia, which was then subject to claims of so called squatters, and on that day entered into an agreement under seal with the defendants, which, after reciting his ownership of the land and the existence of such claims, contained stipulations, of which the parts material to this case were as follows, the paragraph first quoted being the third paragraph thereof:

"Said Pease hereby agrees with said Brown and others, that he will extinguish the claims of said squatters, by compromise with them, if the same can be done for a reasonable sum, and cause them to remove from the premises above described, within sixty days after Brown and others shall have paid to him the sum of \$5000.

"If it shall be found by Pease impracticable to effect a settlement with said squatters on reasonable terms, instead of being required to make such settlement he is to resort to proper legal measures to relieve the real estate of them and their claims. And in such case Brown and others shall pay to Pease from time to time, within thirty days after request, such sums as may be needed for said purpose, not exceeding in all \$2000, until the claims of said squatters shall be extinguished."

"And further, if Pease shall find he can effect a settlement with said squatters, and shall wish for said \$5000, or any part thereof, for that purpose, Brown and others are to pay him said sum of \$5000, or such part thereof as he may desire, within thirty days after notice from Pease."

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"Said Pease also agrees with said Brown and others, their associates, successors and assigns, that he will convey said real estate to them by good and sufficient deed with usual covenants of warranty." "But Pease is not to be required to execute such deed, until said Brown and others, their associates, successors and assigns, shall have paid to him, his assigns or legal representatives, \$50,000; the before mentioned \$5000 being a part of said \$50,000 and of the \$9500 mentioned below, and the \$50,000 payable as follows: \$200 to be paid on July 22, 1863, and \$300 on or before December 1, 1863; \$9500 (which sum includes the before mentioned \$5000) on or before December 1, 1864; \$10,000 on or before December 1, 1865; \$10,000 on or before December 1, 1866; \$10,000 on or before December 1, 1867; and \$10,000 on or before December 1, 1868."

"Said Pease hereby authorizes and permits said Brown and others, their associates, successors, assigns and legal representatives, to commence the occupation of said real estate at any time after sixty days from this date; and sooner, if Pease is able sooner to effect a settlement with said squatters; and to make any erections or improvements thereon, and any excavations, and to take therefrom and appropriate to their own use any ores, minerals, coal and other substances, in or on said real estate; but in case said Brown and others shall attempt possession before such settlement with said squatters, Pease is not to be made liable for any claims of said squatters on account of the acts and doings of said Brown and others, their associates, successors and assigns, while he is effecting the extinguishment of their claims in manner before described. But such occupation is not to continue, except upon the condition that the aforesaid payments, amounting to \$50,000, shall be promptly made in the manner before described. And in case there should be a failure to make any of said payments, all the erections and improvements upon said real estate, which shall then have been made, shall be forfeited, and shall become the property of Pease, his heirs or legal representatives.

"Said Brown and others are to make reasonable efforts in such way as they may deem judicious, for the purpose of devel-

oping, working, and bringing before the public and into market, the minerals and ores on said real estate; but they do not incur any personal liabilities for the payment of the said \$50,000, or any part thereof except the aforesaid \$5000, or the aforesaid \$2000, as the case may be, and the aforesaid \$500. But the security for the payment of all sums, except as aforesaid, is upon the property itself, and upon the improvements which may be made thereon, as before described."

"If no settlement should be effected with the squatters, and no arrangements made by which said Brown and others can commence the occupation of said estate for the purposes and in manner aforesaid, peaceably and without danger of collision and trouble, within sixty days from this date, then, and in such case, all payments named and specified in this indenture, except such as shall then have been made, are to be deferred beyond the time when they would be otherwise payable, just as long as said Brown and others shall be delayed occupancy beyond said sixty days."

"And it is further agreed, that if, from unforeseen causes, said Brown and others, their associates and assigns, should fail to make any of the payments mentioned in this indenture, excepting always the before mentioned \$500, and the \$2000 or the \$5000, as the case may be, there is to be no forfeiture nor loss of right to occupy, if any such payment should be made within sixty days from the time when the same shall be payable."

The count further alleged that the plaintiff extinguished the claims of the squatters, and did everything on his part required by the terms of the agreement to be done before the full contract price of \$50,000 should be paid by the defendants; that he "did find that he could effect a settlement with said squatters, and did wish for the said \$5000 mentioned in said agreement, for the purpose of effecting such settlements and the expenses necessarily incident thereto, and thereupon gave notice to the defendants of his wish for said \$5000, and demanded the same; yet the defendants, although the thirty days after such notice and demand have long since elapsed, and the first day of December 1864, when the defendants promised absolutely by

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said contract to pay the plaintiff the said sum of \$5000, has long since elapsed, have neglected to do and perform on their part everything whatever in said agreement agreed to be done and performed on their part, and have never paid the whole of said \$5000, but only a portion thereof, to wit, \$2442.85;" and that the defendants owed the plaintiff the balance of the \$5000, with interest from and after such notice and demand.

The answer admitted the making of the agreement, but denied all liability of the defendants to the plaintiff thereon, for the reason that they were induced by him to enter into it by means of false and fraudulent representations; alleged that he utterly failed to do the things in the agreement stipulated to be done by him in relation to extinguishing the claims of squatters; further alleged that on his request, and for the purpose pretended by him that he needed certain moneys to enable him to extinguish such claims, they paid him moneys more than sufficient to extinguish all such claims, and more than he in fact paid or was called upon to pay to extinguish them, and he misappropriated the moneys to his own use; and denied all the allegations in the declaration, except such as were expressly admitted.

At the trial in the superior court, before *Reed, J.*, the parties agreed that the defendants paid the plaintiff \$200 on July 22, 1863, \$1000 on September 26, 1863, and \$242.85 upon an acceptance of Abiel Abbott in his favor on or before January 2, 1864, and on January 16, 1864, gave him their promissory note for \$1500 payable in sixty days, and paid it at maturity, making a total of payments from them to him of \$2942.85; and it was proved that, on or about August 10, 1863, he paid William Waggy, one of the squatters, \$800, in extinguishment of all his claims, which covered two hundred and thirty-six of the four hundred and seventy acres, and that, on April 26, 1865, he extinguished the claims of William King, another squatter, by paying him \$850; and there was no evidence that he paid any other sums to squatters, nor any evidence that there were any other squatters than Waggy and King except by inference from letters of the plaintiff, dated after August 10, 1863, which were put into the case and contained allusions to "the remaining

squatters" and "their claims," and from a supplemental agreement of the parties hereinafter mentioned. It appeared also that on June 11, 1864, the plaintiff drew on the defendants for \$1500; that the draft was duly presented to them for acceptance, on the same day, with a written request of the plaintiff that they would accept it "in accordance with the stipulations of agreement of July 15, 1863," and that they refused to accept it. The plaintiff relied on this evidence of his draft and letter to sustain his allegations of notice and demand.

The plaintiff, in putting in his case, introduced in evidence a supplemental agreement made under seal between him and the defendants on January 16, 1864, modifying the agreement of July 15, 1863, by providing, first, that "Said Abbotts and Brown are hereby permitted to make a division of the real estate described in said agreement into two nearly equal parts, and to negotiate a sale for either or each of said parts; and in case they shall succeed in effecting a sale of either or both within one hundred days from this date, and within that time shall give to Pease written notice, Pease is to convey by deed of warranty, within ten days after the receipt of said notice, to such persons or company as they in said writing may request, either of said parts, upon payment to Pease of a sum which, with the payments that have previously been made, shall amount to \$35,000;" and secondly, that "Said Pease is to deed the other part of said real estate to such parties or company as they may in writing request, in the manner before stated, provided they shall pay to said Pease, at the time of the delivery of the deed, a sum, which, with all the other payments made by them at or before the delivery of said deed, shall amount to \$45,000; payments to be made and deed to be given within a hundred and twenty days from this date, and upon the same conditions as to time, notice and place as before stated; and it is further agreed and understood that if it shall be more convenient to said Pease, in making settlement and arrangements with squatters and abutters, to change somewhat the boundaries of said tract, so as to have more river front below the present survey, and to obtain portions of land adjoining in the

rear, which will work advantageously with the tract possessed, and make more desirable boundaries, he is at liberty so to do." The two final paragraphs of this supplemental agreement were as follows :

" It is also agreed that Pease shall have at least thirty days beyond the sixty days specified in the third paragraph of the original agreement, namely, ninety days, for effecting a settlement with said squatters, after the receipt of the amount specified in said paragraph, if the same shall be necessary.

" This modification of the agreement is made with the understanding that said Abbotts and Brown are to pay to Pease the sum of \$1500 on said contract within sixty days hereof, according to the terms of their promissory note of even date herewith, and also the further sum of \$1000, if Pease shall require, within sixty days from this date, for the purpose of settling with said squatters, provided Pease shall give to either of said parties thirty days' notice of his requiring the same. Said \$1000 is not to be required or paid as above, unless and until Pease shall be requested to give a deed to the northerly part of said tract. If such payment or payments shall not be so made, this modification is to be utterly void and of none effect, and Pease shall have the same rights under the original agreement, and the same claims for breach thereof, against the other parties, as if this modification had not been adopted."

The plaintiff contended that the note for \$1500, given to him by the defendants on January 16, 1864, was given as the consideration for this modification of the original agreement, and that " by proper construction of said modification the defendants would be precluded from having any part of said \$1500 applied in extinguishment of the so called squatters' claims or moneys paid."

" The judge gave such construction to the modification, and ruled in accordance with the above position of the plaintiff; whereupon the defendants offered to prove, by oral testimony, that said \$1500 note was given upon the agreement with the plaintiff that the money to be paid thereon should be used in extinguishing the claims of the squatters, and should be taken

as a part of the \$5000 named in the original agreement to be expended for that purpose; but the judge ruled that such oral testimony could not be introduced."

At the close of the evidence, the judge refused a request of the defendants for a ruling that it would not sustain the action; and also refused a request of the plaintiff for a ruling that "upon the true legal construction of the agreement of July 15, 1863, he was entitled to recover of the defendants \$5000, less the sum which had been paid in part towards said \$5000;" and submitted the case to the jury, with instructions that the plaintiff was entitled to recover only so much of the \$5000, with interest from the date of the writ, as they should find that he found necessary to settle squatters' claims and demanded of the defendants, in addition to the \$2942.85 agreed to have been paid by them to him, less the \$1500 paid on their promissory note of January 16, 1864, and less also \$500, namely, the \$200 paid on July 22, 1863, and \$300 more on account of the payment of \$300 stipulated in the original agreement to be made by them on or before December 1, 1863. Under these instructions, the jury returned a verdict for the plaintiff for \$789.55; and both parties alleged exceptions.

E. P. Brown, for the plaintiff.

J. S. Abbott, for the defendants.

MORTON, J. 1. The first question which arises in this case is, as to the construction of the provision in the contract of July 15, 1863, by which the defendants agree that "if Pease shall find he can effect a settlement with said squatters, and shall wish for said \$5000, or any part thereof, for that purpose, Brown and others are to pay him said sum of \$5000, or such part thereof as he may desire, within thirty days after notice from Pease." We have no doubt that the construction of this clause adopted at the trial in the superior court was correct. It is not an undertaking to pay \$5000 absolutely, but only such part of it as the plaintiff desired and needed for the purpose of effecting a settlement with squatters. Provision is made in a subsequent part of the contract for the payment of such part of the \$5000 as is not needed to extinguish the claims of squatters. The

contract also contains provisions, by the fair construction of which the defendants were to pay the plaintiff in place of the \$5000 a sum not exceeding \$2000 for the purpose of ejecting the squatters by legal proceedings, in case the plaintiff found it impracticable to effect a settlement with them; showing that the parties did not understand, as now claimed by the plaintiff, that the \$5000 was to be paid absolutely upon his request. The exceptions of the plaintiff therefore cannot be sustained.

2. A question of more difficulty arises upon the construction of the agreement made January 16, 1864. This is a modification of the original agreement, and contains the following provision: "This modification of the agreement is made with the understanding that said Abbotts and Brown are to pay to Pease the sum of \$1500 on said contract within sixty days hereof, according to the terms of their promissory note of even date herewith, and also the further sum of \$1000, if Pease shall require, within sixty days from this date, for the purpose of settling with said squatters, provided Pease shall give to either of said parties thirty days' notice of his requiring the same." At the trial, the presiding judge ruled that this sum of \$1500 was paid as the consideration for said modification, and that it was not to be applied by the plaintiff to the extinguishment of squatters' claims, nor accounted for by him as a part of the said sum of \$5000. We are unable to concur in this construction of the agreement. There is nothing in the terms of the modification which indicates that this sum of \$1500 was to be received by the plaintiff to his own use, and not as a payment under the contract. It is not stated to be the consideration of the new agreement. On the contrary, the agreement provides that it is to be paid "on said contract." These words necessarily refer to the contract of July 1863 as modified by this agreement. There is no other contract to which they can refer, and we think they are decisive against the construction claimed by the plaintiff. This sum of \$1500 thus paid on said contract must be applied towards the sum of \$5000, or such part thereof as was needed to settle with the squatters. There is no other payment required by the contract, to which it can apply. We are there-

fore of opinion that the plaintiff is bound to account for this sum as a part of the money paid to him for the purpose of extinguishing the claims of squatters. Upon the evidence at the trial, it appeared that, if he was charged with this sum, he has been more than paid for all sums needed for this purpose, and therefore the court should have instructed the jury, as requested by the defendants, that he was not entitled to recover anything under the first count in his declaration. These views render the other exceptions taken at the trial immaterial.

Defendants' exceptions sustained.

At the new trial in the superior court, before *Brigham, C. J.*, after this decision, "the only controversy between the parties was, whether the plaintiff could claim, for the purpose of settling with squatters, anything beyond what had already been paid to him for that purpose, which it was agreed was the sum of \$2442.85." It was further agreed that the plaintiff had paid \$800 to Waggy and \$850 to King, and no more; but he contended that he was entitled to be allowed \$1000 more, on account of an oral agreement, made between him and Waggy, in their negotiations, for the purchase by him from Waggy, for that sum, of a lot of one hundred acres outside of the tract of four hundred and seventy acres. The other material facts are stated in the opinion. The judge instructed the jury that, "if the consideration of Waggy's relinquishing his squatter's title was \$800, that sum was all which the plaintiff could properly call upon the defendants to pay under the contract, notwithstanding Waggy's agreement to extinguish his squatter's title for \$800 was coupled with and dependent upon the plaintiff's agreement to purchase other land of Waggy, not included in said tract, for the sum of \$1000." The verdict was for the defendants; and the plaintiff alleged exceptions, which were argued in March 1871 by the same counsel.

MORTON, J. When this case was before the court at a former term, it was decided that the plaintiff was entitled, under his contract, to demand and receive of the defendants only so much of the \$5000 named in the contract as he found necessary for the settlement of squatters' claims.

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At this trial, it appeared that the plaintiff had received from the defendants, for the purpose of settling with squatters, the sum of \$2442.85, and that he had paid the sum of \$1650, namely, \$850 to King, and \$800 to Waggy. He testified that in August 1863 he settled with Waggy, paid him \$800, and received a quitclaim deed of his interest in the four hundred and seventy acre tract described in the contract. He also testified that at the same time, as an inducement to Waggy to give the quitclaim deed, he orally promised to purchase of Waggy a lot of land wholly outside of the four hundred and seventy acre tract, containing a hundred acres, for one thousand dollars, to be paid within a short time. This money has never been paid, and nothing has been "done by the plaintiff or Waggy in carrying this agreement into effect." The only question now before us is, whether the plaintiff is entitled to recover this sum of one thousand dollars.

The presiding judge ruled that upon the evidence the plaintiff was not entitled to recover it, and we are of opinion that this ruling was correct. The plaintiff has not paid the amount, and it does not appear that he is under any legal liability to pay it. But if he is, we do not think he could recover it of the defendants. By the contract, he was made their agent, with authority to settle the claims of squatters, and to call upon them for such sums as he needed for that purpose, not exceeding \$5000. They were to pay him such sums as were needed to extinguish the claims of squatters. The contract with Waggy to purchase a distinct parcel of land was not fairly within the scope of his authority, and was not binding on the defendants. There is no hardship in requiring the plaintiff, before he entered into an agreement of this character, not contemplated by his contract with the defendants, to consult with and take the instructions of his principals. Not having done so, and the act being in excess of his authority under the contract, he cannot recover from the defendants the amount he agreed to pay for the land.

Exceptions overruled.

THE SECOND CASE WAS an action of tort, with an alternative count in contract, brought by the defendants in the previous case against the plaintiff therein. Writ dated June 22, 1869. The declaration contained three counts, alleged to be for the same cause of action.

The first count alleged that on July 15, 1863, the parties entered into the written agreement or indenture of that date, the material parts of which are quoted in the report of the other case; that the plaintiffs were unacquainted with lands in West Virginia, and particularly with the tract of four hundred and seventy acres referred to in the agreement; but that the defendant was well acquainted with said tract, and its minerals and its value, and with other mineral lands in that region; and that he induced them to enter into the agreement by false representations concerning said tract and its minerals and value, and said other mineral lands, which representations the count alleged in detail; that on July 22, 1863, they paid him \$200, and on September 26, 1863, \$1000, on January 16, 1864, gave him their promissory note for \$1500 payable in sixty days, which was paid at maturity, and on September 1, 1863, gave him an acceptance of Abiel Abbott in his favor in the sum of \$400, upon which they paid him certain amounts; that "said acceptance and all of said sums were so paid under and in consequence of the indenture obtained as aforesaid, and because the defendant assured the plaintiffs that said sums, draft, note and acceptance were needed, and were to be used, to extinguish the claims aforesaid of said squatters, whereas in fact said sums were not so needed, and were not so used, but were misappropriated by the defendant to his own use;" and that, "in consequence of said misrepresentations of the defendant, they were and have been subjected to large expenses, and have devoted much time in examining said four hundred and seventy acre tract, and having one of their number, to wit, said William A. Abbott, go to West Virginia for that purpose; the whole amount claimed by the plaintiffs as damages under this count being \$5000, with interest thereon from aforesaid dates when paid to the defendant."

The second count, also in tort, was as follows: "And the plaintiffs say the defendant has converted to his own use \$3500 of current money, the property of the plaintiffs; under this count, the plaintiffs will claim the same money described in the first count."

In the third count, which was in contract, the plaintiffs alleged the making of the original written agreement or indenture, and the payment of moneys and an acceptance to the defendant, as alleged in the first count; and alleged "that said acceptance and said several sums were paid and given to the defendant under said agreement and indenture; and that the plaintiffs were induced to pay and give the defendant said sums and acceptance in consequence of the false representations and statements fully set forth in said first count; and the plaintiffs claim said several sums and amounts as moneys had and received by the defendant to the plaintiffs' use, and moneys paid by the plaintiffs to the defendant, with interest thereon from said several dates of payment."

This action was tried in the superior court, before *Brigham*, C. J., at the same time with the second trial of the action of this defendant against these plaintiffs.

At the trial, the plaintiffs gave notice to the defendant that they should "not claim to recover anything from said Pease on account of any alleged statements of said Pease, touching the value or quality or cost of the four hundred and seventy acre tract, or the ores, minerals and coal alleged to have been found thereon." The defendant thereupon asked the judge to rule that the declaration did not set forth any legal cause of action but he declined so to rule.

In reference to extinguishing the claims of squatters, "it was agreed by the parties that the whole sum the defendant had received for 'that purpose' (in the language of the original indenture) was \$2442.85; that he had actually paid to squatters \$1650, namely, \$800 paid to Waggy August 10, 1863, and \$850 paid to King April 26, 1865, which was more than Pease had received for 'that purpose' up to January 16, 1864; that on January 16, 1864, the plaintiffs gave the defendant their

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promissory note for \$1500 on sixty days, which was paid at maturity and constitutes a part of said sum of \$2442.85 and on the same day the modification of the original agreement was made; and the plaintiffs contended that the defendant induced them to make this note by false and fraudulent representations," and upon this issue they introduced the deposition of William A. Abbott, one of their number, portions of whose testimony were as follows:

"About the time the original contract was made, Pease said he thought the squatters could be settled with for some one, two or three thousand dollars, but could better tell after going there and seeing them; that he would call for no more than he should ascertain would be needed; and that he would like \$5000 put in the contract as a nominal sum, and as a limit fixing the extent which we should be liable to pay to extinguish the claims by compromise; and as it would be needful for him to go at once to West Virginia, we agreed to pay \$200 within a few days, as is stipulated in the contract."

"On January 16, 1864, at the time the modification of the contract was made, the note of \$1500 was not given to Pease as the consideration for such modification, but was given because he said he should need this sum to settle with squatters. About the time the note became payable, Pease called at the office of John S. Abbott and myself, and asked me if the note would be paid, stating that he should need it to pay the squatters the money he had promised them. I replied that the note would be paid; and after this I did pay the note at its maturity."

"Pease was in our office and asked for more money to settle with squatters, John S. Abbott being present. I told him, in substance, that I could settle with the squatters for less than he had already received. He then, without making reply, left the office. As he was leaving, John S. Abbott stated to him that if he would satisfy us that more money than we had paid him was actually needed to settle with the squatters, he should have it. To this no reply was made. The letter of Pease, dated June 11, 1864, with the draft accompanying it, was sub-

sequently brought to the office by a messenger." This was the letter in which Pease requested these plaintiffs to accept his draft for \$1500, and on which he relied, in his action against them, for evidence of notice and demand.

Abiel Abbott, another of the plaintiffs, testified "that he could not swear that the defendant made any representations as to the purpose for which he desired the \$1500 paid on said contract of January 16, 1864, but that he supposed it was to be paid in extinguishment of squatters' claims."

The defendant requested the judge to give the jury the following instructions: 1. "If the jury believe, on the whole testimony, that the parties to the contract of January 16, 1864, believed that the sum of \$1500 was paid with the impression, created by the phraseology of that contract or otherwise, that no part of the same was to be paid to the extinguishment of squatters' claims, then no part of it can be recovered back." 2. "There is no evidence on which the plaintiffs can recover in this action." 3. "If at the time of the bringing of this suit money was due Pease on the contract beyond the \$5000 which was to be paid to squatters, then Pease has the right to retain such sum, *plus* the sum named in the second count, although there was no personal liability under the contract to pay more than was needed to settle with the squatters."

These requests were not complied with, except so far as appears from this statement of the instructions given: "The plaintiffs, to recover in their action, must prove by preponderance of evidence that they were induced to make payments of money to the defendant by representations, made by him, that he had found that he could effect settlement with squatters, and required for that purpose the money paid to him, when in fact there were not any such squatters, or he had not found that he could effect settlement with them, or the moneys paid on his call and notice were not then or at all required for that purpose, the defendant having no right to call for more than was required for that purpose."

The jury returned a general verdict for the plaintiffs, with damages in the sum of \$1087.90; and the defendant alleged

exceptions, which were argued at the same time with the exceptions taken by him on the second trial of the other case, and by the same counsel.

MORTON, J. We are of opinion that none of the exceptions taken by the defendant can be sustained.

1. The plaintiffs' declaration contains three counts, two in tort and one in contract, alleged to be for the same cause of action. Gen. Sts. c. 129, § 2. At the trial, the plaintiffs gave notice that they should "not claim to recover anything from said Pease on account of any alleged statements of said Pease touching the value or quality or cost of the four hundred and seventy acre tract, or the ores, minerals and coal alleged to have been found thereon." The defendant thereupon asked the court to rule that the declaration did not set forth any legal cause of action. This the court correctly refused to do. If all the allegations referred to in the notice are stricken from the first count, we think it still sets forth a legal cause of action. But this is not material, in this connection, because the third count, in contract, clearly sets forth a good cause of action, and the plaintiffs would be entitled to recover upon it if the allegations are proved. This exception therefore must be overruled.

2. The defendant asked the court to rule that there was no evidence to support the allegations of the declaration. This request was properly refused. The defendant contends that it does not sufficiently appear that the plaintiffs paid the money relying on the representations made; and that they have failed to show that the representations made were false. But William A. Abbott, one of the plaintiffs, testified that the payments were made by them because of representations made by Pease that he needed the money to extinguish squatters' claims; and the facts admitted show that the whole amount received by Pease was not needed or used for that purpose. It is not within our province to judge of the weight or sufficiency of evidence. There was some evidence upon all the material allegations of the declaration, and the court rightly submitted it to the jury.

3. The defendant requested the court to instruct the jury that if they believed, on the whole testimony, "that the parties to

the contract of January 16, 1864, believed that the sum of \$1500 was paid with the impression, created by the phraseology of that contract or otherwise, that no part of the same was to be paid to the extinguishment of squatters' claims, then no part of can be recovered back." The essential question involved in this request is, whether the plaintiffs paid the \$1500 for the purpose of extinguishing the claims of squatters. This question the court submitted to the jury under proper instructions. Under these instructions, the jury must have found that the plaintiffs made payments to the defendant for the purpose of extinguishing such claims, and were induced to do so by his representations that such payments were required by him for that purpose. These instructions were adapted to the evidence, and sufficient; and no exception lies to the refusal of the court to adopt the language of the prayer.

4. The defendant also requested the court to instruct the jury that, "if, at the time of the bringing of this suit, money was due Pease on the contract beyond the \$5000 which was to be paid to squatters, then Pease has the right to retain such sum, *plus* the sum named in the second count, although there was no personal liability under the contract to pay more than was needed to settle with the squatters." The contract provides that the plaintiffs are not to incur any personal liability beyond the sums necessary to settle with squatters, but the defendant is to look to the land for security for all sums beyond that. No money beyond the sum needed to settle with squatters was due and payable to Pease under the contract. If by fraudulent misrepresentations he induced the plaintiffs to pay him more, the law will not allow him to retain it. His fraud cannot enlarge the liability of the plaintiffs. The instruction requested was properly refused.

5. The defendant excepted to the admission of the testimony of Abiel Abbott to the effect that he supposed the \$1500 was to be paid in extinguishment of squatters' claims. We think this testimony was admissible. One of the issues which the plaintiffs were required to maintain was, that they were induced to pay this sum by false representations by Pease that he needed

it for the purpose of settling with squatters, and that they did pay it for that purpose. The defendant contended that when the payment was made the plaintiffs did not understand that it was to be used for that purpose, but that it was paid to him as the consideration of the modification of the contract made January 16, 1864. The statement of Abiel Abbott objected to was equivalent to a statement that he understood the payment made by him was for the purpose of settling with squatters, and bore directly on this issue.

There were several other questions raised in this bill of exceptions, but as the defendant's counsel did not press them at the argument, we regard them as waived.

Exceptions overruled.

JOHN R. POOR & another vs. SAMUEL OAKMAN.

A., owning land, gave B. a bond for a deed of it. A religious society was afterwards formed, of which B. was treasurer. A. sold the land to the firm of C. & D., and B. surrendered his bond and took from them another bond to convey the land to him upon his paying a certain price for it on or before a specified day. After this day had passed without such payment, the society, through a committee of which D. was chairman, built a meeting-house on the land, upon stone foundations set deep in the ground, procured insurance on it, and put furniture in it. C. was clerk of the society, and solicited subscriptions towards the cost of the building, recommended purchases of the pews as a good investment, and spoke of the building as belonging to the society; it was the general expectation of the members of the society that C. & D. would convey the land to it for the price named in B.'s bond; and on the pastor's asking for a conveyance in order to make the society secure, D. replied that it was in no danger, for it could remove the building when it should choose. After this, C. refused to convey the land to the society till its debts were paid. A creditor sued the society, and attached the meeting-house and furniture on his writ; recovered judgment; and assigned the judgment to C. & D., who directed the officer to sell the attached property on the execution, and were present at the sale. After the officer had received some bids, C. announced that he claimed the building as part of the realty, and should resist its removal by any buyer, and the officer declared that he did not warrant title to any of the property; but the sale proceeded, and the whole property was bid off for an entire price, which the officer received, and out or it paid to C. & D. the amount of their execution, and delivered the key of the meeting-house to the buyer as a symbolical delivery of the property. The buyer gave the key to the sexton, with directions to take care of the property; and C. then expelled the sexton from the building, and took possession of it, whereupon the buyer sued C. for a conversion. *Held*, that the meeting-house was not built on the land as personal property, but was fixed to the realty; and that C. & D. were not estopped to deny the buyer's title in it.

Proof of the taking of exclusive possession of a building by a person who has a right to such possession, and of his putting a new lock on a door, the key of which he knows is held by the owner of some furniture in the building, will not warrant a finding of a conversion of the furniture by him, in the absence of any evidence that he ever made claim to the furniture or hindered its owner from removing it.

TORT by John R. Poor and Samuel A. Carleton for the conversion of a meeting-house and the furniture thereof, in Somerville. Answer, a general denial, and an allegation that the building was real estate belonging to the firm of Oakman & Eldridge, of which the defendant was the surviving partner.

At the trial, before *Morton, J.*, the plaintiffs introduced evidence tending to prove these facts :

The Broadway Congregational Society in Somerville, a religious society, was formed in 1863 ; Poor, Carleton, Oakman and Eldridge were all members of it ; Oakman was clerk, and Carleton treasurer. It appointed a building committee, consisting of Poor, Carleton and Eldridge, of which Eldridge was chairman ; built a meeting-house ; procured insurance on it through Eldridge, as chairman of the committee ; furnished it with a pulpit, pews, carpets, cushions, and other suitable and usual articles of furniture ; raised by subscription part of the cost of the building ; and defrayed the cost of the furniture out of the proceeds of a fair. Carleton, Oakman and Eldridge each subscribed upwards of \$1000 towards paying for the building, which was begun in November 1863 and finished during the summer of 1864. The subscribers had a right to take pews, to the amount of their subscriptions, on or before July 1, 1865.

The land which the meeting-house was erected upon belonged originally to the Blue Hill Bank, which had given Carleton a bond for a deed of it. On April 22, 1863, several months after giving him this bond, the bank sold and conveyed the land to Oakman & Eldridge, and Carleton surrendered his bond, and took from Oakman & Eldridge another bond for a deed of it to be delivered by them to him on or before July 1, 1863, on his payment of \$1800. When Carleton took his first bond from the bank, he paid the bank \$100 for it, and received a receipt for the money. When he surrendered that bond, he gave this receipt to Oakman & Eldridge, and took a like receipt from

them. Carleton was a witness, and testified that the society was not formed when he took the first bond; that he took the bond for himself, and for his own benefit, and not for the society; but that after the building was begun he expected that Oakman & Eldridge would convey the land to the society. It appeared also, from other evidence, including testimony of the pastor of the society, and of Poor, that it was a general expectation among the members of the society that Oakman & Eldridge would convey the land to the society for the price named in Carleton's bond. Poor testified, among other things, that the building was erected on the land of Oakman & Eldridge with their consent, and that "Oakman always spoke of the church as belonging to the society, till the time of the sheriff's sale" hereafter to be mentioned; and Erasmus P. Dyer, the pastor, testified that after the building was finished he called twice upon Eldridge for a deed of the land, and told him "we ought to be secure," and he replied, in Oakman's presence, that the society was in no danger,—that it could remove the building when it chose. There were two sales of pews after the building was finished. At the first sale, Oakman and Eldridge each bought pews. At the second sale, Oakman bought a great number; and at both sales he urged others to buy, and recommended such purchases as a good investment. He also solicited and obtained subscriptions towards the cost of the building. On November 1, 1865, a conversation occurred between Poor and Oakman, which Poor testified to as follows: "I had a talk with Oakman on that day about giving the society a deed. He said the society should not have a deed till every dollar of debt was paid. I asked him to give a deed, that the society might raise money on a mortgage. The society wanted the money to pay its debts. My understanding was, that the society was to have a deed on paying the sum named in Carleton's bond. I offered to pay Oakman the money, and he refused."

Various estimates of the value of the building were made by different witnesses. No one estimated it at less than \$12,000, for removal, to be turned into a factory; and some set its value for such a purpose as high as from \$15,000 to \$17,000. It was

built under the superintendence of an architect, who described it, in his testimony, as a substantial building, but capable of removal; and from plans, and policies of insurance, which were put in evidence, it appeared to have been erected on stone foundations set into the ground to a considerable depth.

At September term 1866 of the superior court in Middlesex, Uriel Adams recovered a judgment against the Broadway Congregational Society for \$2590.69, and on September 21, 1866, took out execution thereon. This judgment and execution he duly sold and assigned to Oakman & Eldridge, and Oakman then put the execution into the hands of an officer for service. The material parts of the officer's return, which was dated November 16, 1866, were as follows :

"By virtue of this execution, and by direction of Samuel Oakman, hereinafter named, on the seventeenth day of October, last past, I seized and took, as the property of the within named Broadway Congregational Society, the Broadway Church Building, situated on the corner of Broadway and Central Streets in the town of Somerville and county of Middlesex, also the pews pew cushions, all the carpets, pulpit, gas fixtures, sofa, chairs, settees and table belonging to said church, being the same that were attached by me on the original writ, and having safely kept the same for the space of four days, and having given public notice of the time and place of the intended sale," "pursuant to said notifications, on the fifteenth day of November current, at twelve o'clock, noon, on said premises, I sold said property by public auction to John R. Poor and Samuel A. Carleton, they being the highest bidders therefor, for the sum of thirty-two hundred dollars, and made and gave them a bill of sale thereof in writing, signed by me, from which sum I have taken the sum of one hundred and sixteen dollars and fifteen cents for my fees, and of the balance I have applied twenty-six hundred and fifteen dollars and fifty-five cents in full satisfaction of the within named judgment, to wit, by paying the same to Samuel Oakman and Benjamin W. Eldridge, to whom the within judgment and execution had been assigned, and the remainder I hold to be disposed of according to law, and so I return this execution satisfied in full."

The officer testified that on the morning of the sale Oakman first told him that he should bid as high as \$4000 on the property, and wished him to attach it on another writ in his favor; that he replied that he already held another writ with instructions to attach the property on it; and that thereupon Oakman said that he should not bid much on the property. It appeared by other testimony that this other writ was one sued out by Carleton.

At the sale, after some bids had been made, Oakman, in the presence of Poor and Carleton and the rest of the assembled company, gave public notice that he owned the land and the meeting-house on it, and that, if any one should buy the meeting-house, he would not permit the buyer to remove it. One of the bidders then asked the officer what he would warrant; and the officer replied that he would warrant nothing. After a warm dispute between Poor and Oakman, the sale proceeded, and the entire property was bid off by these plaintiffs, Poor and Carleton, through their attorney, for \$3200. They paid the officer that sum, and he delivered the key of the front door of the meeting-house to Poor as a symbolical delivery of the property and the next morning paid to Oakman the amount of the execution and took a receipt for it.

The plaintiffs, at the close of the auction, gave the key to Abraham Coan, the sexton, with directions to lock the doors of the meeting-house, take care of the property, and let nothing go out. Coan waited until the crowd dispersed, and then was busy in the meeting-house, when Oakman came behind him, pushed him out of the front door, bolted it, came out of a side door and demanded the key, but Coan refused to surrender it. A few days afterwards, during an evening service in the meeting-house, the plaintiffs told Coan, in Oakman's presence, to take care of the building; but after the service, Oakman turned off the gas, pushed Coan out of the front door, and said he would call the police if Coan should come in again. Oakman then put new locks on the doors. About this time the plaintiffs' attorney called upon Oakman, and said to him that the plaintiffs contemplated removing the meeting-house, but if he would sell them

the land they would pay its appraised value, and in addition whatever would be the cost of moving the building; and he replied that he owned the building, and would resist any attempt to remove it.

Soon afterwards, on December 9, 1866, the meeting-house was destroyed by fire. Part of the furniture was saved, and removed to a building which belonged to Oakman. After the trial of an action brought by Oakman against the Dorchester Insurance Company, reported 98 Mass. 57, Carleton was notified to take this furniture away. The remnants of the meeting-house, left from the fire, were sold under Oakman's direction, and the proceeds paid to him.

On this evidence, the judge ruled that the plaintiffs were not entitled to recover, directed a verdict for the defendant, and reported his rulings, with a statement of the testimony in detail, for the revision of the full court.

H. W. Paine & G. A. Somerby, for the plaintiffs. 1. The plaintiffs bought the meeting-house and furniture at the sale on the execution, and paid the purchase money to the officer, who paid it to the defendant for himself and Eldridge.

2. The house was erected by the society on land of Oakman & Eldridge, with their knowledge and consent, and not under any contract for the purchase of the land by the society. When Carleton's first bond was made, the society had no existence, and the time of the last bond had expired when the house was begun. Carleton took the bond for himself, and not for the society. The society obtained insurance on the house through Eldridge as one of the building committee, and paid the premium. And Eldridge told the pastor, who called on him for a deed, that the society could remove the house whenever it chose. Upon these facts, the plaintiffs contend that the house was personal property of the society, and liable to be taken on execution for its debts. *Osgood v. Howard*, 6 Greenl. 452. *Hilborne v. Brown*, 3 Fairf. 162. *Jewett v. Patridge*, lb. 243. *Fuller v. Tabor*, 39 Maine, 519. *Pullen v. Bell*, 40 Maine, 314. *Shaw v. Carbrey*, 13 Allen, 462. *Hinckley v. Baxter*, lb. 139. *Howard v. Fessenden*, 14 Allen, 124, 128. The doctrine of *Hutchins*

v. *Shaw*, 6 Cush. 58, and *King v. Johnson*, 7 Gray, 239, is not applicable, as there was no contract or agreement for the purchase of this land or the payment of rent. It was a case of license.

3. The defendant is estopped to deny the title of the plaintiffs. His firm bought the judgment, obtained the execution, put it into the hands of the officer, and ordered him to advertise and sell the meeting-house. He expected to bid himself, and requested the officer to take his writ and attach, that he might receive any surplus; but finding that he had been anticipated, he resolved "not to bid much." The company was assembled. The officer, in the presence of Oakman and Eldridge, received bids for the house and furniture; and then, finding that the officer was not likely to sell the house for a nominal price, Oakman for the first time proclaimed himself owner of it and the land. He knew that it was then knocked down to the plaintiffs, and the next day he received and receipted for their purchase money. *Andrews v. Lyon*, 11 Allen, 349. *Tobey v. Chipman*, 13 Allen, 123. *Hooker v. Hubbard*, 97 Mass. 175.

4. If the plaintiffs acquired title in the meeting-house, the proof of the defendant's conversion of it is clear.

5. There was evidence for the jury, of a conversion of the furniture. *Forsyth v. Hooper*, 11 Allen, 419. If Oakman expelled the plaintiffs' keeper and put new locks on the doors for the purpose of preventing the removal of the furniture by the plaintiffs, this was a conversion.

C. B. Goodrich & S. J. Thomas, for the defendant.

CHAPMAN, C. J. The plaintiffs' title to recover the value of the meeting-house depends upon the question whether it was, at the time of the sale to them, personal estate or a part of the realty. If it was a part of the realty when erected, the legal title to it was at the first in the defendant. What equitable relations existed between him and the society cannot be considered here. The defendant might consent to an oral sale of it to the plaintiffs; and after such sale, and the severance of the structure from the land, it would become personal property. Not only a structure, but trees, grass, stone in a quarry, and

other things which are a part of the realty, may be sold by oral agreement, and removed by virtue of an oral license; but it is well established law that before the severance the owner may revoke the sale and the license, and no title will have passed to the purchaser, and he will have no right to go upon the land and sever and remove the property. *Claflin v. Carpenter*, 4 Met. 580. *Nettleton v. Sikes*, 8 Met. 34. *Nelson v. Nelson*, 6 Gray, 385. *Stearns v. Washburn*, 7 Gray, 187. *Lamson v. Patch*, 5 Allen, 586. The principle is well stated in *Giles v. Simonds*, 15 Gray, 441. If standing trees are sold, they become personal property by being cut, and the license to go upon the land and take them away becomes irrevocable; but before they are cut the license may be revoked,—otherwise it would *ex proprio vigore* convey an interest in the land. See also *Burton v. Scherpf*, 1 Allen, 133, as to the sale of a ticket for a concert. The same doctrine applies to buildings owned as real estate, and sold with intent to be severed. *Shaw v. Carbrey*, 13 Allen, 462.

The ground of these decisions is, that the statute of frauds requires that a sale of any interest in real estate, in order to be valid, must be in writing. In this case, if there was any consent given by the defendant to the sale and removal of the building, it was revoked before the sale, and before any attempt to remove or sever the house from the land. If, then, the plaintiffs can maintain this action, it must be upon the ground that the house was built upon the land as personal property, and never became fixed to the realty.

It was not erected as a trade fixture, to be removed before the term of a lease should expire; for there was no lease of the land, even at will, as was held in *Doty v. Gorham*, 5 Pick. 487. Nor was it like the building standing on wooden blocks, which was the subject of controversy in *Hinckley v. Baxter*, 13 Allen, 139, and which was never annexed to the land. It was a large building, affixed to the soil by stone walls and excavations of considerable depth; and, so far as its character is to be determined by these particulars, it was as completely a part of the realty as any building could be. Nor was it built with any intent it should remain there temporarily, as personal property

under an oral license from the owners of the land, and then be removed, within a reasonable time, upon the revocation of the license. But Oakman & Eldridge had given a bond to Carleton, the treasurer of the society, to convey the land to him on the terms therein stipulated; and it was the expectation of all parties interested in the house, that a conveyance should be made to the society. Carleton testified that he took the bond for his own benefit. This may not be very material, as Carleton was in fact their treasurer. The term stated in the bond had expired; but time was not a material part of the contract. The conduct of Eldridge, in acting as a member of the building committee of the society, and appropriating the money of the subscribers and the society to the building of the house, was inconsistent with such an idea, as were also the repeated declarations of himself and Oakman. Of the same character were their purchase of pews, and their agency in the sale of pews to others. They had also an interest in the structure itself, by investing money in it, both as subscribers and as purchasers of pews. The idea of treating the house as personal property does not appear to have occurred to any one till a question arose as to the time when a conveyance should be made to the society, and Eldridge, in the presence of Oakman, endeavored to quiet apprehensions by stating what he supposed the legal rights of the society were.

In *First Parish in Sudbury v. Jones*, 8 Cush. 184, it was held that buildings are part of the freehold; and if erected on the land of another voluntarily and without any contract, they become the property of the owner. But there is no evidence of any contract between the society and Oakman, either express or implied, that the house should be erected on his land as personal property. The agreement is an essential part of the matter. If a husband erect buildings on the land of his wife, they become realty, because he cannot contract with her. *Washburn v. Sproat*, 16 Mass. 449. So a house erected by a reversioner during the intervening term becomes real estate. *Cooper v. Adams*, 6 Cush. 87. So a building erected by one who has a contract for a conveyance of the land is a part of the realty. *Eastman*

v. *Foster*, 8 Met. 19, 26. In *Oakman v. Dorchester Insurance Co.* 98 Mass. 57, upon evidence not varying essentially from that which appears in the report of this case, this building was held to be real estate. See also *Howard v. Fessenden*, 14 Allen 124, 128.

In *Pullen v. Bell*, 40 Maine, 314, it was held that a house erected by one who took possession under an oral agreement for a bond for a deed was personal property, and that a purchaser under an execution might maintain an action of trover against the owner of the land, who would not allow him to remove it. But our cases, cited above, do not sustain this view. There are several other cases in Maine which go further than ours. *Russell v. Richards*, 1 Fairf. 429, and 2 Fairf. 371. *Hilborne v. Brown*, 3 Fairf. 162. *Jewett v. Patridge*, Ib. 243. We are satisfied that the cases in Massachusetts go as far as the statute of frauds will permit. Nor are any of our cases inconsistent in principle with those above cited from our reports. See *Wells v. Banister*, 4 Mass. 415; *Doty v. Gorham*, 5 Pick. 487; *Ashmun v. Williams*, 8 Pick. 402; *Belding v. Cushing*, 1 Gray, 576.

Upon the whole, we think there was not sufficient evidence to authorize the jury to find that the building ever was personal estate. Nor was the defendant estopped to revoke his oral consent that the building might be sold and removed. He did nothing that could amount to a legal estoppel.

As to the personal property in the building, it does not appear that he ever made claim to it, or hindered the purchaser from removing it. His contest with Coan was for the possession of the building, and no question arose as to the right of the owners of the furniture to carry it away. But Oakman having a right to the building, had a right to its exclusive possession, and to the possession of the key. This would not amount to a conversion of the furniture.

Judgment for the defendant.

CLARA E. STONE *vs.* EDWIN L. SANBORN.

On the trial of an action for breach of an oral contract, a letter of the defendant to the plaintiff, offered by the latter to show admissions of the defendant that the contract was made and broken by him, is admissible in evidence, although it is one of a series of letters between the parties, all of which were in the plaintiff's possession, and some, including his own letter to which the one in question was a reply, he has voluntarily destroyed or refuses to produce; and the refusal of the judge to instruct the jury that, in the absence of those letters, and in view of their voluntary destruction by the plaintiff, they have a right to draw the most unfavorable inferences against the plaintiff as to their contents, affords the defendant no ground of exception, if the judge instructs them that the plaintiff's failure to produce all the letters and destruction of some of them are circumstances to be considered in determining the weight and effect to be given to the letter produced.

On the trial of an action for breach of a contract which both parties agree was terminated at a certain time, and differ only as to whether the termination was by mutual consent, the refusal of instructions to the jury, which were framed on the assumption that the contract subsisted some months later, affords no ground of exception.

CONTRACT for breach of promise of marriage. Writ dated April 23, 1867. Answer, that any engagement or promise of marriage, made by the defendant with the plaintiff, was conditional, and terminable at any time at the option of either party, and was terminated by mutual consent. Trial in the superior court, before *Wilkinson, J.*, who allowed a bill of exceptions substantially as follows :

" The plaintiff testified, in her own behalf, to an absolute engagement being made about June 20, 1864; and offered in evidence, in further proof of the engagement and the violation of the same by the defendant, the mutual correspondence by letters between the parties. The defendant testified that, on July 4, 1864, when he gave her an engagement ring, the alleged condition was mutually agreed upon as a part of the engagement. The plaintiff offered evidence that the defendant was engaged to another woman in 1866 and married to her in 1867; and that the plaintiff then proceeded to bring this action.

" It appeared that a change of feeling and a coldness toward the plaintiff occurred, and was manifested to her, by the defendant, in January 1865, and the matter was a subject of difference and conversation between them in interviews during that

month; that finally, in February 1865, the defendant returned to the plaintiff her letters in a letter dated February 13, 1865, and the plaintiff returned to him the ring and a book which he had given her; that she kept the defendant's letters to her, and refused to return them, as he in one of his letters had given her permission to do so, and for the reason alleged by her also that her parents would not permit her to return them."

The following was the material part of the defendant's letter of February 13, 1865: "Inclosed you will find all the letters you have written me since March 1863 up to date, one hundred sixty-six in all, of the first series, and thirty-four of the second. All that I request you to return is the letters I have written, and the ring, which I doubt not you will do, perhaps ere you receive these. Then everything will be settled, and I hope you will soon forget me."

"The plaintiff testified that, on the day when she received her returned letters from the defendant, she suddenly and without any particular design destroyed a portion of them by burning them, and kept the rest. The defendant put in evidence one letter from her, dated February 17, 1865, and another written to the defendant's sister on December 29, 1865, tending to show, as he contended, that she did not destroy them as or when she claimed to have done it, if at all."

All but the formal parts of the letter of February 17, 1865 were as follows: "Your request in regard to the letters has just reached me, and it shall not pass unnoticed, yet it must be ungranted. You told me in one of your recent letters that if I wished I might keep them as a parting favor; you also told me the same when you were last here; and I am inclined to hold you to that promise, though you neglect to fulfil others. I shall return part of them. The rest I shall keep till I wish them no longer. I know it seems cruel to you that I should disappoint you; but remember that I too have had disappointments since I first knew you, and you must not murmur at this trifling refusal, or rather refusal of a trifling request. Besides, to say nothing of my own wish to retain them, my parents positively refuse to let me return them; and of course my duty to them is

more binding than to another now. I never asked you to return the letters I have written you; but as you voluntarily sent them to me, I shall do by them as I supposed you would do. I may preserve two or three of them."

In her letter of December 29, 1865, to the defendant's sister, the plaintiff began thus: "Doubtless you will be surprised to receive a letter from me at this late hour, thus calling to your mind a subject which perhaps by you has long since been forgotten, yet to me is as fresh as when one year ago next Monday your brother Edwin informed me that there was no longer a place for me in his affections." The letter then commented on certain gossip about the writer and the defendant, immaterial to this case, and ended as follows: "Poor worm of earth,—I pity him rather than feel indignant, for, believing as I do in retribution, he has most to suffer. I have the letters we have both written; and, if you question my fidelity or kindness to him from what he has told you, I hope some day to permit you to peruse our correspondence. Perhaps I have written as much as propriety will allow; and I will close, hoping you will not misconstrue my motive in writing to you by thinking that the thought of renewing any intimacy with him by so doing entered my mind, for nothing is further from my wishes. No matter how much suffering might be alleviated, or how much he might plead, nothing would tempt me to trust my happiness in his keeping again."

"The plaintiff's counsel offered in evidence some of the defendant's letters and some of the plaintiff's, making selections of such as they desired to put in. The defendant objected, on the ground that, the correspondence being offered to prove the engagement and the breach of the same by the defendant, the whole should be put in and not a part; that the plaintiff, having voluntarily destroyed a portion of it, or, if not destroyed, refusing to produce the whole should not be permitted to read portions of it. But the judge overruled the objection, and permitted the plaintiff to read such letters of either party as she pleased. Some letters were read which appeared to be in reply and in reference to the contents of a letter from the other party

which was not put in. It appeared that in January or February 1865, after manifestations of change of feeling on the part of the defendant, and some conversations had between them in reference to a continuance of the engagement, the plaintiff wrote a letter to the defendant at Boston, which was forwarded and received by him at Pittsfield, relating to the termination of the engagement, and that the defendant replied to it by letter. These two letters were among those destroyed, or not produced at the trial. The defendant contended that in this letter of hers, and in his reply, the engagement was ended by and upon her request, and by her consent. The plaintiff put in evidence her letter in reply to his letter written from Pittsfield, dated February 3, 1865, it so appearing on the face of the same. This was one of the letters which the defendant objected to, for the reason stated, particularly, and because of the nonproduction or destruction of the letter to which it was a reply. The plaintiff denied that the engagement was ended by her consent. The defendant testified, and contended, that, in her letter to him at Pittsfield, she consented to his terminating the engagement, and requested him to do so if he desired it, in substance; but not having kept a copy, he could not state the exact contents thereof. The letter written by the plaintiff to the defendant's sister in December 1865 was given and communicated to the defendant; and with the others in evidence may be referred to." Among these others was a letter from the defendant to the plaintiff, dated February 4, 1865, in reply to the plaintiff's letter to the defendant of February 3, and referring to it.

The defendant requested the following instructions to the jury:

"1. That the breach of the contract as claimed, being in the marriage of the defendant to another party in 1867, and it appearing, in the letter of the plaintiff to the defendant or his sister, and communicated to him, that she wrote 'No matter how much suffering might be alleviated or how much he might plead nothing would tempt me to trust my happiness in his keeping again,' this was putting an end to the contract, and he had a right to rely upon it.

"2. That if the correspondence in January and February was only to the effect and with the view of terminating the engagement by mutual consent, and the defendant ceased his attentions then because he understood, and had reason to understand, that she had consented to it, this would not be of itself a breach of the contract, in the absence of any time fixed for the marriage; and if matters lay along in this way until the said letter to the sister was received, and in which she stated as quoted above, this would justify the defendant in taking her at her word and engaging himself to and marrying another person.

"3. That if the proposition of marriage was made and accepted in June, as stated by the plaintiff, and yet on the 4th day of July, as stated by the defendant, the condition contended for was mutually attached to the engagement, it would be the same as if the condition had been embraced in the agreement originally as made in June on the plaintiff's evidence.

"4. That in the absence of the missing letters, and the voluntary destruction of them by the plaintiff, the jury have a right to draw the most unfavorable inferences as to their contents as against the plaintiff."

"The judge did not give the instructions as prayed for; but instructed the jury, among other things not objected to, that whether the contract was absolute or conditional was a question for them to determine upon the evidence; that it was competent for the parties to make it in either form, or to alter or to vary its terms in this respect at any time after it had been made, or to rescind it in whole or in part, or either party might release the other from the performance of the promise; and that whether or not any of these things had been done in the present case was a question for the jury; that if the plaintiff had used expressions in any of her letters, or otherwise, from which the defendant might fairly understand that she waived the contract or released him therefrom, and he married under that belief, the plaintiff could not recover; that the absence of a portion of the correspondence did not make the letters introduced incompetent, but the facts that the plaintiff had destroyed some of the letters, and did not produce the whole correspondence, were circum-

stances to be considered by the jury in determining the weight and effect to be given to the letters produced."

The jury found for the plaintiff, with damages in the sum of \$5500; and the defendant alleged exceptions.

A. A. Ranney, for the defendant.

G. A. Somerby, (D. F. Crane with him,) for the plaintiff.

GRAY, J. The contract of marriage, on which the plaintiff relied to support her action, and to which she testified, was oral. The letters between the parties which were admitted in evidence were not offered by the plaintiff as themselves constituting the contract, but as evidence of the defendant's admissions that it had been made, and of a breach by his refusal to perform it. The only objections taken at the trial to the admissibility of this evidence were, that the plaintiff had voluntarily destroyed part of the correspondence, or, if she had not destroyed it, refused to produce the whole, and should not be permitted to introduce portions of it only; and particularly that she could not put in a letter replying to one which was destroyed or not produced. We are of opinion that neither of the objections can be maintained.

The plaintiff might give in evidence against the defendant any letters of his, containing admissions material to the questions in issue, without putting in the whole correspondence between them. If letters which she introduced showed that they were written in reply to other letters, she might doubtless give in evidence those letters too, as tending to explain the replies. *Trischet v. Hamilton Insurance Co.* 14 Gray, 456. She was not however bound to do so, but might leave it to the defendant, upon cross-examination or otherwise, to offer any competent evidence of them or their contents, if he wished. If the ruling of Chief Baron Pollock in *Walson v. Moore*, 1 C. & K. 626, cited for the defendant, that the party offering the reply in evidence should put in both the letters or neither, was anything more than an exercise of discretion as to the order of proof, it is more than counterbalanced by the opinions of Lord Kenyon in the earlier case of *Barrymore v. Taylor*, 1 Esp. 326, and of Baron Parke in the later one of *De Medina v. Owen*, 3 C. & K. 72

In *Crary v. Pollard*, 14 Allen, 284, the reply was held admissible as evidence of notice to the party to whom it was addressed, without producing the letter to which it referred; and the question whether it was admissible for any other purpose was not considered. When a particular communication which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written, than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also; and if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel their production.

A party who wilfully destroys a document cannot indeed be permitted to testify to its contents without first introducing evidence to rebut the inference of fraud arising from his act. *Joannes v. Bennett*, 5 Allen, 169. *Oriental Bank v. Haskins*, 3 Met. 336, 337. But it is unnecessary to consider whether the plaintiff's testimony as to the circumstances under which she destroyed some of the defendant's letters was sufficient to rebut any inference of fraud in the present case; for she offered no evidence of the contents of the letters destroyed; and their destruction could not estop her to give in evidence any existing letters in themselves competent.

The result, as applied to the plaintiff's letter of February 3, 1865, to the admissibility of which the objection was most strongly urged, is this: The defendant's reply of February 4, referring to this letter of February 3, was in evidence; and this was therefore competent also. The introduction by the plaintiff of this letter of February 3 warranted, but did not oblige, her to give in evidence, if she would and could, the previous letter of the defendant to which it in turn referred. She did not offer or produce that previous letter, and the defendant testified to its contents. He has therefore no ground of exception to the course of proof at the trial.

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There was no error in refusing the instructions requested. The plaintiff's letter to the defendant's sister in December 1865 did not, as was contended in the first of these instructions, put an end to the contract, but treated it as terminated by him long before. The second instruction was inapplicable to the case, because it was assumed that the engagement continued to the date of this letter; whereas both parties had contended that it had been terminated in the February preceding, and differed only upon the point whether it had been so terminated with her consent. The third was covered by the instructions given, which permitted the jury to find that the contract was originally conditional, or was afterwards made so. The fourth instruction presented a partial view of the case, and was calculated to prejudice the plaintiff with the jury. The submission to the jury of the plaintiff's failure to produce all the letters and destruction of some of them, as circumstances to be considered by them "in determining the weight and effect to be given to the letters produced," necessarily involved a consideration of the probable contents of the missing letters. All the instructions given appear to us to have been clear and just, well adapted to the case, and open to no legal exception.

Exceptions overruled.

CAROLINE C. MERRIAM vs. SHEPHERD S. WOODCOCK & another.

A judgment recovered on the merits, by a laborer, for the full amount of his claim, in an action against a married woman and her husband for work done on her separate estate, which she defended on the ground that he was negligent in doing the work, though without seeking to recoup therefor, is a bar to a subsequent action by her against him for such negligence.

COLT, J. In a former action between these parties, the present defendants recovered compensation for services rendered under a contract with the present plaintiff, made with reference to her sole and separate estate, in which her husband was joined as codefendant. In defence of that action, the answer, after

setting out the contract with particularity, alleges negligence and unskilfulness in the performance of the services required, in every respect, and charges that the services actually rendered were of no value. The case was sent to an auditor, who found, in accordance with the defendant's claim, that the damage resulting to the defendant, on account of the plaintiffs' want of skill and negligence, was greater than any benefits received, and that the plaintiffs were not entitled to recover anything for their services. But this finding was not sustained at the trial, and a judgment was recovered, apparently for the full amount of the plaintiffs' claim.

The pending action is for the recovery of damages for the negligent and unskilful performance of the same contract for services by the plaintiffs in the former, and the defendants in this, action; and it is urged by this plaintiff that the former judgment is no bar to this suit.

The legal tests by which this is to be determined are of easy application to the facts presented. It is apparent that the subject matter of judicial controversy here has already been drawn in question, and directly put in issue in the former action. The parties to this suit were parties to that. The pleadings show that the declaration in both cases is upon the same contract; that the allegation of negligence and unskilfulness, which is the ground of this action, was set up in defence of that, and would have reduced or defeated the claim for services, if proved, on the ground of their total or partial want of value; and the jury must have passed upon that question in coming to their verdict. A recovery in the first action could not have been had without establishing a performance of the contract, or at least valuable services rendered under it. *Merriam v. Whittemore*, 5 Gray, 316. *Burlen v. Shannon*, 99 Mass. 200.

It is said that there was no claim by the defendant in the first action to recoup the damages claimed here. This may be so; and such is the proper course to pursue, when, in the opinion of the party defending, the damages which he has suffered from the plaintiff's negligence or want of skill exceeds a just claim for services under the contract, and it is intended to make a

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claim for such excess in an independent action. For the purpose of avoiding circuity of action, it is permitted to show these damages in an action on the contract, instead of compelling a resort to a cross action. The defendant must make his election, however. He cannot avail himself of such a defence by way of recoupment strictly, and afterwards bring his action to recover for the damages in excess. In this case, plainly it is of no consequence that the answer did not seek technically to recoup in the first action; for the facts set up in it, if proved, would have made out a complete defence; and the difficulty is, that the same facts are made the foundation of the present action. The subsequent remedy for the excess depended on defeating the first action, in which there could have been no recovery without proof of performance of the contract, or of valuable services rendered under it. The issue once found in favor of the plaintiffs, followed by judgment thereon, is forever settled between these parties. *Harrington v. Stratton*, 22 Pick. 510. *Burnett v. Smith*, 4 Gray, 50. *Stevens v. Miller*, 13 Gray, 283. And see *Davis v. Tullcot*, 2 Kernan, 184. *Exceptions overruled.*

J. F. Pickering, for the plaintiff.

D. H. Mason & W. P. Harding, for the defendants.

LEVI F. STEVENS vs. PETER C. TUITE & others.

A manufacturer, from whom the entire machinery of his cloth printing factory, in running order and actual use, was replevied, including steam apparatus for supplying the motive power, took judgment for a return and for damages assessed by computing interest on the appraised value of the property from the date of the writ to the date of the judgment, under an agreement expressly provided to be without prejudice to his action on the replevin bond. On the demand of the officer upon the writ of return, tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that, or to replace it. This tender was not accepted; and the writ was returned in no part satisfied, and suit brought on the bond. *Held*, 1. that the officer had a right to treat the property as an organized whole, and refuse the offer to return part of it: 2. that the manufacturer's claim for damages, in the action of replevin, included compensation for the general inconvenience and loss resulting from the interruption of his possession, and for the expense, trouble and delay of restoring the factory to its former condition, as well as interest on the value of the property; but 3. that the claim was an entire claim and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and 4. that the measure of his dam-

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ages in the suit on the bond was the sum which, under the ordinary circumstances attending a sale, might reasonably be agreed upon as a fair price for the property, between a seller desirous of selling, and a buyer desirous of buying, it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged.

CONTRACT on the replevin bond taken in the case of *Tuite v. Stevens*, 98 Mass. 305. At the trial in this court, before *Morton, J.*, the plaintiff put in evidence an auditor's report, the material parts of which were as follows :

"The plaintiff in the present action, being defendant in the original replevin suit, recovered judgment against Tuite, the plaintiff therein, for \$1448.02 damages, and \$224.80 costs, and for a return of the goods replevied. The date of the replevin was October 19, 1865; judgment for return was recovered December 7, 1867; and the writ of return was issued December 12, and demand made thereon for restitution of the goods replevied, as appears by the officer's return, December 19, 1867. The execution has been in no part satisfied, and no part of the goods has been returned.

"The property replevied consisted of the machinery, apparatus, tools, implements, trade fixtures and entire equipment of an establishment for printing woolen cloths, and included, among other things, steam engines and boilers, a steam pump, and other steam apparatus, screw presses, power presses, printing machines, copper print rolls, press plates and papers, shafting, belting and pulleys, and a large amount of steam piping—the whole being designed, adapted and arranged for carrying on the business of cloth printing, and at the date of the replevin being in complete running order and actual use in that business. The plaintiff in this action derived his title to the property under a mortgage from Daily & Worthen, by whom the establishment had been fitted up a few months before the replevin suit, although a considerable part of the machinery and apparatus therein had been removed from premises which they formerly occupied for the same purpose. At the time of the replevin, he had perfected his title by foreclosure, and secured a lease of the premises in which the property was situated and was

engaged there in the business of cloth printing on his own account.

"It was assumed by the counsel for both parties, that the general rule of damages to be applied was the market value of the property replevied at the date of the demand made upon the writ of return, supposing it to be at that time in the same order and condition as it was when replevied, with interest from the date of such demand, added to the amount of the judgment for damages and costs in the original action, with interest thereon from the date of such judgment. But in the application of this rule to the facts of the case, and as to the mode and principle by which such market value was in this case to be ascertained, they differed, the counsel for the plaintiff contending that such value was to be determined by ascertaining for what sum the plaintiff could replace the property replevied with property of like character in the premises, including the cost of placing and setting up the same; and the defendants' counsel contending that the measure of market value was such sum as the property would bring if sold after being taken on replevin, and removed from the premises in which it was found.

"The testimony of witnesses familiar with the property, and experts in its valuation, was introduced for the purpose of showing its nature, condition and value. I find, upon the testimony produced, that some portions of the property replevied were articles having in themselves a fixed or ascertainable value, as articles of bargain and sale, and capable of being readily disposed of at such market value, either at public or private sale, removed from the premises in which they were situated, and separated from the other machinery and apparatus in connection with which they were used. But I find that other portions of such property, if so removed and separated from the establishment of which they formed a part, and disconnected from the machinery and apparatus in connection with which they were designed and adapted to be used, would be thereby deprived of a great part of their value, and could be disposed of only at a price greatly inferior and disproportionate to their cost, and to their value when sold, as used in connection with the other parts of said property."

"Upon these facts, I have not adopted the rule or method contended for by either party before me, in determining in this case the market value of the property replevied. I have not adopted as the measure of damages in this case the cost of replacing the property replevied in the premises occupied by the plaintiff with other like property, including the cost of procuring, placing and setting up the same, because, although that rule might afford only an indemnity to the plaintiff, it appears to me to include a portion of the damages which were recoverable, and which I must assume were recovered, in the original replevin suit. But, in ascertaining the fair market value of the property, I have not, on the other hand, adopted as the limit of such value the price which the several articles replevied would bring if separately sold at public or private sale after being taken from the premises in which they were found and disconnected with each other; because they were not replevied in such condition, but were taken under such circumstances and conditions that they should be considered as constituting the connected component parts or elements of a single organization and subject matter the value of which is capable of being ascertained as a whole. I have therefore adopted, as the measure of the market value of the property replevied in this case, that sum which, under the ordinary circumstances attending a sale and purchase, might reasonably be agreed upon as a fair price for such property between a vendor desirous of selling and a purchaser desirous of purchasing the property as a whole, to be used in the place where it was situated, and for the purposes for which it was intended and arranged.

"Applying this rule and method of ascertaining the market value of the property to the evidence before me in this case, I find that, at the date of the demand made upon the writ of return, the fair market value of the property replevied, provided it had remained in the same order and condition as when taken in replevin, was \$12,750. And I accordingly report that the plaintiff in this suit is entitled to recover of the defendants the said sum with interest from December 19, 1867, in addition to the sum of \$1672.82, the amount of judgment in the original re-

plevin suit, with interest on the last sum from December 7, 1867 the date of said judgment."

The plaintiff then offered, and, against the objection of one of the sureties, was permitted to introduce, the testimony of his counsel in the action of replevin, that the judgment therein was entered upon an agreement between him and Tuite's counsel in that action, by which damages were assessed by computing interest upon the appraised value of the replevied chattels from the date of the writ of replevin to the date of said judgment, and that this agreement was stipulated, and in a memorandum thereof (which was put in evidence) was expressed, to be "without prejudice to action on bond."

The plaintiff here rested his case; whereupon the defendants sought to prove that, when the officer made demand for the replevied chattels upon the writ of return, one of the sureties offered to return all of them except the boilers, engines and steam pump, in as good condition as when replevied, and to pay the value of the boilers, engines and pump, or replace them with others, and also to pay the damages and costs. But the judge, on the plaintiff's objection, rejected this evidence.

The defendants contended, on the whole case, that the plaintiff could not recover more than the value of the replevied chattels, estimated as if they had been sold after their removal from the factory on the writ of replevin; and thereupon, by agreement of the parties, the judge directed a general verdict for the plaintiff, and reported the case for a revision of his rulings on evidence and a determination of the true rule for the assessment of damages by an assessor.

H. W. Paine & E. Avery, for the defendants.

T. H. Sweetser & N. St. J. Green, (*C. S. Lincoln* with them,) for the plaintiff.

AME3, J. In the action of replevin, it is sometimes said that each party is an actor, or plaintiff. It is substantially in the nature of a proceeding *in rem*. The question litigated is, whether the plaintiff is entitled to keep the property which he has taken from the defendant, or is bound to return it to him with damages for having intermeddled with it. The property in dispute

may be said to be in the mean time in the custody of the law; that is to say, it is represented by the bond, which imports that it is held by the plaintiff to abide the event of the suit and to be disposed of accordingly.

If the plaintiff prevails, the result of the suit is, that, in the judgment of the court, the property belonged to him; and that he did right in taking it, and may lawfully continue to keep it, and dispose of it according to his pleasure. As the prevailing party, he would in that event recover damages and costs. The value of the goods would not make a part of his damages, for the reason that from the commencement of the suit he has had the property in his own hands, and is now adjudged to be the rightful owner. In most cases, his damages are but nominal and constructive, such as are incident to the vindication of a right that has been denied or violated, rather than for reparation for a substantial pecuniary loss.

On the other hand, if the defendant in the replevin, as in this instance, should be the prevailing party, (except in cases in which he prevails merely on the ground of some technical informality distinct from the merits,) the legitimate inference would be, that the property belonged to him, or at least that the plaintiff had no right to it, and by interfering with it was guilty of a violation of the defendant's right; and that the latter is entitled to have it restored to him, and also is entitled to indemnity, in the shape of damages, for the wrong done in taking it out of his possession. The judgment, as ordinarily made up in such a case, assumes that the plaintiff, in compliance with the order of the court, will return the property, or that the sheriff (if he should refuse so to do) will take it from him and return it to the defendant; and that the pecuniary loss and general inconvenience which the wrongful act of the plaintiff has occasioned to the other party are to be covered by the judgment for damages. It is the business of the jury to assess these damages, unless the parties see fit to have them ascertained in some other manner. The value of the property is not in any event to be included, because the bond stands in place of the property and in contemplation of law is capable of causing its im-

mediate restoration. Even in the case of perishable property or such as has worn out or depreciated by use, or been destroyed by fire or other accident, or removed by being sold, or otherwise, to a distant part of the country since the service of the writ, the bond would still continue to represent it, and the remedy upon the bond is understood to be its equivalent.

It is evident that the mere restoration of the property, or its equivalent in money, would fall short, and in many cases very far short, of being an indemnity for the wrong done to the defendant by interruption of his possession. Where that wrong consists merely in the detention of property, without waste or depreciation; or in the compulsory postponement of the exercise of his rights under legal process, the interest upon the value may be an adequate measure of the damages. Gen. Sts. c. 143, § 14. But the wrong to the original defendant (and present plaintiff) was more than the mere detention of the property and interruption of its use. It was more injurious to him than if he had been simply locked out of his place of business during the pendency of the suit. His complaint is, that his cloth printing establishment was wrongfully broken up; his steam-engine, machinery, fixtures and apparatus taken down and carried away; and that returning the property or its equivalent in money will still leave him subject to the great expense, inconvenience and delay of the entire reconstruction of his works. It is manifest that the damages actually awarded him do not cover all the elements of damage which he was entitled to prove, and might have proved; and that the amount allowed him was for that reason inadequate as an indemnity for the wrong that he had sustained.

The difficulty in the present plaintiff's case lies in the fact that all these elements of claim are comprehended under the general head of damages recoverable in the original action. The time to prove his damages, and to have them assessed, in order to be included in the judgment, was when the replevin suit was before the court and on trial. At that stage of the case, and for that purpose, he certainly was an actor or plaintiff, claiming compensation for the injury done him by the wrongful act of

replevying his goods out of his hands. In contemplation of law, his claim for compensation (independently of the return of the goods, or their equivalent in money, as secured by the bond) would be made up of, 1st, interest on the money value; 2d, the general inconvenience and loss resulting from the interruption of his possession; and 3d, the expense, trouble and delay attending the operation of replacing everything and restoring the establishment to its original condition. This is an entire and indivisible claim. He cannot recover part of it in one action, and subsequently maintain another action for the remainder. *Warren v. Comings*, 6 Cush. 103. *Bennett v. Hood*, 1 Allen, 47. It will not avail him to show that part of his true claim was omitted by accident or misapprehension. "The time for such proof has gone by. He has had his day in court. It was the very thing which he might and should have proved in the suit in which the judgment was recovered." *Fuller v. Shattuck*, 13 Gray, 70, 71. *Homer v. Fish*, 1 Pick. 439.

It may be said, that, under the order to return the goods "in like good order and condition as when taken," the original plaintiff was bound not only to deliver them to the party, and at the place from which they were taken, but also to replace them in the same position as before, and in the case of machinery, to put it in working order in its original place. We think, however, that such a construction of the order would lead to much practical inconvenience, and is not required by a fair interpretation of the words. It might be a matter of much detail and expense to carry out the order in that manner, and each item might be a matter of much controversy and litigation. The original defendant, in order to go on continuously with his business, may have been compelled to supply himself with new machinery, engines and fixtures to take the place of those that were improperly taken from him; in which case the literal replacement of the replevied property in its original position would be very inconvenient and unreasonable. The general object of indemnity to him, on his proving to be the prevailing party, would be as effectually and much more conveniently secured by a computation by the jury of his damages, according

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to the rule above laid down, in the trial of the suit. It is true, this computation would necessarily be to some extent a matter of estimate, in advance of the actual outlay; but this inconvenience, such as it is, would be slight, compared with that which would result from the other construction of the rule.

The condition of the bond is, that the plaintiff in replevin "shall pay all such costs and damages as the defendant in replevin shall recover against him, and shall also return the goods replevied in like good order and condition as when taken, in case such shall be the final judgment." There is no provision for the assessment of those damages, or for the correction of any mistake in their assessment, in a suit upon the bond. The damages intended by the bond are those recovered against the original plaintiff and in the original suit. If he had paid those damages and costs, and also given up the property to the officer when demanded under the judgment, we do not see how there could be said to be a breach of the condition of the bond. The *caveat* contained in the agreement as to the damages does not in our opinion vary the case.

The rule adopted by the auditor appears to us, therefore, to have been entirely correct. We think that he rightfully considered the plaintiff's establishment as an organized whole, and rejected all evidence of an offer to return a part. The case is therefore to be sent to an assessor, in order that damages be computed upon the principles above set forth.

Ordered accordingly.

CHARLES L. BARTLETT vs. JOSEPH A. TUCKER.

One who, for and at the request of a partnership, and knowing that they intend to negotiate them as their business paper for the purpose of raising money to be used in their business, makes promissory notes payable to their order, and signs to each of the notes as maker the name either of a person whose name he has no authority to sign or use, or of a fictitious person; but who is not proved to have used either of those names for the purpose of transacting other business, or to have held himself out to the world as doing business under either; is not liable in contract upon the notes as maker, to one who buys them from the payees before maturity for full consideration as their business paper, without knowing that they are signed by him or giving him any credit thereon.

CONTRACT upon eleven promissory notes, each bearing another name than that of the defendant as maker, but alleged to have been signed by him, payable to the order of the firm of Coe & Company, and by them indorsed.

The first count was as follows: "And the plaintiff says the defendant made a promissory note, a copy whereof is hereto annexed, payable to the order of Coe & Company, and Coe & Company indorsed the same to the plaintiff; that the defendant signed said note in the name of James H. Stearns; that said James H. Stearns was a fictitious party or name, there being no such person, or no such person whose name the defendant was authorized to sign; wherefore the plaintiff says said note is the note of the defendant, made and signed by him, and that he owes the plaintiff the amount thereof, with interest and costs of protest." Each count was in like form, annexing a copy of the note, and the name signed to nearly every note being different from that signed to the others.

Trial before *Gray, J.*, who reserved the case upon the following report: "The plaintiff offered to prove that these notes were made and signed by the defendant, and that the signatures so affixed by him were either of fictitious persons, or persons whose names he had no authority to sign or use; that the defendant made the notes for and at the request of Coe & Company, with the knowledge that they intended to negotiate and use them as their business paper, for the purpose of raising money to be used in their business; and that the plaintiff bought the notes from Coe & Company before maturity, for full consideration, as their business paper. The plaintiff did not offer to prove that the defendant had ever used either of the names signed to these notes for the purpose of transacting any other business, or had held himself out to the world as doing business under either of these names; or that the plaintiff had any knowledge, when he took the notes, that they were signed by the defendant, or gave him any credit thereon. The plaintiff contended, that, if he satisfied the jury that the defendant signed either fictitious names to the notes, or the names of real persons without any authority from them, he would be liable in this action. If, in the opinion of the full

court, this position, or either alternative thereof, can be maintained, the case is to stand for trial; otherwise, judgment is to be rendered for the defendant."

B. F. Thomas & O. Stevens, for the plaintiff. The facts bring the case directly within the authority of *Grafton Bank v. Flanders*, 4 N. H. 239. It is also within the principles recognized and affirmed in the following cases: *Gibson v. Minet*, 1 H. BL 569; *Phillips v. Im Thurn*, Law Rep. 1 C. P. 463; *Hill v. Perrott*, 3 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20; *Jones v. Hoar*, 5 Pick. 285; *Lobdell v. Baker*, 3 Met. 469; *Melledge v. Boston Iron Co.* 5 Cush. 158, 173; *Draper v. Massachusetts Steam Heating Co.* 5 Allen, 338; *Brown v. Parker*, 7 Allen, 337; *Palmer v. Stephens*, 1 Denio, 471; *Brown v. Butchers' & Drovers' Bank*, 6 Hill, 443.

The transactions originally assumed the form of contracts. The defendant was the maker of the notes. They were made and signed by him. Whether he used a mark merely, or the initials of his name, or a fictitious name, is immaterial. They were made as and for genuine notes, and he intended to bind himself thereby. Not only is this the presumption of law, but the defendant is estopped to deny it. But whether he would be so estopped or not was immaterial, in the then posture of the case. When he sets up as matter of defence his forgery of the notes in suit, it will be time to consider the question of estoppel. The only view of these contracts consistent with the integrity of the defendant is that he meant to be bound by them.

Or the position of the plaintiff may thus be stated: The plaintiff alleges that the defendant made the notes in suit, and, instead of proving the fact affirmatively, proves, as by the rules of law he is entitled to do, that the defendant is estopped to deny that the signing the notes is obligatory upon him. *Fall River Bank v. Buffinton*, 97 Mass. 498.

The fact whether the defendant had ever before done business under either of the names affixed to the notes is unimportant. There must be a first time.

So it is immaterial whether the plaintiff gave credit to the defendant specifically, in the purchase of the notes. He paid

his money upon the faith that the notes made and signed by the defendant were genuine.

This is not an attempt to hold an agent for using the name of a principal in a way not authorized. The defendant did not claim or assume to act as agent.

J. G. Abbott & J. L. Stackpole, for the defendant.

GRAY, J. Although the question presented by this case is novel in one of its aspects, the law of this Commonwealth, as established by previous decisions of this court, will go far to assist us in determining it.

It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot therefore maintain an action upon the note against any other person. *Bank of British North America v. Hooper*, 5 Gray, 567. *Williams v. Robbins*, 16 Gray, 77. *Brown v. Parker*, 7 Allen, 337. *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101, 104, and other cases there cited. That rule of course does not preclude charging a party who, instead of the name by which he is usually known, signs, with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business. *Merchants' Bank v. Spicer*, 6 Wend. 443. *George v. Surrey*, Mood. & Malk. 516. *Williamson v. Johnson*, 2 D. & R. 281; S. C. 1 B. & C. 146. *Fuller v. Hooper* 3 Gray, 334.

But if a person signs the name of another, as maker of a promissory note, who has not authorized him to do so, and who therefore is not bound by the signature, the signer is not personally liable in an action of contract upon the note itself, even if he signs his own name also as that of the agent affixing the other signature, and the party whose name he assumes to put to the note is incapable of making such a contract; but only in an action of tort for falsely representing himself to be authorized to sign the name of the other person. This rule has been asserted and steadfastly maintained by this court for half a century. In *Long v. Colburn*, 11 Mass. 97, it was held that upon a promissory note beginning "For value received, I promise to pay," and

signed "Pro William Gill, J. S. Colburn," no action would lie against Colburn; and the court said: "The plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not, a special action on the case might make Colburn answerable." In *Ballou v. Talbot*, 16 Mass. 461, the same point was adjudged; and it was held that upon a note signed "Joseph Talbot, 2d, agent for David Perry," no action would lie against Talbot, although the jury found that he was not authorized to sign the note as agent for Perry. So where a note, purporting on its face to be the note of the pastor and deacons of the First Freewill Baptist Church in Lowell, was signed "S. D. York, Agent for the First Freewill Baptist Church in Lowell," it was held that no action could be maintained on the note against York. *Jefts v. York*, 4 Cush. 371. And in a subsequent action between the same parties on the money counts, although the plaintiff proved an oral admission by the defendant that he had received the money and that he expected to pay the note, and it also appeared that neither such a church nor the pastor and deacons thereof had any legal authority to give a promissory note, it was held that the action could not be maintained, unless the money had been paid by the plaintiff to the defendant under a mutual mistake as to the legal capacity of the principal to authorize the giving of such a note, and the money had been applied by the defendant to his own use, or before he paid it over to his principal, been demanded back by the plaintiff; and Chief Justice Shaw said: "The court are of opinion, that where a person, acting as agent, borrows money for his principals, and gives their obligation for it, and it turns out that the principals were not of legal capacity to make such contract, and of course could confer no such power on another the agent is not personally liable on the contract as his contract." "But if in fact he was not so authorized, but under a belief that he was, and acted on such belief, and the party advancing the money did not know that he was not authorized, the agent would be liable in an action on the case, to an amount in damages equal to the sum advanced. If one falsely represents that he has an authority, by which another, relying on the representa-

tion, is misled, he is liable; and by acting as agent for another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort." *Jefts v. York*, 10 Cush. 392. So in *Abbey v. Chase*, 6 Cush. 54, Mr. Justice Metcalf said: "When one, who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed or the promise in the simple contract, unless it contains apt words to bind him personally. The only remedy against him, in this Commonwealth, is an action on the case for falsely assuming authority to act as agent." And in *Draper v. Massachusetts Steam Heating Co.* 5 Allen, 338, Mr. Justice Hoar said: "In this Commonwealth it is well settled, that, if the instrument purports to express the contract of the principal, the agent is not personally liable on it; but that the remedy in such a case is by an action on the case for falsely representing himself to be authorized to bind his principal."

In the present case, the plaintiff counts upon the notes themselves, seeking to charge the defendant as the maker of them, upon the alternative ground that the name signed by him to each of the notes was either the name of a person whose name he had no authority to sign or use, or the name of a fictitious person.

If either of those names was that of a real person, then, although no agency was expressed on the face of the note, and whether the signature was affixed under a mistaken belief of authority, or fraudulently, or even if it was a forgery, it was, so far as regards the liability to a civil action upon the notes, a mere case of signing without authority, and the signature might be adopted or ratified by that person, and such adoption or ratification would render him liable to be sued as maker thereof. *Ballou v. Talbot*, 16 Mass. 461, 463. *Merrifield v. Parritt*, 11 Cush. 590, 597. *Brigham v. Peters*, 1 Gray, 139. *McIntyre v. Park*, 11 Gray, 102. *Greenfield Bank v. Crafts*, 4 Allen, 447.

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Hunter v. Giddings, 97 Mass. 41. In such a case, it is clear that by the law of this Commonwealth, as shown by the cases already cited, the defendant could not be sued in contract upon the note, but only in tort. See also Met. Con. 108, 109.

The same rule must apply if the names signed to any of the notes were those of fictitious persons. In either alternative, the notes were not signed in the defendant's own name, nor by any name under which he was shown to have transacted, or held himself out as transacting, other business. The defendant has not, by word or act, asserted that they were his own promissory notes. The plaintiff did not take them immediately from him, or on his credit. The defendant therefore is not estopped to deny them to be his. The defendant's representation was, that they were signed by parties bearing, or doing business under, the names signed. He made no contract, and intended to make no contract, and was not understood by any other party to make any contract, himself. His relation to the plaintiff was not one of contract, but of tort. The case is not distinguishable in principle from that of *Jefts v. York*, 10 Cush. 392, already stated. There is no essential difference in this respect between a note purporting to be made by a person or corporation that has no capacity to make it, and a note purporting to be made by one that in fact has no existence; or between a note on which the name of the person by whose hand it is written appears, and a note on which it does not; and no more reason for holding him liable to an action upon it as his own contract in the one case than in the other.

The cases cited by the learned counsel for the plaintiff, when closely examined and weighed, afford no sufficient ground for a different conclusion.

The strongest case in his favor is that of *Grafton Bank v. Flanders*, 4 N. H. 239. It was there held that a person who signed the name of another to a promissory note as maker without any authority from him, and delivered it to the payee for a valuable consideration, was himself liable upon the note as maker in an action by the payee, charging him as having made it in the name of the other person. It is to be observed that in

that case the defendant himself delivered the note to the plaintiff. And a careful consideration of the elaborate opinion of the court has failed to satisfy us that it is in accordance with the law of this Commonwealth. The courts of New Hampshire have always gone beyond our own in holding a person signing the name of another without authority to be himself liable to an action upon the contract. *Underhill v. Gibson*, 2 N. H. 352, 356. *Woodes v. Dennett*, 9 N. H. 55. *Pettingill v. McGregor*, 12 N. H. 179, 191. *Moor v. Wilson*, 6 Foster, 332, 336. *Weare v. Gove*, 44 N. H. 196.

In *Palmer v. Stephens*, 1 Denio, 471, the defendant had signed the promissory note sued on with his own initials; the court expressly waived the consideration of the question whether, if neither his name nor the initial letters thereof had appeared on the paper, he could have been holden as a party to it; and the general statement in the opinion, that, "if one, assuming to be agent of another person, executes a note in his name, having in truth no authority for the purpose, the assumed agent is himself bound by the signature," though supported by the earlier cases in New York, is inconsistent with the later cases in that state, as it is with our own decisions. *Walker v. Bank of New York*, 5 Selden, 582. *White v. Madison*, 26 N. Y. 117.

In *Brown v. Butchers' & Drovers' Bank*, 6 Hill, 443, the signature which was held to bind the defendant as indorser of a bill of exchange was not of another name than his own, but of figures; and the report states that evidence was given strongly tending to show, not only that they were in his handwriting, but that he meant they should bind him as indorser.

The case of *Melledge v. Boston Iron Co.* 5 Cush. 158, went no farther than to hold that a corporation was liable on a note given by its general agents, a mercantile firm, in their own name, for a debt of the corporation, if the note was in fact the note of the corporation, executed under a name which it had adopted and sanctioned as indicative of its contracts, or if the payee took the note under a misapprehension, caused by the acts of the corporation and its agents, as to the identity of the corporation with the firm whose name was signed to the notes

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The doctrine of that case does not warrant charging either a corporation or a natural person upon a note signed in the name of another, without clear proof that such name has been adopted by the first for the purpose of transacting business. *Williams v. Robbins*, 16 Gray, 77. *Brown v. Parker*, 7 Allen, 337.

The remark of Mr. Justice Hoar, in *Draper v. Massachusetts Steam Heating Co.* 5 Allen, 338, that "there may be cases in which the signature is in such a form that it might be held to be either the signature of the principal or of the agent, and in such case a want of authority to bind the principal might well be regarded as fixing the personal liability of the agent," related to cases in which the names of both agent and principal appeared upon the face of the contract, and in a form making it doubtful which was intended to be bound.

The plaintiff much relied on the English cases in which an acceptor of a bill of exchange, in which a fictitious person was named as payee, has been held to stand as if it had been payable to bearer, and to be liable for the amount of the bill to one who has discounted it on the faith of his acceptance, even when the signature of the drawer for whose honor he accepted it was forged. *Gibson v. Minet*, 1 H. Bl. 569; *S. C.* 2 Bro. P. C. 48; 3 T. R. 481. *Phillips v. Im Thurn*, Law Rep. 1 C. P. 463; *S. C.* 18 C. B. (N. S.) 694. But those cases go upon the ground that the defendant's own acceptance bound him, so that he could not, even if he acted in good faith, dispute the genuineness of the prior signatures. They do not hold him liable upon those signatures as his own, but upon his own signature as acceptor.

The plaintiff also cited *Lobdell v. Baker*, 3 Met. 469, in which it was held that if the holder of a promissory note, indorsed in blank by the payee, caused it to be indorsed by a minor, and then sold it, without erasing this indorsement or otherwise making it appear on the note to be without binding force, he was liable to all subsequent holders upon his implied representation that the indorsement constituted a valid contract. But the action in that case was in tort for the false representation. See *S. C.* 1 Met. 193.

The plaintiff further contended that he might waive the tort and sue in assumpsit; for which he cited *Hill v. Perrott*, 8 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20; and *Jones v. Hoar*, 5 Pick. 285. But as there was no offer to show that the defendant had received any money upon the notes, that rule does not apply. *Ladd v. Rogers*, 11 Allen, 209.

If the facts which the plaintiff offered to prove were true, he would seem to have been defrauded by the act of the defendant. But he must seek his remedy for such fraud in an appropriate form of action. He cannot compel the defendant to try the question of false representation in an action of contract upon the notes.

We regret that after much consideration our judgment is not unanimous. It is the opinion of a majority of the court, that, for the reasons above stated, this action cannot be maintained upon either alternative of the facts which the plaintiff offered to prove. The result is, that, according to the terms of the report upon which the case was reserved, there must be

Judgment for the defendant.

ALBERT M. PECK vs. JAMES A. WATERS & another.

A contract of sale of a hundred barrels of whiskey in Philadelphia, to be delivered in Boston, "twenty-five barrels to be shipped by each steamer from Philadelphia, or as fast as that," does not necessarily imply that the delivery is to begin by the first steamer thereafter; nor, if the fact that there are two steamers a week from Philadelphia to Boston is contemplated by the parties, does the contract imply that precisely twenty-five barrels are to be delivered by each steamer.

Proof of a sale of whiskey in Philadelphia to be delivered in Boston does not sustain an allegation of a sale of whiskey in Philadelphia without specification of a place of delivery; nor is an allegation of a sale of the whiskey for a certain sum sustained by proof of its sale for that sum together with payment by the buyer of charges on the whiskey for which the seller was liable. But amendments of the declaration may be allowed to cure such variances after verdict, and even after the argument of exceptions taken at the trial.

CONTRACT. Writ dated March 15, 1869. The declaration contained two counts, the first of which was as follows: "And the plaintiff says that in March 1868 he bought of the defendants two hundred barrels of whiskey, and agreed to pay therefor

at the rate of \$1.40 per gallon for one hundred barrels of the same, and \$1.45 per gallon for the remaining one hundred barrels; and in consideration thereof the defendants sold said two hundred barrels at said prices to the plaintiff, and agreed to deliver the same to the plaintiff in April and May 1868; and the defendants, in pursuance of the agreement, delivered fifty barrels of the whiskey to the plaintiff, and the plaintiff received the same on account of the agreement, and paid the defendants \$1134.45 on account of the agreement; but the defendants have neglected and refused to deliver the balance of said goods, though the plaintiff has been willing to accept and pay for the same, according to the terms of said sale; and the plaintiff says that the goods rose in value in the market between the time of the making of said contract of sale and the time when the goods should have been delivered, so that he lost the profits of the same."

The second count was as follows: "And the plaintiff says that in March 1868 he bought of the defendants one hundred barrels of whiskey, and agreed to pay therefor at the rate of \$1.40 per gallon in thirty days after the delivery of the same; and the defendants agreed to sell said whiskey to the plaintiff at said price, and deliver the same within a reasonable time thereafter; and the plaintiff and the defendants in April 1868 agreed to alter and modify said agreement as follows: that the defendants should sell and deliver to the plaintiff one hundred more barrels of whiskey on the same terms, save that the price thereof should be \$1.45 per gallon; and the defendants in pursuance of said agreement delivered fifty barrels of said whiskey, and the plaintiff paid \$1134.45, on account of said agreement; and the plaintiff has been ready and willing to accept the balance of said goods and pay for the same according to the terms of said agreement, but the defendants have neglected and refused to deliver said balance; and the plaintiff says that the goods rose in value in the market between the time of the making of said contract of sale, and the time when the goods should have been delivered, so that he lost the profits of the same." There was no allegation that both counts were for the same cause of action.

The answer denied each and every allegation of the declaration; and alleged that, if any contract between the plaintiff and the defendants was ever broken, it was broken by the fault of the plaintiff, not of the defendants.

Trial in the superior court, before *Rockwell, J.*, who allowed a bill of exceptions which referred to the pleadings and then continued as follows: "Upon the trial to the jury the plaintiff testified that on March 14, 1868, he purchased of the defendants at Boston, through Barnet F. Warner, their agent, one hundred barrels of whiskey at \$1.40 a proof gallon thirty days after delivery, to be delivered at his store in Boston, twenty-five barrels thereof to be shipped by each steamer from Philadelphia, or as fast as that; that there were two steamers a week from Philadelphia to Boston, and that the defendants resided in Philadelphia; and that on or about April 4, 1868, one of the defendants being in Boston, the plaintiff purchased of the defendants one hundred barrels more whiskey upon the same terms, to be delivered in the same manner, except he was to pay \$1.45 a proof gallon for said last named hundred barrels. The plaintiff then offered to testify that after the last named contract was made, and before any controversy between the parties, the defendant, still being in Boston, offered to pay the plaintiff \$400 to be let off from said last named agreement. To this testimony the defendants objected; and the same was admitted by the court. This was all the evidence offered by the plaintiff of the terms of any contract or contracts between him and the defendants, other than that, upon cross examination, he said that he was to pay the freight on the whiskey from Philadelphia to Boston, and wharfage and cartage in Boston, in addition to the above named prices a gallon. The plaintiff was also allowed by the court to introduce evidence of the advance of the price on whiskey in Boston between March 14 and June 1, 1868, against the objection of the defendants. And the plaintiff rested his case. The defendants then insisted, and requested the court to rule, that there was a fatal variance between the declaration and the proof, and that the plaintiff could not recover upon either count in his declaration as it then stood; which the court declined to do.

"The defendants then introduced evidence tending to show that the first one hundred barrels were to be delivered to the plaintiff in Philadelphia, on board the steamer, at \$1.45 per proof gallon, on a credit on drafts payable in thirty days after sight; that the second one hundred barrels were sold upon the same terms as the first, except that the price was to be \$1.40 a proof gallon for the last hundred barrels; and that there was no advance in price on whiskeys in Philadelphia between March 14 and June 1, 1868; and rested.

"The defendants requested the court to instruct the jury that to entitle the plaintiff to recover he must prove the contracts, or some one contract, substantially as he had alleged in his declaration or some count thereof; and that any material variance as to the price, quantity, time or place of delivery, was material, and if any such variance existed the plaintiff could not recover, as his declaration then stood.

"The court declined to instruct the jury in the language prayed for, but did instruct them, among other things not excepted to, as follows: That in order to sustain this action the plaintiff must prove that the defendants agreed to sell the plaintiff two hundred barrels of whiskey, at or about the time stated in the declaration, and for the prices then stated, and that he failed to perform the agreement without a legal excuse for such failure; that the place of delivery was material, and if the whiskey was to be delivered in Philadelphia the plaintiff could not recover; and that, in reference to the difference of statement between the parties as to the price agreed upon, the same did not affect the right of the plaintiff to maintain his action, but would, if the declaration had so alleged, affect the amount of damages to which he would be entitled in case of a breach; that though, if the jury should find that the prices were as stated by the defendants, the plaintiff, if he had so declared, would be entitled to more damages, yet, under the declaration, he could not recover more than he then claimed. The court also instructed the jury that the fact that the plaintiff was to pay freight, wharfage and cartage, in addition to prices specified in his declaration was not conclusive in establishing Philadelphia as the place of

delivery ; but that this evidence has to be taken and considered, with the other evidence in the case, upon the question where the whiskey was agreed to be delivered. The jury returned a verdict for the plaintiff, and to all said rulings, instructions and refusals to instruct, the defendants allege exceptions."

L. W. Richardson, for the defendants.

R. M. Morse, Jr., & F. W. Hackett, for the plaintiff.

WELLS, J. The difficulty in this case is to ascertain with precision what questions are raised by the bill of exceptions. At the close of the plaintiff's testimony in chief, the defendants "insisted, and requested the court to rule, that there was a fatal variance between the declaration and the proof." They except to the refusal of the court so to rule. It does not appear in what particular the variance is alleged to exist; nor that any particular variance was pointed out in the court below. The testimony of the plaintiff, touching any supposed point of variance, is not given minutely, nor specifically in the language of the witness, but in the form of a general statement of its effect. From the bill of exceptions we are unable to distinguish that which expresses the terms used by the parties in making the contract, from that which is mere narration of fact.

This want of definiteness in the bill of exceptions makes it impossible to determine what the contract in proof was, in respect to that particular most important to the decision of the case, in its several aspects, namely, the time within which the delivery was to be completed.

The court below treated the two agreements as one contract, made entire, for the whole two hundred barrels, by the second negotiation and agreement of April 4. We think that construction was justified by the testimony both of the plaintiff and of the defendant. No ruling was asked for, and no question of fact to the contrary of that interpretation was made at the trial. The proof, therefore, in respect to quantity, corresponds with the allegations of either count in the declaration.

As to the time of delivery, the allegation of the first count is, that it was to be delivered in the months of April and May; of the second count, "within a reasonable time." In each case

the allegation is manifestly intended to express the legal effect, or what was supposed to be the effect, of the provisions of the contract. As already suggested, the bill of exceptions is too general and indefinite in its statement of the testimony to enable us to discover what were the provisions made by the terms of the agreement. It does not appear that there had been any deliveries prior to April 4. If not, then, under the renewed and modified agreement, the time for delivery would commence after that date. But how soon after is left uncertain. The provision for a certain limited quantity only by each steamer does not necessarily imply that the delivery was to commence by the first steamer thereafter. That might depend very much upon the situation of the parties and the course of business. The contract being silent upon that point, the term "reasonable time" is supplied by construction of law.

Again, as to the rapidity of delivery after commencing; assuming that the fact stated, that "there were two steamers a week from Philadelphia to Boston," was contemplated by the parties in making the contract, the report is ambiguous as to the limit of quantity to be forwarded by each steamer. As it is stated, the contract permitted, but did not require, that the delivery should be at the rate of twenty-five barrels precisely by each steamer. The qualification, "or as fast as that," imports an option on the part of the defendants. But whether it is an option to deliver the whole at once, or any quantity not less than twenty-five barrels by each steamer; or an option to deliver in such quantities as the defendants should choose, not faster than the rate named, cannot be decisively ascertained from the report. The plaintiff was to pay the purchase money in thirty days after delivery. This consideration might make it for his interest to restrict the delivery to such quantity as suited the demands of his business, or his convenience in regard to payments. If this qualification was intended as a restriction in favor of the plaintiff, it left the obligation of the defendants, within that restriction, to be measured by the legal rule of "reasonable time." We cannot say, as matter of law, that this rule would not extend the time for the entire delivery through the

whole month of May; thus making a correspondence in legal effect between the allegations of the first count and the proof, by means of evidence *ab extra*. *Cleaves v. Lord*, 3 Gray, 66.

As to the place of delivery, the plaintiff testified that it was to be at his store in Boston; and, upon the instructions of the court, the jury must have so found the contract to be. This was a variance. *Middlesex Co. v. Osgood*, 4 Gray, 447. *Lucas v. Nichols*, 5 Gray, 309. Long on Sales, 450.

As to the price or consideration, the rate per gallon is the same in the proof as in the declaration. But if the contract was for a delivery at the plaintiff's store in Boston, the payment by the plaintiff of the freight and the wharfage and cartage in Boston was a part of the consideration for the contract of the defendants, and should have been alleged. *Stone v. White*, 8 Gray, 589.

Such variances might have been cured by amendment at the trial; and we may presume that they would have been, if the precise nature of the objections had then been pointed out. The general form of the objection then taken did not direct attention to the particular defects now made apparent. As against mere formal and technical objections, not affecting the real character of the questions tried and submitted to the jury, we think the verdict should protect the party in whose favor it is rendered, notwithstanding such previous general objection. *Lund v. Tyngsboro*, 11 Cush. 563, 568. But even if not cured by verdict, where the case has been rightly tried and decided upon its merits, an amendment may be allowed after verdict and hearing upon exceptions, and judgment may then be entered thereon, provided it can be done without injustice to the defeated party. *Nichols v. Prince*, 8 Allen, 404.

We do not see that the defendants could have been prejudiced, upon the merits of the case, at the trial, by the failure of the plaintiff to set forth the terms of his contract correctly, according to its legal effect. The declaration does not set forth, in terms, any place of delivery; and it does not appear that the defendants were misled thereby, or taken by surprise when the plaintiff undertook to prove a contract to deliver in Boston.

The trial took place in Boston, where the evidence upon the question of an advance of price affecting the damages was to be obtained, if anywhere. No delay was asked for in order to procure such evidence. The contest seems to have been rather upon the question of fact whether the contract was for a delivery in Boston or in Philadelphia. The plaintiff put in evidence of an advance of price in Boston; the defendants put in evidence that there was no advance in Philadelphia. The defendants did not ask any ruling or instruction from the court that the contract declared on was a contract to deliver in Philadelphia; but relied upon their own testimony, together with the fact that the plaintiff was to pay freight, wharfage and cartage, to prove that the contract was so in fact. Upon this issue, so tried, the jury have found that the contract was to deliver in Boston; and we think the defendants cannot now complain if the plaintiff is allowed to make his declaration accord with the issue actually tried.

The variance as to the consideration is of still less importance to the rights of the defendants. It does not affect their obligation or the question of damages. It goes rather to the description and identity of the contract. *Stone v. White*, 8 Gray, 589.

The other questions in the case, so far as we have been able to apprehend them, are substantially disposed of by the suggestions already made. The instruction "that the fact that the plaintiff was to pay freight, wharfage and cartage, in addition to the prices specified in his declaration, was not conclusive in establishing Philadelphia as the place of delivery," was undoubtedly correct. We see no occasion to comment further upon the instructions given, or those refused.

Upon the case as it stands, it does not appear that the evidence of the advance of prices in Boston, between March 14 and June 1, 1868, was improperly admitted by the court below.

The offer of the defendants "to pay the plaintiff \$400 to be let off from said last named agreement," was not in the way of an attempt to compromise a disputed claim. There was no question as to the obligation of their contract, and there had then been no breach of it. The offer to purchase a release was

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an admission of its value as an executory contract at that time. It does not come within the class of offers made in an attempt to compromise, or buy one's peace from a disputed and doubtful claim.

Upon the whole case, we are of opinion that the defendants, by their bill of exceptions, do not show such errors in the rulings or instructions of the court below as to entitle them to another trial of the issues of fact to a jury.

The plaintiff may be allowed, therefore, to amend his declaration so as to make the contract set forth in it correspond with that upon which the jury have rendered a verdict in his favor; and thereupon have judgment upon the verdict. We think the terms should be, in this case, that the plaintiff take no costs, and pay the defendants' costs since the verdict. For the above purpose only, the

Exceptions are sustained.

JOHN LINTON vs. DANIEL HURLEY & another.

A claim for damages for a personal injury is not assignable before judgment thereon.

CONTRACT on a judgment recovered by the plaintiff in an action for a personal injury inflicted on him by the defendants. Writ dated May 29, 1869. Defence, a release and discharge executed by Moses G. Cobb to whom the plaintiff had assigned his claim before the judgment.

At the trial in the superior court, *Reed, J.*, refused to rule that the assignment was void, and directed a verdict for the defendants. The plaintiff alleged exceptions. The material facts are stated in the opinion.

I. Knowles, Jr., for the plaintiff.

D. H. Mason, for the defendants.

CHAPMAN, C. J. On the 10th of June 1858 the plaintiff had a claim against the defendants for damages for a personal injury, and had commenced an action of tort to recover damages therefor, which action was then pending, and judgment was not ren-

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dered in his favor till October term 1859. On the day first mentioned he assigned his claim to Moses G. Cobb. He contends that this assignment was void, and this position is sustained by the case of *Rice v. Stone*, 1 Allen, 566. The ruling that it was valid was erroneous. *Exceptions sustained.*

WILLARD MANUEL vs. SAMUEL W. BATES & another.

The magistrate's certificate required by the Gen. Sts. c. 124, § 5, to be annexed to an execution in order to arrest the judgment debtor thereon, need not in terms authorize an arrest in the daytime.

A magistrate's certificate under the Gen. Sts. c. 124, §§ 5, 8, subjoined to the affidavit of the judgment creditor, and annexed to the execution, in these terms: "I certify that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset," authorizes an arrest of the debtor before sunset.

CONTRACT against Bates as surety and Edward Crane as principal, on a recognizance entered into by them in the usual form under the Gen. Sts. c. 124, § 10, before a master in chancery, upon the application of Crane to take the oath for the relief of poor debtors, in order to obtain release from arrest on an execution, issued in favor of the plaintiff upon a judgment recovered by him against Crane in the superior court, for \$3450. The alleged breach of the recognizance was the failure of Crane to surrender himself for examination. Writ dated February 5, 1869.

By the copies, appended to the recognizance, of the affidavit and magistrate's certificate annexed to the execution as authority for the arrest, it appeared that the affidavit was made by Daniel C. Linscott in behalf of the judgment creditor, "that the judgment on which the said execution has been issued amounted to twenty dollars exclusive of all costs which make part of said judgment, whether the same have accrued in the last action, or any former action on the same original cause of action, and that twenty dollars of that amount remains uncol-

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lected, and that I believe and have good reason to believe that the debtor Edward Crane has property not exempt from being taken on execution which he does not intend to apply to the payment of the judgment creditor's claim ;" and that the magistrate's certificate was as follows :

" Commonwealth of Massachusetts. Suffolk, ss. December 1, A. D. 1868. Personally appeared the above named D. C. Linscott before me, and made oath that the above affidavit, by him subscribed, is true ; and I certify that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in the said affidavit is true ; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset.

" J. B. Richardson, Master in Chancery."

The answer alleged " that the certificate of the magistrate, upon which the alleged arrest of Crane was made, as set forth in the declaration, was on its face illegal, invalid and contrary to law, in this, that, instead of showing a special authorization of arrest upon satisfactory cause shown to the magistrate, it left to the arresting officer to determine whether or not the arrest in this case was authorized by law to be made, thus throwing upon such officer the responsibility of decision which the law imposes upon the magistrate making such certificate, and that consequently all subsequent proceedings founded on such certificate were without authority and of no legal force or effect, and therefore that Crane was not bound in law to surrender himself up or to perform the conditions of the recognizance." *

* The Gen. Sts. c. 124, § 5, provide that " no person shall be arrested on an execution issued for debt or damages in a civil action, except in actions of tort, unless the judgment creditor or some person in his behalf, after execution is issued amounting to twenty dollars exclusive of all costs," " and while so much as that amount remains uncollected, makes affidavit and proves to the satisfaction of some magistrate named in § 1," (including masters in chancery,) either of five specified charges, the first of which is, " that the debtor has property not exempt from being taken on execution, which he does not intend to apply to the payment of the plaintiff's claim." " And such affidavit and the certificate of the magistrate that he is satisfied there is reasonable cause to believe the

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At the trial in the superior court, before *Putnam, J.*, the breach of the recognizance was admitted; and it appeared that Crane was arrested before sunset. The judge ruled that the certificate of the magistrate authorized an arrest before sunset; and directed a verdict for the plaintiff. The defendants alleged exceptions.

H. F. Smith, for the defendants.

D. C. Linscott, for the plaintiff, was not called upon.

BY THE COURT. The certificate of the magistrate, that he is satisfied there is reasonable cause to believe that the charge made in the affidavit is true, is independent of the clause that follows it, and authorizes an arrest in the daytime. Such an arrest was made. Its construction is not varied by the clause that follows it, namely: "and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset." The last clause is immaterial, there having been no arrest after sunset.

Exceptions overruled.

JOSEPH LEONARD *vs.* LEOPOLD SPEIDEL & another.

The substitution, by a clerical error, in the condition of a bond to dissolve an attachment, of the name of the plaintiff, instead of the defendant, as the person in event of whose payment of the judgment the obligation shall be void, does not invalidate the bond, if the true intention of the parties can be ascertained by applying the terms of the whole instrument to its subject matter; and in suing such a bond it is not a material variance if it is declared upon as it was intended to be written.

In an action on a joint and several bond, it is too late to object to the nonjoinder of part of the obligors, after filing an affidavit of merits and an answer in bar.

In an action against A., B. and C., the rendering of judgment against A. and B. only, and for C., does not exempt sureties from liability on a joint and several bond given by them with A., B. and C. as principals, to dissolve the plaintiff's attachment of "goods and

charges therein contained, or some one of them, are true, shall be annexed to the execution."

Section 8 provides that "no arrest shall be made after sunset, unless specially authorized by the magistrate making the certificate, upon satisfactory cause shown."

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estate of said A., B. and C.,” the condition of which is that “A., B. and C. shall pay to the plaintiff in said action the amount, if any, which he shall recover therein.”

In a suit on a bond given in the usual form to dissolve an attachment, judgment will be rendered for the full penal sum, upon proof of a breach of the condition, although this sum is larger than the amount recovered by the plaintiff against the principal obligor.

CONTRACT, begun January 1, 1869, against the sureties on a bond alleged to have been signed and sealed by them, together with the principals named therein, as follows :

“Know all men by these presents, That we, Carl Mattoni, Gottfried Reichardt and Leopold Babo, all of Boston in the county of Suffolk and Commonwealth of Massachusetts as principals, and Leopold Speidel and Isaac Samuels, both of said Boston, as sureties, are holden and stand firmly bound and obliged unto Joseph Leonard, of said Boston, in the full and just sum of one thousand dollars, to be paid unto the said Joseph Leonard, his executors, administrators or assigns ; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the eighth day of January, in the year of our Lord one thousand eight hundred and sixty-eight. The condition of this obligation is such, that, whereas the said Joseph Leonard has caused the goods and estate of said Mattoni, Reichardt and Babo, to the value of one thousand dollars, to be attached on mesne process, in a civil action, by virtue of a writ bearing date this day, and returnable to the superior court, next to be holden at Boston within and for the county of Suffolk on the first Tuesday of April next, in which said writ the said Joseph Leonard is plaintiff and the said Mattoni, Reichardt and Babo are defendants ; and whereas the said defendants wish to dissolve the said attachment, according to the provisions of the Gen. Sts. c. 163, § 30, and other laws relating thereto ; now therefore, if the above bounden *Mattoni, Reichardt and Babo* shall pay to the plaintiff in said action the amount, if any, which he shall recover therein, within thirty days after the final judgment in said action, then the above written obligation shall be null and void ; otherwise, to remain in full force and virtue.”

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At the trial in the superior court, before *Lord, J.*, the plaintiff was permitted, against the defendants' objection, to introduce, in proof of his allegations, a bond corresponding with that alleged by him, save that in the condition thereof the words "*Joseph Leonard*" appeared, instead of the words "*Mattoni, Reichardt and Babo*," in the place where the last named words are above printed in italics. The records of the superior court in the action of Leonard against Mattoni, Reichardt and Babo, in which this bond was given, were introduced in evidence; and it appeared from them, that the action was duly entered in the superior court at April term 1868; that by agreement of the parties it was tried without a jury, before *Lord, J.*, who made the following finding therein: "I find that the defendant Babo is not a party to the contract declared on, and I find for the plaintiff against Mattoni and Reichardt in the sum of \$555, and for the defendant Babo;" and that judgment was entered on this finding, against Mattoni and Reichardt, and for Babo.

The defendants requested the judge to rule, 1. that the plaintiff could not maintain this action without joining as defendants the principals on the bond; 2. that the judgment for Babo against the plaintiff in the action in which the bond was given was "such a cancellation of the bond as to prevent the plaintiff from recovering against the sureties of Babo, the defendants in this action;" and 3. that "the plaintiff cannot recover in this action on the bond unless all the parties to it as principals are joined and made defendants, and Babo cannot legally be made a defendant, so that the plaintiff cannot recover." The judge refused so to rule; and directed a verdict for the plaintiff for the sum named as the penalty in the bond, which was returned, and the defendants alleged exceptions.

J. Nickerson, for the defendants.

R. M. Morse, Jr., (*C. P. Greenough* with him,) for the plaintiff.

Colt, J. The bond upon which this action is brought is joint and several, and is signed by the defendants as sureties for the original defendants in the first action. It was given to dissolve the attachment, under the Gen. Sts. c. 123, § 104, and was conditioned to secure the payment to the plaintiff of the amount

of the judgment, if any, which he should recover in that case, within thirty days after final judgment.

1. The bond produced at the trial corresponds with the allegations in the declaration. By an obvious clerical error the blank in the condition was filled up with the name of the plaintiff, instead of that of the principals in the bond. There is no difficulty in ascertaining from the whole instrument, applied to the subject matter, the intention of the parties, and the bond is to be read as if the name of the principals, or no name at all, had been inserted in the blank space.

2. Upon a joint and several bond, the plaintiff must sue one or all of the obligors, and cannot bring his action against an intermediate number. But in actions of contract, nonjoinder of parties jointly liable as defendants can only be taken advantage of by plea in abatement. In this case, the right to plead in abatement was lost, by filing an affidavit of merits with an answer in bar. *Pratt v. Sanger*, 4 Gray, 84, 88. *Cole v. Ackerman*, 7 Gray, 38. *Whipple v. Rogerson*, 12 Gray, 347.

3. The condition of the bond was broad enough to include a judgment recovered in the original action, upon the contract declared on, against two of the original defendants. It is not restricted to a judgment against all jointly, and the fact, that at the trial the plaintiff failed to show that one of them was a party to the contract, who thereupon recovered costs, does not release the defendants here from liability.

The case at bar is to be distinguished from *Tucker v. White*, 5 Allen, 322, where the surety was held to be discharged. In that case, the plaintiff in the original action, of his own motion, without notice to the surety, discontinued against one of two defendants, and upon summoning in a new joint defendant took judgment against him and the remaining original defendant. Plainly this was a judgment against a new party; and the surety had a right to say, I entered into no obligation to secure such judgment. The present case does not show, nor is it perhaps material, what property was attached. The joint property of all, or of any two of the defendants, or the separate property of one or more of them, was subject to attachment. And it may

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be that only the property of the defendants against whom judgment was rendered was in fact taken. If the separate property of the defendant who eventually prevailed was under attachment, and he wished to escape liability upon any judgment which might be had against his codefendants, then in order to dissolve the lien upon his property he should have given a separate bond, to secure only the judgment which might be recovered against him.

The judgment of the superior court must be entered for the penalty of the bond, and execution will be awarded for so much of the penal sum as appears to be due according to the *Gen. Sts. c. 133, §§ 9, 10.*

Exceptions overruled

CHARLES Y. MESERVE & another vs. JOHN S. ANDREWS

An agreement to share profits may, but does not necessarily, imply a joint interest in property held or used for the purposes of the business from which the profits are to arise.

The submission of a case to the judgment of the court on an auditor's report as a statement of agreed facts does not import that the court is to presume in favor of conclusions of the report upon facts not sufficiently stated to enable a revision of such conclusions in matters of law, and if they are essential to a judgment the statement will be discharged.

CONTRACT. The declaration alleged that the parties agreed that the plaintiffs should permit the defendant to use and occupy their shop in Boston, and should render certain services to him in his business, and in consideration thereof he should pay them rent, and for repairs and furniture, and also a quarter of the net profits of the business; that the plaintiffs faithfully performed their part of the agreement, and there were net profits resulting from the business; but that the defendant refused to pay the plaintiffs anything.

The case was sent to an auditor, who made a report of which the following is the material part:

"The plaintiffs were several years lessees of shop No. 106 Sudbury Street, and the defendant occupied with their permission a part of the shop. In February 1865, it was agreed between the parties, that, after March 1 ensuing, the defendant

should have increased accommodations, should pay the entire rent of the shop, and should furnish the necessary capital and defray all expenses incident to his business; and that the plaintiffs should assist him in carrying on his business and receive one quarter of the net profits thereof. Pursuant to this agreement, the defendant was allowed such increased accommodations as he desired, and the plaintiffs performed such services in the management of his business as they were required to perform. They expended money in fitting the shop for his accommodation, and purchased and paid for certain articles of furniture for his use, and paid certain expenses incurred in the prosecution of his business. [The sums thus paid were stated in an exhibit annexed to the report.] On April 30, 1865, shop No. 108 was burned, and on May 1 the plaintiffs procured another shop on the same street, No. 85. The defendant on that day removed with the plaintiffs into this shop, where he continued to prosecute his business till May 15, when he removed to another shop and discontinued his connection with the plaintiffs. Upon all the evidence, I find that the net profits of the defendant's business during March and April were \$1200, and that during the first fifteen days of May there were no profits. The defendant sustained a loss by the fire at No. 108; and he was prosecuted for carrying on an illicit business. He defended successfully, and expended a considerable sum of money in the defence. In ascertaining the profits, I have not taken into account the loss by fire or the money expended in defence of the prosecution."

After the return of this report, the case was submitted thereon to the judgment of the superior court under an agreement of the parties "that the above report be taken as a statement of agreed facts, and if the court shall be of opinion that the loss of the defendant by fire, and the sums expended by him in defending against prosecution, mentioned in said report, ought to be deducted from the profits of the business reported by the auditor, then the case is to be recommitted to ascertain those losses and sums paid." Judgment was ordered thereon for the plaintiffs, and the defendant appealed.

Meserve v. Andrews.

J. F. Pickering, for the plaintiffs.

J. G. Abbott, for the defendant.

WEILS, J. The agreed statement does not make it appear whether or not the business of Andrews was such that the right of the plaintiffs to share the net profits involved an interest in the property burned, as a part of the subject matter out of which those profits were to be derived. The agreement to share profits may, but does not necessarily, imply a joint interest in the property held or used for the purposes of the business from which such profits are to arise. *Howe v. Howe*, 99 Mass. 71. The agreed facts also fail to show whether the prosecution which he defended arose from, or had such reference to the joint interest and conduct of the parties, as to give rise to the implication that the defence was properly made and the costs incurred for the joint benefit, or with the authority or assent of the plaintiffs.

An auditor's report is *prima facie* evidence upon any issue of fact to be tried in the case, and, if not controlled, will warrant a verdict and judgment in accordance with its conclusions. The court may, upon the facts stated in the report, derive a conclusion different from that adopted by the auditor, if the legal construction and effect of those facts require it. But the facts stated in the report must, for that purpose, be such as to control the conclusion. If they do not, the presumption is that the conclusions are based upon evidence before the auditor which is not reported; and the report stands as establishing *prima facie* the results it states, unless overcome by evidence *abunde*. We cannot suppose that it was intended by this agreement to give to the conclusions of the auditor any such effect upon the issue of law to be presented here. The very purpose of the submission of the case upon the report as an agreed statement was, as we understand it, to test the correctness of the conclusions of that report by the special facts which it states. In this hearing, therefore, the report of the auditor must be regarded as having no force except as a mere statement of facts; and the facts stated are not sufficient to enable the court to determine whether the conclusions of the auditor upon the questions presented here were right, as matters of law, or not. Consequently the

Agreed facts must be discharged.

DANIEL H. BARNES & others, petitioners, vs. TIMOTHY H. SMITH.

After a defendant has taken judgment and execution for costs in an action in the superior court, the court has no jurisdiction, on his petition, even with the assent of the plaintiff, to bring forward the action upon the docket to a subsequent term, and permit him to return the execution and obtain a new taxation of his costs and another execution for them as taxed anew; and such a petition is an independent proceeding in which the respondent is the prevailing party, and costs may be allowed to him therein under the Gen. Sta. c. 156, § 16, in the discretion of the court, which is not subject to exceptions.

PETITION to the superior court, by Daniel H. Barnes, Daniel Green, and Henry E. Howe, for a revision of the taxation of their costs in three actions of tort, brought against them severally, in that court, by the respondent, for trespass on his close. The actions were tried together, without a jury, before Ames, C. J., who gave judgment for these petitioners, and the respondent alleged exceptions, which were overruled, as reported 101 Mass. 275. The petitioners then took out executions for their costs, at April term 1869; and at July term 1869 they united in this petition for the actions to be brought forward from the docket of the April term, and for leave to return and cancel their executions, and obtain a new taxation of costs in respect to the travel and attendance of their witnesses, and new executions for their costs thus revised. Their prayer was granted by Brigham, C. J., after notice to the plaintiff; and the new taxation of costs was affirmed by the court on appeal from the clerk, whereupon the respondent appealed to this court. The other material facts are stated in the opinion.

T. Weston, Jr., & W. P. Harding, for the petitioners.

G. W. Searle, (*A. Wellington* with him,) for the respondent.

COLT, J. Judgments were recovered by the petitioners in three several actions, brought against them by the respondent, in the superior court. Costs were taxed in their favor by the clerk, and executions therefor duly issued. It is now alleged that the certificates upon which the taxation was based erroneously stated the travel and attendance of the witnesses; and the petitioners join in asking the superior court to have these cases

brought forward from the docket of a previous term, in order that the executions to be returned by them may be cancelled, and the witnesses' costs again taxed. This petition, after notice to the respondent, was allowed by the superior court, and the taxation of costs for witnesses ordered to be revised, upon due notice to the respondent and his attorney. A new taxation was made by the clerk, which was affirmed by that court, and the respondent appeals.

We cannot find anything to justify this proceeding, either in the sections of the practice act to which we are referred, Gen. Sts. c. 129, §§ 34, 42, or in that power which is incident to all courts of record, to correct the mistakes of its recording officers, so as to have the record conform to the actual facts of the case. *Balch v. Shaw*, 7 Cush. 282. The statute relates to amendments of the record or proceedings in matter of form, where it is in affirmance of the judgment. Here it is sought to correct, not a matter of form, but of substance; not in affirmation, but in alteration of it. Nor is this a matter of correcting the record at all. It is rather an application for a rehearing of a case upon new evidence, in which final judgment has been rendered, and an execution issued, making a new record altogether. In this respect, a judgment for costs must stand upon the same footing as a judgment for damages. It is convenient that the evidence upon which it is taxed should in the first instance be presented to the clerk. If there is no appeal from his decision, the taxation is final, and cannot be changed even by a writ of error. *Jacobs v. Potter*, 8 Cush. 236. *Day v. Berkshire Woollen Co.* 1 Gray, 420. The petitioners have had a day in court, and the judgment of the court is final. It has passed beyond its control to alter or amend the judgment upon a mere petition which does not ask the exercise of that power to grant a review which the statute gives.

It is said that the appearance of the respondent before the clerk, and the production of witnesses by him, was equivalent to consent on his part to the cancelling of the executions and to the new taxation. But the new taxation was by order of the court, and his appeal was properly taken upon its affirmation

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And besides, his consent cannot give to the court jurisdiction over a subject matter where it had none before.

Petition dismissed.

After this decision, the respondent applied to the clerk to tax his costs in the matter of the petition, and contended that he was entitled to separate costs against the several petitioners. The clerk taxed in his favor but one bill of costs; and both parties appealed to the court,—the petitioners because the clerk allowed any costs, the respondent because he declined to allow costs against them severally. At the hearing, the petitioners, as tending to show that costs should not be allowed in this proceeding, offered to prove that the respondent assented to the revision of costs in the original actions, in vacation, before the justice who granted the revision; but the evidence was excluded, the clerk's taxation was affirmed, and the petitioners alleged exceptions, which were argued in March 1871.

T. Weston, Jr., & C. Abbott, for the petitioners.

A. Wellington, for the respondent.

COLT, J. The exceptions in this case are in the nature of an appeal by the petitioners from the judgment of the superior court affirming the taxation of costs by the clerk in favor of the respondent. The petitioners, who were the several defendants in three actions brought against them separately by the respondent, after there had been several judgments for costs in their favor, and executions had issued in each case, asked to have the cases brought forward, the executions returned and cancelled, and the costs again taxed, on account of some error or omission in the original taxation. The petition was at first allowed by the superior court, and a revision of the taxation ordered upon notice. The respondent appeared and objected, and upon his appeal to this court it was held that the superior court had no power under this petition, after judgment and execution issued, to correct the taxation. The petition was thereupon dismissed, and the respondent applied for his costs in this proceeding. The clerk accordingly taxed one bill of costs, and on appeal his taxation was sustained by the superior court.

George v. Reed.

We see no error in this. The defendant appeared in court in answer to a notice issued upon a petition which was entered in court and took its place upon the docket as an independent proceeding. He objected to the legality of it, appealed to this court, and ultimately prevailed on the ground that the court below had no authority or jurisdiction in the premises. Want of jurisdiction does not prevent the respondent from recovering costs. The court so far entertained the petition as to hear and determine the question. And the respondent, within the meaning of the statutes, must be regarded as the prevailing party. *Hunt v. Hanover*, 8 Met. 343. *Elder v. Dwight Manufacturing Co.* 4 Gray, 201, 205.

In civil suits and proceedings in which no provision is expressly made by law, the costs to be allowed are declared to be wholly in the discretion of the court. Gen. Sts. c. 156, § 16. In a case very like this, costs were allowed under this provision. *Fales v. Stone*, 9 Met. 316, 320. And in *Bond v. Fay*, 1 Allen, 212, it was held that no exception lies to the exercise of this discretion by the court in which the proceeding is pending. See also *Chase v. Blackstone Canal Co.* 10 Pick. 244, 246.

The evidence that the defendant assented to a revision of the original taxation, before a justice of the superior court in vacation, was properly excluded. Jurisdiction could not have been conferred by such assent; and the effect of the evidence was to contradict the record. *Exceptions overruled.*

NATHANIEL M. GEORGE & another vs. BENJAMIN T. REED & others.

In an action of tort, changed on the plaintiff's motion to a suit in equity upon the terms that he shall pay the defendants' taxable costs, each defendant is entitled to separate costs if they have answered severally; and it is immaterial that the action was brought originally in contract.

APPEAL from the taxation of costs in an action in the superior court which the plaintiffs obtained leave to change to a suit

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in equity and transfer to this court, "paying all defendants' taxable costs up to the time of such transfer." See 101 Mass. 378. The action was brought originally as an action of contract, and the plaintiffs were then allowed to amend their declaration so as to proceed in tort. To the original declaration, and to it as amended, the defendants answered severally.

The clerk of the superior court, in taxing the costs to which the defendants were entitled under the terms on which the change to a suit in equity was allowed, taxed costs of travel and attendance for each of the four defendants. On appeal, the court affirmed the taxation, and the plaintiffs appealed to this court.

E. Avery & G. M. Hobbs, for the plaintiffs.

E. Merwin, for the defendants.

BY THE COURT. This was originally an action of contract, but was changed by amendment into an action of tort. The defendants answered severally, as they had a right to do; and if they prevailed, they were entitled to tax costs separately. *West v. Brock*, 3 Pick. 303. *Fales v. Stone*, 9 Met. 316. *Davis v. Hastings*, 8 Cush. 313. When the plaintiffs moved to change the action to a suit in equity, the judge who allowed the motion had authority to fix the terms, and has done so. All we can do is, to give a construction to his order. We cannot doubt that "taxable costs" includes separate costs to each defendant.

Taxation affirmed.

BENJAMIN JAMES vs. CHARLES T. S. TOWNSEND.

▲ review of a judgment rendered against a defendant on his default in an action of which by a mistake in the service of the original writ, he had no knowledge until after judgment, may be granted on his petition filed within one year after he has notice of the judgment, although more than a year after the judgment was rendered, and although, when it was rendered, he was within the Commonwealth.

Whenever the presence of the defendant in a suit is not secured, either in fact, by his appearance, or constructively, by the service upon him of the summons to appear, a judgment rendered therein upon his involuntary default is rendered "in his absence," within the meaning of the Gen. Sts. c. 146, § 21, concerning petitions for writs of review.

James v. Townsend.

PETITION filed October 23, 1869, for a review of a judgment recovered against the petitioner by the respondent in the superior court at October term 1867.

At the hearing, before *Morton, J.*, it appeared "that the original writ was returnable to the superior court at October term 1859, and was served by a copy left at the last and usual place of abode of the petitioner in Worcester, on September 17, 1859; that the writ was duly entered in court at the term at which it was returnable, and the petitioner, not appearing, was defaulted, and the case continued for judgment from term to term till October term 1867, when judgment was rendered." It was admitted "that, when the writ was served, the petitioner had long been, and was, a resident and living in Worcester, and was such resident in Worcester, and was within the Commonwealth, when such writ was served and when judgment was rendered, and has been ever since, and is now." The petitioner introduced evidence tending to show "that he never had any actual notice of the suit or of the judgment until within one year before the filing of the petition; that he had changed his residence to another house in the village where he lived, shortly before the service of the writ; and that the copy of the writ left by the sheriff might have been left at his former and not then abode;" and evidence to the contrary was introduced by the respondent.

The judge ordered that the petition be dismissed, on the ground that it was not seasonably filed; and the petitioner alleged exceptions.

S. J. Thomas, for the petitioner.

C. T. Russell, for the respondent, cited St. 1791, c. 17, § 2; St. 1820, c. 53; Commissioners' Rep. on Rev. Sts. c. 99, § 20, note; Rev. Sts. c. 90, § 53; c. 92, §§ 4-6, 10-12, 15; c. 99, §§ 17-20; Gen. Sts. c. 3, § 7, cl. 1; c. 112, §§ 11, 31; c. 123, § 26; c. 126, §§ 5, 17; c. 129, §§ 43-45; c. 133, §§ 1, 2, 4; c. 146, § 21; c. 150, § 15.

WELLS, J. We assume the facts to be as the testimony of the petitioner tended to show them. By mistake of the officer serving the process in the original suit, the copy was left at a place where the defendant had ceased to reside and he had in

fact no notice of the suit, and no knowledge of the judgment rendered therein, until within one year prior to the filing of this petition. The statute limits the right of review to petitions filed within one year from the date of the judgment complained of; except that in case the judgment "was rendered in the absence of the petitioner and without his knowledge, the petition for review shall be filed within one year after he first had notice of the judgment." Gen. Sts. c. 146, § 21. In the opinion of a majority of the court, the present case comes within both the letter and the spirit of this exception.

The case has been so elaborately discussed in reference to collateral provisions of the General Statutes, as well as to the earlier statutes and the successive modifications thereof, that some review of the law upon this subject seems to be required. The respondent contends that the terms "in the absence of," as applied to a party in a suit, and "absent defendant," are co-extensive, and have acquired a special or technical meaning in the General Statutes, signifying absence from the Commonwealth; that otherwise they can have no meaning, in the section relating to reviews, which would not include in the exception all judgments rendered on default.

By St. 1791, c. 17, § 2, it was provided that reviews might be granted in all cases upon application made "within three years after the rendition of the judgment complained of." St. 1820, c. 53, extended the time to three years after the party first had notice of the judgment, in case of a suit commenced when he was absent from the Commonwealth and had no notice thereof before the rendition of the judgment. By the Revised Statutes the time in both cases was reduced to one year. In c. 99, § 17, a writ of review, at any time within one year after judgment, is given "as of right, and without any petition therefor," in case of a judgment "upon the default of a defendant who is out of the state." Although reference is made to the ninety-second chapter for the manner in which judgment is rendered, the language of this section does not permit its application to any of the cases provided for in c. 92, except those where the defendant is "out of the state." This section contains the further

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clause, "and no writ of review shall be issued in any other case, unless it shall be allowed upon petition, as hereinafter provided." Section 18, allowing a petition to be filed "within one year after the defendant shall first have notice of the judgment," in case the review is not prosecuted as of right, is limited to "the case mentioned in the preceding section;" to wit, of a defendant absent from the Commonwealth. But § 20, following that which confers upon this court a general discretionary power to grant reviews upon petition, in all cases, is as follows: "If the judgment complained of was rendered in the absence of the petitioner, and without his knowledge, the petition for review may be filed at any time within one year after he shall first have notice of the judgment, otherwise it shall be filed within one year after the judgment was rendered."

The defendant contends that this section limits the right to file a petition for review, within one year after notice of the judgment, to precisely the same cases as are already provided for by § 18. If this were the intention of the statute, we think it would have been indicated either by some allusion to the previous section, or by the use of similar phraseology. In §§ 17 and 18, the application to defendants "out of the state" is made certain by distinct and appropriate language. The use of phraseology in § 20, of which the natural and obvious meaning is less restricted, indicates a corresponding intent in the provision. This inference is strengthened by reference to chapter ninety-two, "Of proceedings when the defendant does not appear and answer to the suit." It provides, first, for judgment upon default. Section 3 provides for continuance and further notice to the defendant, if he "is not an inhabitant or resident within the state, or if his residence is not known to the plaintiff nor to the officer serving the writ." Section 4 provides that, "When judgment is so rendered upon the default of an absent defendant," he shall be entitled to a review within one year, as of right. Section 5 allows a review in such case, when not prosecuted as of right, upon petition made within one year after notice of the judgment. It would seem that the term "absent defendant" in § 4 was intended to be applied to all those for

whom further notice was provided in § 3; namely, to one whose residence "is not known to the plaintiff, nor to the officer serving the writ," as well as to one not resident within the state. If so, then not only a review as of right within one year after judgment, but also a review upon petition within one year after notice of the judgment, is given by this chapter, to a defendant not served with process for the reason that his residence was not known, as well as to one who was out of the state.

Some doubt of this construction of the Revised Statutes would arise from the fact that by *c. 99, § 17*, a review as of right is explicitly limited to the case of a defendant who is out of the state, and the writ is forbidden to issue in any other case, unless allowed upon petition. But this difficulty is removed in the General Statutes, *c. 146*, either by alteration, or by legislative construction; and it is immaterial by which mode it is done. A writ of review, within one year after judgment, is given by § 20, "when judgment is rendered, as provided in chapter one hundred and twenty-six, upon the default of a defendant upon whom service has not been made by reason of his being out of the state, or his residence being unknown." It is clear that, under this section, the review as of right cannot be limited, as in *Rev. Sts. c. 99, § 17*, to defendants "out of the state." It is also manifest, especially upon reference to *c. 126, § 6*, that the right to have a review by writ without petition was intended to be based upon the want of service of the writ, either personal upon the defendant, or at his actual place of residence.

A review upon petition, when not prosecuted as of right, may be granted by the supreme court, "provided, that if the judgment complained of was rendered in the absence of the petitioner, and without his knowledge," the petition shall be filed within one year after he first had notice of the judgment, otherwise within one year after judgment was rendered. *Gen. Sta. c. 146, § 21*. Construing this section with reference to its connection, as well as by the obvious sense of the words used, we find no reason to interpret "absence" as meaning "out of the state" only. We think it was intended to apply to all cases of

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default, without service of process, to which the preceding section applies. When the presence of the defendant is not secured, either in fact by his appearance, or constructively, by the service upon him of the summons to appear, a judgment obtained upon his involuntary default is, in legal intendment, rendered in his absence.

From this review of the statutes, we are satisfied that it was the intention of the legislature to give to every party the right to file his petition for a review within one year after notice of a judgment against him, whenever by any means or for any cause there was in fact no service of the process upon him and no notice of the pendency of the suit, so that he was deprived of an opportunity to appear and defend his rights in the original action.

At common law no judgment could be rendered against a party without his appearance in court to answer to the suit. If he failed to appear upon the first summons, further process was necessary to compel his attendance. 3 Bl. Com. 279. *Picquet v. Swan*, 5 Mason, 35. It is only by statute that judgment can be rendered upon default, against a party who has been duly served with the process of the court. It is the manifest purpose of the statutes upon this subject that a defendant shall, in some form, have actual personal notice of the pendency of proceedings against him before any judgment is rendered which shall absolutely and forever preclude him from an opportunity to avail himself of his rights in defence. Although the statutes allow service of process to be made by leaving "the original or a copy, as the case may be," at the "last and usual place of abode" of the defendant, yet if he is absent from the state and no personal service is made on him, or if the service is defective or insufficient, by reason of mistake as to the place where the summons ought to have been left, the court, upon suggestion thereof by the plaintiff, is required to order a continuance and further notice to the defendant. And in any case in which the defendant does not appear, the court may, in their discretion order the action to be continued and further notice given to him "in such manner as the court may direct." Gen. Sts. c. 126, § 6

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We think that the right and the duty of the court are equally comprehensive and liberal, under the statutes authorizing the granting of reviews, for the protection of parties from the loss of their rights by the effect of judgments in suits of which they had no notice or knowledge. In such cases a judgment upon default is truly rendered "in the absence of" the party. Presence within the Commonwealth, without proper service of process or notice, does not give jurisdiction to the court. For the purposes of a review, the apparent jurisdiction arising from the return of service by the officer may be shown not to have existed in fact. *Brewer v. Holmes*, 1 Met. 288.

The judgment in this case appearing to have been rendered in his absence and without his knowledge, the petitioner was entitled to file his petition at any time within one year after he first had notice of it. The case must therefore stand for hearing, to determine whether the facts are as the petitioner's testimony tended to show them to be. *Exceptions sustained.*

JAMES GRAY vs. BENJAMIN THRASHER.

A writ of *scire facias* against a person charged as trustee is not a civil action, within the meaning of the Sts. of 1862, c. 217, § 4, and 1866, c. 279, § 9, authorizing the removal of such actions by the defendant from the municipal court of Boston to the superior court; and a judgment rendered therein for the plaintiff in the superior court, after such removal, may be reversed by writ of error for want of jurisdiction, although the defendant in that court appeared and filed both a motion to dismiss for that cause and an answer to the merits, and notwithstanding the provision of the Gen. Sts. c. 129, § 79, that, when the defendant has appeared and answered to the merits of an action, no defect in the writ or process by which he has been brought before the court shall be deemed to affect the jurisdiction of the court.

WRIT OF ERROR to reverse a judgment rendered by the superior court, at October term 1868, on a writ of *scire facias* against the plaintiff in error.

The record showed that, in an action of contract brought by the defendant in error against Merrill Davis, in the municipal court for the city of Boston, the plaintiff in error was summoned, and on his default was charged, as trustee of Davis, against

whom, on February 19, 1868, the defendant in error recovered judgment for \$300 and costs; that on May 29 a *scire facias* was sued out on this judgment, and duly returned and entered in the municipal court on June 6; that on June 9, the plaintiff in error having appeared and filed his affidavit of merits, and having paid the entry fee to the clerk of the superior court, the municipal court ordered that the *scire facias* be removed to the superior court, and it was so removed, and was entered in the superior court, and both parties appeared there; that the plaintiff in error there filed a motion that it be dismissed for want of jurisdiction, in that it was certified from the municipal court without judgment or appeal and by an erroneous assumption of authority under the St. of 1862, c. 217, § 4, and also filed a general answer, denying each and every allegation of the defendant in error; that after a hearing the motion to dismiss was overruled; and that judgment was then rendered against the plaintiff in error on his default.

The assignment of errors was: "First, in that said suit was improperly removed and entered in the superior court, the same not being a civil action wherein a debt or damage was sought to be recovered over \$100, and the superior court had not, nor could have, any jurisdiction in the case. Second, in that § 4 of c. 217 of the Sts. of 1862, under which the suit was removed from the municipal court, applied only to the police court for the city of Boston, and did not, nor could, apply to the municipal court."

The defendant in error pleaded *in nullo est erratum*; and also filed a plea to the jurisdiction of this court, "for that the errors alleged in said assignment concern the jurisdiction of the superior court over the writ of *scire facias* in said errors set forth, and relate solely to the form of process by which this defendant was brought before the superior court, and this defendant says that by the Gen. Sts. c. 129, § 79, it is provided that, when the defendant has appeared and answered to the merits of an action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court."

J. Bennett, for the plaintiff in error.

I. Knowles, Jr., for the defendant in error.

COURT, J. The defendant's plea to the jurisdiction of this court in this writ of error is founded upon the Gen. Sts. c. 129, § 79, by which it is provided that defects in the writ or other process by which the defendant is brought before the court shall not affect the jurisdiction of the court. But the objection of the plaintiff in error, which was made in the original suit, was not to the process or its service; it was to the jurisdiction of the court over the subject matter of the suit; and this was a defect which could not be waived by appearance and answer. *Ashuelot Bank v. Pearson*, 14 Gray, 521. The defendant had a right to appear and protect himself against an erroneous judgment. *Elder v. Dwight Manufacturing Co.* 4 Gray, 201, 205. And besides, the case does not come within the provisions of the section cited, because the judgment was rendered upon a default, and not upon a verdict. *Hollis v. Richardson*, 13 Gray, 392.

A writ of *scire facias* is not a civil action, returnable before the municipal court of Boston, wherein the debt or damage demanded exceeds a definite sum, within the meaning of those statutes which authorize the removal of certain cases of that description to the superior court. Sts. 1862, c. 217, § 4; 1866, c. 279, § 9. It is a judicial writ, which can only issue from the court having possession of the record on which it is founded. If issued by any other court, it will be a mere nullity, and an appearance and answer by the defendant will not give jurisdiction. *Osgood v. Thurston*, 23 Pick. 110. No debt or damage is therein demanded. The plaintiff in such an action therefore has no choice as to the courts in which he will bring his suit. No other court, from the nature of the writ, can have jurisdiction. The provisions of the statutes which give the defendant a right of removal are intended to meet the injustice of only allowing to the plaintiff, when there is more than one court having jurisdiction, the right to elect in which to try his case. The interpretation for which the defendant contends would put the parties upon unequal footing, by giving only to the defend-

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ant an opportunity to some extent of choosing his tribunal. It could not have been the intention of the statutes to establish such inequality, and it cannot be inferred from doubtful provisions. *Humphrey v. Berkshire Woolen Co.* 10 Allen, 420, 423.

It is of no consequence that the alleged error was the result of the act of the plaintiff in error. Nothing that he could do could confer jurisdiction on the court, in the original action, which by law it did not possess.

The original action was improperly removed from the municipal court. The judgment of the superior court must therefore be reversed, and the case dismissed from that court. Gen. Sta. c. 146, § 2. *Ordered accordingly.*



FREDERICK U. TRACY *vs.* SARAH A. WARREN, administratrix.

A judgment against a constable for nominal damages and for costs, in an action of replevin of goods attached by him, is a judgment for a misfeasance, within the meaning of the St. of 1814, c. 165, § 1, providing for suits on the bonds of constables of Boston.

CONTRACT in the name of the treasurer of Boston, by Henry P. Boynton, on the bond of Silas Warren as a constable of Boston for a year from September 26, 1864, upon which the defendant's intestate, Dewey K. Warren, was a surety. Writ dated October 26, 1868. The pleadings and an agreed statement, on which the case was submitted to this court on appeal from the superior court, showed these facts:

On June 6, 1865, Silas Warren, as a constable, attached on a writ against Susan M. Badger goods which Boynton replevied from his custody on July 10, 1865. In the replevin suit, entered in the superior court for Suffolk at October term 1865, Boynton recovered judgment on October 18, 1868, for \$1 damages and \$112.86 costs, and took out execution, which was returned before the beginning of this action, wholly unsatisfied, after demand made upon Silas Warren thereon.

J. S. Abbott, for the plaintiff.

C. R. Train, for the defendant.

COLT, J. The only objection made to the maintenance of this action on the bond is, that no judgment, within the meaning of the St. of 1814, c. 165, § 1, has been recovered against Warren, the principal obligor, for malfeasance or misfeasance in his office, as constable of the city of Boston.

The statute cited is still in force, and authorizes persons injured by any breach of a constable's bond, given to the treasurer of the city, to maintain an action therefor upon the bond in the name of the treasurer, provided a judgment for malfeasance or misfeasance, or for nonpayment of money collected, shall have first been recovered by such person against the constable. *Calder v. Haynes*, 7 Allen, 387.

The judgment in this case was recovered in an action of replevin against the constable, Warren, and was for nominal damages and costs, in favor of the person for whose use this action is brought. This was sufficient, under the statute, to lay the foundation for an action upon the bond. It is a judgment for a misfeasance.

Replevin lies, for him who has the general or special property in goods, against him who has wrongfully taken them. The remedy in this form, even if it did not originally extend to the recovery of chattels in the custody of the law, is now given by statute to all persons whose goods are attached on mesne process or taken on execution, except the defendant in the suit. Gen. Sts. c. 143, § 10.

To hold that it is the intention of the statute of 1814 to exclude replevin in the proviso would be to deprive the party injured, without reason, of his election, either to recover the specific articles taken, or to sue for damages in trespass or trover. 1 Chit. Pl. (11th Am. ed.) 146. *Tracy v. Goodwin*, 5 Allen, 409. *Judgment for the plaintiff.*

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**GARDNER BREWER & others vs. PROPRIETORS OF THE BOSTON
THEATRE & others.**

SAME vs. SAME.

SAME vs. SAME.

A bill in equity by stockholders of a corporation, in behalf of themselves and the other stockholders, for fraud and conspiracy whereby the interests of the corporation have been sacrificed, brought against the corporation and persons who were its directors in former years, and others, cannot be maintained, if it does not show either that an effort has been made to set the corporation in motion to redress the wrong, or an application been made to the board of directors in office at the time of bringing the bill, or that such effort or application would be useless; and this requirement is not satisfied by an allegation that a majority of the directors are acting in the interest and under the control of persons charged with the fraud.

A bill in equity brought by stockholders of a corporation, in behalf of themselves and the other stockholders, against the corporation, and against certain directors and other individuals for fraudulently conspiring to lease the corporate property on improperly low terms and share in the profits of the lessees, which alleges that individual defendants own or control a majority of the stock and control the proceedings at the stockholders' meetings, and that a majority of the directors are knowingly and fraudulently colluding with them to continue to them the control of the corporation and its property, sufficiently shows that no redress can be obtained through the corporation or the directors, and that neither the lessees, nor all, nor a majority of, the directors, are necessary parties to the bill.

The recital, in a bill in equity for fraud, of other frauds by some of the defendants, which are the subject matter of another bill in equity filed by the same plaintiff at the same time, does not make the bill multifarious, nor can he be compelled to elect on which bill he will proceed.

THREE BILLS IN EQUITY by Gardner Brewer and twenty-four others, stockholders in the corporation chartered by the St. of 1858, c. 79, under the name of The Proprietors of the Boston Theatre. The bills were inserted in writs, each of which was dated June 21, 1869, and were filed August 2, 1869.

The first bill, which was brought in behalf of the plaintiffs and all other stockholders of the corporation except such as were made defendants, against the corporation and Orlande Tompkins, Benjamin W. Thayer and George N. Faxon, alleged that the corporation owned a theatre in Boston; that the number of its directors was fixed at seven; that at the annual meetings in the month of July in 1864 and 1865 Tompkins and Faxon were chosen on the board of directors; that the thea-

tre was nominally leased to Henry C. Jarrett in 1864 for one year from August 1, and also in 1865 for one year from August 1; that "Tompkins, being a director, covertly and by collusion with Faxon and Thayer, and without the knowledge of the other directors, except Faxon, was associated with Jarrett and interested in the profits of said leases; that Jarrett made application for said leases at the solicitation of Tompkins, being a director, and for the joint benefit of Jarrett and Tompkins; that, covertly and without the knowledge of the other directors, except Faxon, and in violation of his own duty as a director, Tompkins agreed with Jarrett to divide with him the profits of said leases; that large net profits were made by Jarrett, as nominal lessee, from said leases, and from the use and occupation of the theatre and the management of the same, and were shared equally between Tompkins and Jarrett; that Thayer, by agreement with Tompkins, or with Tompkins and Jarrett, shared equally the profits received by Tompkins;" that Tompkins and Faxon, being directors, and Thayer fraudulently colluding with Tompkins and Faxon and each of them, "procured that the lease should be given to Jarrett in each of the years 1864 and 1865, at a rent much smaller than it was worth in the market, and smaller than the directors might have got from other parties, for the benefit of Tompkins and Thayer, and in fraud of the corporation; that thereupon Tompkins, being a director, covertly and in violation of the duties of his office and with the aid of Faxon, and of Thayer, colluding with Tompkins and Faxon in a breach of their trust as directors, procured large and extravagant amounts to be expended upon the theatre in repairs, new properties and furniture, and for other like purposes, real or pretended, for the private benefit of the parties interested in the lease and in fraud of the corporation;" and "that a majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, Tompkins and Thayer, and these plaintiffs have instituted a suit in this court concurrently herewith" [which was the third of these bills in equity] "against the present board for breaches of trust by them committed in their

office in collusion with Tompkins and Thayer, reference to which suit is hereby made as a part of this bill." The prayer was for discovery as to the premises, and that the defendants "may come to a just and true account as to the same, and may be decreed to be trustees for the defendant corporation in respect of all sums received as herein alleged, and for such further sums as they might and ought to have received or accounted for to the corporation," and for general relief. Tompkins answered. The corporation and Thayer and Faxon demurred generally for want of equity.

The second bill, which was brought in behalf of the plaintiffs and all other stockholders of the corporation except such as were made defendants, against the corporation and Tompkins, Thayer, Faxon, George E. Hersey, Noble H. Hill and Frederick O. Prince, alleged that the corporation owned a theatre in Boston; that the number of its directors was fixed at seven; that at the annual meeting in the month of July 1864 Tompkins was chosen on the board of directors; that at the annual meeting in 1865, Tompkins, Faxon, Hersey, Hill and Prince were chosen on the board, and at the annual meeting in 1866 Faxon, Hersey, Hill and Prince were chosen on the board; that the theatre was nominally leased to Jarrett in 1864 for one year from August 1, and also in 1865 for one year from August 1, and was nominally leased to Edwin Booth and John S. Clarke in 1866; "that Tompkins, being a director, covertly and without the knowledge of the other directors, except Faxon, and by collusion with Faxon and Thayer, and in violation of his trust as a director, was jointly interested with Jarrett in both of the two leases made to him and in the management of the theatre thereunder, and received therefrom large pecuniary profits and shared the same with Thayer, and that Faxon and Thayer knowingly aided Tompkins in his breach of trust; that it was well known to Hersey, Hill and Prince at the time of their election as directors, and at the time of their becoming candidates for said office, that Tompkins and Thayer were pecuniarily interested in the leases and in the management of the theatre, and had derived large profits therefrom, and that they became candi

dates for the office of director and were elected as aforesaid at the request of Tompkins and Thayer, and by their agency; that during the pendency of the second lease to Jarrett, it was determined by Tompkins and Thayer to separate from Jarrett unless he would agree to share the profits of future leases with them in equal thirds; that Jarrett refused so to do, and the parties agreed to separate at the expiration of the lease then pending;" "that the offer of Booth and Clarke was made at the solicitation of Tompkins and Thayer, and for their benefit, wholly or in part, and in pursuance of an agreement that Tompkins and Thayer should share the profits of the lease and of the management of the theatre thereunder; that Tompkins, acting in violation of his duty as a director and in prejudice of the corporation for his own private gain, so contrived that the offer of Booth and Clarke was accepted by the directors, and the other offers aforesaid were rejected; that large and extravagant and unnecessary amounts of money were expended upon the theatre for repairs, new properties and furniture for the private benefit of Tompkins and Thayer, and to the prejudice of the corporation; that the directors, Faxon, Hersey, Hill and Prince, and also Thayer, knowingly colluded with said Tompkins in his said breach of trust, and through fraud and gross negligence procured and consented that the lease should be awarded to Booth and Clarke, and that such amounts should be expended as aforesaid for the private gain of Tompkins and Thayer and to the prejudice of the corporation; and that Tompkins and Thayer received large sums of money as net profits from the lease to Booth and Clarke and from the management of the theatre thereunder, and shared the profits between them."

The second bill further alleged that "during the years 1863, 1864 and 1865, and later, and especially during the early part of the year 1866, Tompkins and Thayer in person, and by their agents, and in particular through the agency of Hill and Hersey, who were at that time directors, were engaged in buying up and getting control of the stock of the corporation;" that "at the annual meeting in 1866 they owned and controlled a clear majority of the stock; that Tompkins and Thayer have at

divers times corrupted and unduly influenced the said defendant directors;" "that said defendant directors have been in fact unduly influenced as aforesaid by Tompkins and Thayer; that by reason of said undue influence, and through fear of the power of said Tompkins and Thayer, and through gross negligence and a mistaken notion of the general rights of a majority of the stockholders in a corporation, and through fraud and corruption, the said defendant directors allowed themselves to become little else than the creatures of the said Tompkins and Thayer, and the registers of their wishes, and came to consider that no duty rested upon them to do more than make the said corporation serviceable to the said Tompkins and Thayer;" "that Prince, Hill and Faxon are now members of the board of directors of said defendant corporation, and that a majority of the said present board of directors are acting in the interest of, and are under the control of, Tompkins and Thayer, and these plaintiffs have instituted a suit in this court concurrently herewith" [which was the third of these bills in equity] "against the said present board, for breaches of trust by them committed in their said office, in collusion with Tompkins and Thayer, reference to which suit is hereby made a part of this bill."

The prayer was in the same words as that of the first bill Tompkins answered. The corporation and the other defendants demurred generally for want of equity.

The third bill, which was brought in behalf of the plaintiffs and all other stockholders of the corporation except such as were made defendants, against the corporation and Tompkins, Thayer, Faxon, Hersey, Hill, Prince, Aaron W. Spencer, William T. Hart, Newell A. Thompson, Edmund F. Cutter and Junius B. Booth, alleged that the corporation owned a theatre in Boston; that the number of its directors was fixed at seven; that at the annual meeting in the month of July 1864 Tompkins was chosen on the board of directors, at the annual meeting in 1865 Tompkins, Faxon, Hersey, Hill and Prince were chosen on the board, at the annual meetings in 1866 and 1867 the board chosen consisted of Hersey, Hill, Prince, Spencer, Hart, Thompson and Cutter, and at the annual meeting in 1868

the board chosen consisted of the same persons, with the substitution of Faxon for Hersey; that the theatre was nominally leased to Jarrett in 1864 for one year from August 1, and also in 1865 for one year from August 1, was nominally leased to Edwin Booth and Clarke in 1866 for one year from August 1, and that "in each of the years 1867, 1868 and 1869 the theatre was nominally leased to Junius B. Booth for one year from the first day of August in said years, respectively;" "that Tompkins and Thayer were associated with the said nominal lessees in each of the six years last named, and shared in the profits of said leases, and have received large sums from the same and from each of them except the last named, and from the use and occupation of the theatre thereunder, as net profits, and that Tompkins and Thayer caused the applications for a lease to be made by the said nominal lessees for their own private advantage, to wit, the advantage of Tompkins and Thayer, and covertly and by means of the stratagems of Tompkins, acting in the office of director of said corporation, and by divers other wrongful means, procured the leases to be awarded to the nominal lessees for the private advantage of Tompkins and Thayer and to the prejudice of the corporation, for a rent much less than the real market value of the leases, and much less than the directors would otherwise have obtained therefor; and that it was well known to the defendants, Hill, Hersey, Hart, Prince, Thompson, Spencer, Cutter and Faxon, and each of them, at the time of their election as directors, respectively, and at the time of their respectively becoming candidates for said office, that Tompkins and Thayer were pecuniarily interested in the leases which had been previously awarded as aforesaid and in the management of the theatre thereunder, and that Tompkins and Thayer desired still longer to retain control of the leases of the theatre, and had derived large profits from their previous interest in the leases and management, and that said persons were elected directors as aforesaid at the request of said Tompkins and Thayer and by their agency."

The third bill further alleged "that during the years 1863, 1864 and 1865, and later, and especially in the early part of the

year 1866, the said Tompkins and Thayer in person and by their agents, and in particular through the agency of the said Hill, Hart and Hersey, who were at the time directors, were engaged in buying up and getting control of the stock of the said corporation;" that "at the annual meeting of stockholders in the year 1866 they owned and controlled a clear majority of said stock; that Tompkins and Thayer have at divers times corrupted and unduly influenced the defendant directors;" "that, by reason of said undue influence and corruption, and through fear of the power of Tompkins and Thayer, and through gross negligence and a mistaken notion of the general rights of a majority of the stockholders in a corporation, and through fraud, the said defendant directors have allowed themselves to become little else than the creatures of Tompkins and Thayer and the registers of their wishes, and have come to consider that no duty rested or now rests upon them as directors to do more or other than to make said corporation, and the property of the plaintiffs therein invested, serviceable to Tompkins and Thayer; and that Tompkins and Thayer have conspired together and with certain of the directors and with said Booth, as hereinafter set forth, to get and retain control of said corporation and to manage the same in subservience to their own private gain and to the prejudice of the corporation."

This third bill also alleged that "said directors, chosen in the year 1866, in violation of their duty in said office, and being prompted thereto by Tompkins, Thayer, Faxon and Booth, knowing of said breach of trust, and in pursuance of the conspiracy aforesaid, and taking part therein, to the prejudice of the corporation, and for the private advantage of Tompkins and Thayer, nominally made a lease of the theatre to Junius B. Booth for one year from August 1, 1867, at the rent of \$24,000, with the right of renewal on the same terms, the same being much less than the real market value of the said lease and the value which the directors might easily have obtained therefor, and expended large, extravagant and unnecessary sums upon the theatre for repairs, new furniture and properties, real or pretended, for the private benefit of Tompkins and Thayer, and to

the prejudice of the corporation; that in the year 1868 the said directors, elected in the year 1867, in violation of their duty in said office, and being moved and aided by Tompkins, Thayer, Faxon and Booth, knowing of said breach of trust, and in pursuance of the conspiracy aforesaid, and taking part therein, to the prejudice of the corporation, and for the private benefit of Tompkins and Thayer, nominally leased the theatre to Booth, for the year beginning on August 1, 1868, at the rent of \$16,000, the same being much below the real value in the market of the lease, and the value which the directors might easily have obtained therefor; and thereupon expended large, extravagant and unnecessary sums upon the theatre for repairs, new furniture and properties, real or pretended, for the private advantage of Thayer and Tompkins, and to the prejudice of the corporation; that in the year 1869, the said directors elected in the year 1868, in violation of their duty in said office, and being moved and aided by Tompkins, Thayer, Hersey and Booth in said breach of trust, knowing thereof and in pursuance of the conspiracy aforesaid, and taking part therein, to the prejudice of the corporation and for the private advantage of Tompkins and Thayer, nominally leased the theatre to Booth for one year from August 1 in said year, at the rent of \$16,000, the said rent being much less than the real value in the market of said lease, and the value which said directors might easily have obtained therefor; that said leases to Junius B. Booth have all been in writing, and have provided, in substance, that the lessee should employ a first class theatrical stock company, and should conduct and manage said theatre as a first class establishment; that Booth has been permitted by said defendant directors, through gross negligence and fraudulent collusion with Tompkins, Thayer and Booth, in the conspiracy aforesaid, for the private benefit of said parties interested in the leases, and to the prejudice of the corporation, to violate the terms of the said leases in many ways, and in particular to employ only inferior and second rate or third rate theatrical stock companies, and to manage and conduct the theatre as a second class or third class establishment, and to waste the property of the corporation, and to remove the same from

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the theatre and appropriate the same to his own use and to the use of Tompkins and Thayer, without any compensation or any authority therefor."

The prayer was in the same form as that of the other two bills, except that, in addition, it asked that "the said last named lease to Junius B. Booth may be decreed to be delivered up and cancelled." The corporation demurred. Tompkins, Thayer and Booth answered as to part of the bill, and demurred as to part.

The three cases were heard on the bills and demurrers, by Gray, J., and by him reserved for the determination of the full court.

S. Bartlett & R. M. Morse, Jr., for the lessees.

H. W. Paine & H. H. Coolidge, for the corporation and directors.

B. R. Curtis & J. B. Thayer, for the plaintiffs.

WELLS, J. These three bills are brought by certain stockholders of a corporation, in behalf of themselves and all other stockholders not joined as defendants, to recover, for the benefit of the corporation, profits supposed to have been gained to its prejudice, and damages for losses suffered by it, through the improper conduct of certain of its officers during several years past, in leasing its property to parties with whom they secretly confederated to share in the advantages of the contracts so made. The corporation is joined as a party defendant.

One question raised by the demurrers is, whether the bills show sufficient cause for maintaining actions in this form in the name of other parties than the corporation whose interests alone are affected directly, whose rights are to be vindicated, and to whose use exclusively the judgment, if recovered, must enure.

It is unquestioned that, at law, no action could be maintained for the causes set forth, otherwise than in the name and by the authority of the corporation itself. Ordinarily the same rule will apply in equity. It is only from the necessity of the case, and to prevent a failure of justice, that suits in equity in the form of these bills are allowed. To justify a suit in this form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all are

thorities agree. There is some diversity as to what will satisfy the requirement. Whether there must be an effort to move the corporate body to the redress of its own injuries; and, to that end, an attempt to procure a meeting and vote of the stockholders; or whether an application to the present board of officers by whom the corporate affairs are managed, and a refusal by them to allow proceedings in its name and behalf, would be sufficient, does not seem to have been determined by any clear concurrence of decision. It may depend somewhat upon the character of the corporate organization, and the extent of powers confided to its officers for the time being. Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers, during their term of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant. A formal application and refusal need not be alleged, if enough appears to show that such an application would be unavailing. When the directors themselves are the parties charged with the wrong, or by whose fraud or wilful collusion the wrong has been accomplished, and the suit is to be brought against them, they are, by the very nature of the case, incapacitated for the service of representing the corporation in any action for the restoration of its rights, whether by suit or proceeding *in pais*. If the corporate action is under the control of such parties, it is a sufficient reason of necessity to warrant proceedings by suit in the name and behalf of the individual stockholders.

Do these bills allege sufficient grounds for proceeding in this manner, in accordance with the principles above indicated? We think not.

1. It is not alleged that any effort has been made to set the corporation in motion for the purpose of securing its own redress.
2. No application to the directors, to take action in the matter, is alleged. It does not even appear that the directors in

office when the suit was brought had been informed or were aware of the facts upon which these proceedings are founded. These bills were filed August 2, 1869, after the annual meeting of the corporation, as we suppose. It does not appear who are the directors elected in 1869, nor that there is not a majority of them who are free from any charge of violating their trusts, or of confederation or collusion with those who have perpetrated the alleged wrongs against the corporate interests. In the second bill it is alleged that Prince, Hill and Faxon, defendants in that suit, "are now members of the board of directors." But, as the board consists of seven members, they constitute a minority only. The third bill also mentions "defendant directors" in several of its allegations; but it does not appear who of the defendants are directors elected in 1869; nor how many of the directors of that year are referred to in the allegations thus made.

3. In the first and second bills it is alleged "that a majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, said Tompkins and Thayer." But this does not show that they are wilfully disregarding of the interests of the corporation; or that they would so act if informed of the injurious effect of their action; or that they would yield to the influence or control of Tompkins and Thayer, if aware of the purpose and uses for which that influence is exerted. It is not equivalent to a request and refusal of the use of the corporate name and authority for the redress of the wrongs complained of; nor does it show that such an application, upon a suitable representation of the facts, would be unavailing.

4. The same considerations apply to the allegations in the third bill, so far as they apply to present directors. It is alleged that they "have allowed themselves to become little else than the creatures of Tompkins and Thayer, and the registers of their wishes, and have come to consider that no duty rested or now rests upon them as directors to do more or other than to make said corporation, and the property of the plaintiffs therein invested, serviceable to Tompkins and Thayer."

The phraseology of this general statement does not comport with the distinctness and certainty required of legal averments; and we do not think that any process of elimination would educe from it the proposition that the present directors of the corporation are so hostile to its interests, and to any judicial proceedings for their protection, as to make proceedings in this form necessary. The preceding allegations of undue influence, corruption, negligence, fear and fraud are only statements of the means by which those who have been directors during the period to which the allegations relate have been operated upon by the said Tompkins and Thayer, to bring them into the condition of supposed subserviency. And although "corruption" imputes fraudulent conduct on the part of all parties affected, yet those charges are applied generally to the transactions of previous years, and cannot be taken as averments that the present directors are now acting adversely to the interests of the corporation, through corruption or fraud on their part, in respect to the subject matter of these suits.

5. As this question, of the right to maintain actions in the present form, turns entirely upon the capacity to set the corporate body in motion, at the time the suits were commenced; and that capacity depends upon the relations to the corporation and the corporate interests of the directors in office at that time, the several allegations in regard to the conduct of directors in previous years, during which the transactions complained of took place, do not bear upon the point, and need not now be considered.

The plaintiffs having failed to show a necessity for resorting to this mode of proceeding, the bills cannot be maintained as they now stand, and the *Demurrers must be sustained.*

After this decision, the plaintiffs amended their bills.

The amendment to the first bill was as follows: "And the plaintiffs further say, that, ever since the year 1866 inclusive, Tompkins and Thayer have owned or controlled a majority of the stock in the defendant corporation, and have controlled the election of directors and all other proceedings at the meetings of stockholders; that, by the charter and by-laws of the said

corporation, the whole management of its affairs is intrusted to the board of directors, and a majority of the present board of directors of said corporation have been members thereof, and have constituted a majority thereof, in each year since the year 1866 inclusive; that said majority have long been, and now are, fully acquainted with the breaches of trust and frauds herein charged against Tompkins, Thayer and Faxon, and openly excuse and justify the same; and that said majority have long been, and now are, knowingly, wilfully and fraudulently in collusion with said Tompkins, Thayer and Faxon, in seeking to secure and continue the control of said corporation and its property to Tompkins and Thayer, for the private benefit of Tompkins and Thayer, and in fraud of the stockholders and the corporation; and these plaintiffs have instituted a suit in this court, concurrently herewith, against the present board, for breaches of trust by them committed in their said office, in collusion with Tompkins and Thayer, of a like nature with those herein charged against Tompkins and Faxon, and having in view the same purpose of administering the affairs of said corporation so as fraudulently to promote the private interests of Tompkins and Thayer by sacrificing the interests of the stockholders and the corporation; and a copy of the amended bill in said last named suit is hereto annexed [being the amended third bill] and the plaintiffs crave leave to refer to the same as a part of this bill."

The amendment to the second bill was as follows: "And the plaintiffs further say, that, ever since the year 1866 inclusive, Tompkins and Thayer have owned or controlled a majority of the stock in the defendant corporation, and have controlled the election of directors and all other proceedings at the meetings of stockholders; that, by the charter and by-laws of the defendant corporation, the whole management of its affairs is intrusted to the board of directors, and Prince, Hill and Faxon are now members of the board of directors of the defendant corporation; that a majority of the said present board of directors have been members thereof, and have constituted a majority thereof in each year since the year 1866 inclusive; that they have

long been, and now are, fully acquainted with the breaches of trust and frauds herein charged against Tompkins, Thayer, Faxon, Hersey, Hill and Prince, and openly justify and excuse the same; and that they have long been, and now are, knowingly, wilfully and fraudulently in collusion with Tompkins, Thayer, Faxon, Hersey, Hill and Prince, in seeking to secure and continue the control of the said corporation and its property, to Tompkins and Thayer, for the private benefit of Tompkins and Thayer, and in fraud of the stockholders and the corporation; and these plaintiffs have instituted a suit in this court, concurrently herewith, against the present board, for breaches of trust by them committed in their said office, in collusion with Tompkins and Thayer, of a like nature with those herein charged against Tompkins, Faxon, Hersey, Hill and Prince, and having in view the same purpose of administering the affairs of the corporation so as fraudulently to promote the private interests of Tompkins and Thayer by sacrificing the interests of the stockholders and the corporation; and a copy of the amended bill in said last named suit is hereto annexed [being the amended third bill] and the plaintiffs crave leave to refer to the same as a part of this bill."

The amendment to the third bill was as follows: "And the plaintiffs further say, that, ever since the year 1866 inclusive, Tompkins and Thayer have owned or controlled a majority of the stock of the defendant corporation, and have controlled the election of directors and all other proceedings at the meetings of stockholders; that, by the charter and by-laws of the defendant corporation, the whole control and management of its affairs is intrusted to the board of directors, and a majority of the present board of directors are now knowingly, wilfully and fraudulently endeavoring, in collusion with said Tompkins and Thayer, to secure and to continue the control of said corporation and its property to said Tompkins and Thayer, for the private benefit of said Tompkins and Thayer, and in fraud of the stockholders and the corporation in like manner as aforesaid; and that a majority of said board have long been and now are fully informed as to the frauds and breaches of trust herein

charged to have been committed by Tompkins and Thayer, and openly excuse and justify the same."

The defendants demurred to the bills as amended; and Tompkins and Thayer filed a motion that the plaintiffs be required to elect in which of the suits the frauds alleged to have been committed in procuring the leases to Jarrett should be heard and tried, and that the other suits, or so much thereof as charged the same frauds, be dismissed. The cases were thereupon reserved by Wells, J., for the determination of the full court, and were argued in March 1871.

S. Bartlett & R. M. Morse, Jr., for the defendants, in support of the demurrers, cited *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Phillips, 790; *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veazie*, 24 Maine, 9; *Peabody v. Flint*, 6 Allen, 52; *Orr v. Glasgow, Airdrie & Monklands Junction Railway Co.* 6 Jur. (N. S.) 877; *Clinch v. Financial Co.* Law Rep. 5 Eq. 450; *Gray v. Lewis*, Law Rep. 8 Eq. 526; *Kerr on Injunctions*, 565, 567, 568, and cases cited.

B. R. Curtis & G. O. Shattuck, (*J. B. Thayer* with them,) for the plaintiffs.

WELLS, J. Upon further argument and consideration, the court find no occasion for any material change of the opinion heretofore given in this case. It appearing, however, that the suits were in fact commenced before the annual meeting in 1869, and that all the persons then constituting the board of directors are joined as defendants in the third in order of said suits, the question in regard to that suit stands differently from what was then supposed to be the case. The directors themselves are charged with participation in the fraud upon the corporation; and, through the corporation, upon the plaintiffs. Redress is sought against the directors as well as against the other defendants. If it were necessary that proceedings should be commenced at once, in order to prevent irreparable wrong or to secure proper relief, this state of facts would alone justify the form of proceeding adopted in this case. But we do not think that such a necessity is made to appear.

The question then comes, whether, in a case which admits of delay for the purpose of attempting to correct or redress the

alleged wrong through the action of the corporation in its own behalf, such attempt must not first be made, or shown to be useless. We are inclined to hold that it must. The directors represent the corporation for the time being; but they are not the corporation. Annual meetings, even if special meetings are impracticable, secure to the corporators ample means of correcting abuses practised by their officers, so far as correction is desired by the majority, or by the corporation as a body. It is not to be presumed that the body of the corporators will tolerate a wrong in their elective officers, by which they are themselves defrauded. That the present board of directors sustain or participate in the wrong, and refuse to act, or prevent action in the name of the corporation, delays the initiation of proceedings for its correction or redress. But if the delay is only temporary, and does not defeat or endanger the securing of proper redress ultimately, it does not create that necessity which is the warrant for this mode of proceeding.

By the amendment to the bill it is alleged that Tompkins and Thayer, ever since the year 1866, "have owned or controlled a majority of the stock of the defendant corporation, and have controlled the election of directors and all other proceedings at the meetings of stockholders." Also that a majority of the directors "are now knowingly, wilfully and fraudulently endeavoring, in collusion with said Tompkins and Thayer, to secure and continue the control of said corporation and its property to said Tompkins and Thayer."

These allegations, admitted by the demurrer for the purposes of this decision, may be regarded as sustaining, by implication, the proposition that any attempt to secure redress through the action of the corporate body itself, or to obtain authority to proceed in the name of the corporation against the wrongdoers, would be useless. That proposition is, in effect, equivalent to an attempt so to do and a refusal by the corporation to act or to permit action in its behalf. But such a refusal would again be equivalent to an adoption by the corporation of the very acts sought to be impeached, and a confirmation of the title or right by which the supposed wrongful gains are withheld.

The defendants contend that the corporation cannot be deprived of its right to determine, in all matters not *ultra vires*, whether to impeach or to ratify transactions supposed to be prejudicial to its interests. Granting this position, it would result that in no case, as to matters *intra vires*, could a suit be maintained by individual stockholders to enforce rights or redress wrongs of the corporate body, except where the delay necessary in order to secure corporate action might defeat or endanger the attainment of appropriate relief. If, when called upon to act, the corporate body should elect to confirm the supposed wrongful transactions, or should do so indirectly by refusal to act, they would no longer be open to impeachment. If, on the other hand, it should determine to take action, it would do so in its own name and behalf; and there would be no ground of necessity for proceedings in the name of the individual corporator.

We are not prepared to say that this would not be the case in all matters to which the only objection is that they are prejudicial, or supposed to be so, to the corporate interests merely, but not illegal in themselves, and affecting all the corporators alike. Perhaps it would be so whenever the surrender of property or the release of rights, acquired by the corporation through the transactions sought to be impeached, is necessary in order to reach the proper remedy. *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586. The corporation might be entitled to determine for itself exclusively whether it would retain or release property or rights thus acquired, although it thereby precluded, or rendered ineffectual, all proceedings against parties who may have made illegal or fraudulent gains out of the transactions. These questions, however, we need not at present decide.

The cases now before us involve no release of property or rights by the corporation. The alleged wrongs are not merely prejudicial to the interests of the corporation; but are such as tend to deprive one part of the corporators of their rightful share in the fruits of the common property and business, for the advantage of others of the corporators. This inequality and

injustice is accomplished by means of the control over the corporate organization and management, which has been secured by the parties so benefited. By the amendments to the several bills it is alleged that such control has been exercised since the year 1866, inclusive, by Tompkins and Thayer, with the aid of the other defendants. That which is important is the fact of such control and its exercise for such purpose, rather than the means by which it has been obtained. A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitution. This proposition, if stated in reference to formal transactions, such as assessments of capital or dividends of income, would not be questioned. *Preston v. Grand Collier Dock Co.* 11 Sim. 327. *Hodgkinson v. National Live Stock Insurance Co.* 26 Beav. 473. But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. *Gregory v. Patchett*, 33 Beav. 595. *Atwool v Merryweather*, Law Rep. 5 Eq. 464, note. If it were otherwise, the minority would be without means of protection or redress against inequality and injustice. They would be equally so if they could obtain redress only in the name and through the action of the corporation itself. Such acts are wrongs done primarily to the corporation; and therefore the restitution or redress is to be secured to the corporation. But in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and man-

agement. He can seek his redress only through the corporation; but that does not give the corporation the right to deprive him of all redress. Any attempt to do so, whether regarded as the action of the corporation or of a majority of shareholders, would have the same voidable character as the original wrong. Officers of a corporation, dealing with it in matters of their own individual interest, stand very differently in this respect from strangers, who have no occasion to regard any other than the corporate body. If by means of their relations to the corporate management they secure to themselves undue advantage over their associates, they cannot retain it. Such transactions are voidable, not merely for want of authority in the officers by whom they are done, but because neither the officers nor the corporation itself, by whatever majority of votes it may act, can do, assent to, or confirm them. The wrong to the individual shareholder is the same, whether committed with the concurrence or subsequent approval and adoption of his associates controlling the corporation, or without it.

In our opinion, the facts of these cases, as set forth in the several amended bills, show such abuse of authority and breaches of trust by the defendants, in misappropriating the income of the corporate property to the benefit of themselves or of some of them, as cannot be ratified or remitted by the corporation; and also such incapacity of the plaintiffs to move the corporation to take action for their redress, as entitles them, from necessity, to seek it in the form of these proceedings.

In the first and second of the bills a majority of the present directors are not joined as parties; but the necessity for the mode of proceeding adopted is shown by the allegations that Tompkins and Thayer own or control a majority of the stock and control all meetings of the corporation, and that a majority of the present directors are knowingly, wilfully and fraudulently endeavoring to continue and secure such control to them.

In support of these conclusions we may cite *Atwood v. Merryweather*, Law Rep. 5 Eq. 464, note; *Hichens v. Cosgreve*, 4 Russ. 562; *Gregory v. Patchett*, 33 Beav. 595; *Hodges v. New England Screw Co.* 1 R. I. 312; *Allen v. Curtis*, 26 Conn. 456

Hersey v. Veazie, 24 Maine, 9; *March v. Eastern Railroad Co.* 40 N. H. 548, 567; *Robinson v. Smith*, 3 Paige, 222, 233; *Peabody v. Flint*, 6 Allen, 52.

We do not think the authorities cited in support of the demurrers are in conflict with these positions. The leading case relied on, *Foss v. Harbottle*, 2 Hare, 461, was a bill to set aside a sale of property to the corporation. It was dismissed because it did not exclude the supposition that the proprietors might lawfully confirm the transaction; nor show that all means had been resorted to and found ineffectual to set the corporate body in motion, or that such efforts would have been useless. It involved, of course, a surrender of the property by the corporation. The vice chancellor, Sir James Wigram, in his opinion, p. 492, remarks as follows: "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights, to which in their corporate character they were entitled, I cannot think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt*, 4 Myl. & Cr. 619, 635, and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

The defendants object to the second and third bills as being multifarious; and also that each embraces the whole subject matter of that which precedes it in order. They ask that the plaintiffs be required to elect which of said bills they will prosecute, and that they be restricted to one only.

Both positions, although apparently inconsistent, stand upon the same misconception of the purport of the plaintiffs' allegations. The bills are somewhat obscurely drawn; but as we understand the purpose of the pleader, from their construction, the recitals, in the second and third bills, of the facts charged in the preceding, are not made as setting forth the ground of action; and no relief is sought on account thereof. They are recitals merely, setting forth the relations of the parties and the

circumstances tending to show a previous fraudulent combination between them, with which they entered upon and carried through the subsequent transactions which are made the ground of action.

The cause of action, and that for which alone relief is sought, in the first suit, is the illicit gains derived by Tompkins from his secret interest in the two leases to Jarrett, in violation of his trust as director, and shared in by Thayer and Faxon, the other defendants, in fraud of the corporation.

The second sets forth like gains, derived from the lease to Booth and Clarke, by Tompkins and Thayer, by the aid and fraudulent collusion of the other defendants as directors.

The third sets forth like gains, derived from the three leases of 1866, 1867 and 1868 to Junius B. Booth, by Tompkins and Thayer; Booth being also joined as defendant. The other defendants are all charged with aiding and fraudulently colluding in the misappropriation of the property and income of the corporation, for the benefit of Tompkins and Thayer.

These are three distinct causes of action; and could not be joined without being obnoxious to the objection of multifariousness. We think they are not brought together in either bill. Separately neither is multifarious, upon its face. The third may prove to be so, if the allegations of fraudulent collusion and aid should be established against none but directors; HERSHEY having been director only in the years 1866 and 1867, and Faxon only in 1868. But each is charged with fraudulent participation during the years when not a director; and upon demurrer each must be held equally liable for the whole period covered by the charges of the bill.

It is unnecessary, in this connection, to consider whether the relief sought is to be based upon the fraudulent gains of Tompkins and Thayer, or upon the loss to the corporation by means of the improper mode in which the leases have been made and the property of the corporation managed. The question is whether the plaintiffs are entitled to any remedy, and not as to its form or extent.

Another objection is, that in the first and second suits the lessees of the property, who confederated with Tompkins to defraud the corporation, and who shared in the profits, are not joined as defendants. If the suit is merely to recover the amount of profits received by Tompkins, Thayer and Faxon, and to require them to account therefor, as trustees for the corporation, the lessees have no interest in that question, and are not necessary parties to enable the court to render full relief, to the extent of what has thus been received by the defendants. The plaintiffs may not in that mode reach a remedy coextensive with the loss to the corporation.

If the redress sought is the loss or damages to the corporation, occasioned by the fraudulent conduct of the defendants, in relation to its property, the only questions are whether the defendants are guilty of the tort, and what damage has been suffered in consequence. The lessees are not necessary parties, either to the inquiry or to the judgment. Neither equity nor law is solicitous in regard to contribution between tortfeasors. *Walker v. Symonds*, 3 Swanst. 1, 75. *Wilson v. Moore*, 1 Myl. & K. 127.

It is also objected that the allegations, that a majority of the present board of directors are wilfully and fraudulently in collusion with Tompkins and Thayer, are traversable, and therefore that the directors so charged should be named and made parties defendant. But no injunction or other relief is sought against them. They are not to be affected by any decree, otherwise than as general stockholders. Their action is not necessary to the execution of any decree sought in these cases. The allegations are made, not as a ground of action, but merely as laying the foundation for resort to this form of proceeding. They cannot be necessary parties therefore in any sense, or for any purpose.

The necessity of seeking the remedy through and in behalf of the corporation, and therefore of making it a party defendant, is a sufficient answer to the objection that there is an adequate remedy at law.

Gerrish v. Black.

Upon the whole case, we are satisfied that all three bills are maintainable upon the allegations they severally contain.

Demurrers and motion overruled.

GEORGE W. GERRISH vs. GEORGE N. BLACK, executor.

To a bill in equity against the executor of the mortgagee to redeem lands from a mortgage, which set up the reservation of usurious interest, the defendant answered that he was ignorant of the usury, that he neither admitted nor denied it, but left the plaintiff to prove it; and that he was informed and believed that there was no usury; and prayed that if the usury was proved the account might be made up on the basis of the sum actually advanced. The master's report found that there was usury, but that the defendant did not know of it; the defendant excepted to the finding as to usury, and the exception was overruled. *Held*, that the plaintiff was entitled to the benefit of the statute penalty for usury, in reduction of the sum payable upon the mortgage.

A mortgagee in possession will be allowed, as compensation for managing the property, five per cent. on the rents collected, but not on the amount expended in repairs and improvements also, unless his services are worth actually more than the five per cent. on the rents.

On a bill in equity to redeem lands from a mortgage, it appeared that the defendant, who had entered to foreclose, lived in another state, and appointed an agent to manage the property; and there was no evidence of negligence in the appointment of the agent, or of fraud on the part of the mortgagee. *Held*, that, without other evidence of negligence than the testimony of the mortgagor's witnesses, as experts, that a higher rent could have been obtained, the mortgagee should not be charged with a greater amount than he received as rent.

BILL IN EQUITY against John Black's executor, to redeem land in Chelsea from a mortgage given by the plaintiff to the defendant's testator in 1850. The answer claimed that \$26,000, the face of the mortgage note, were due as the principal of the mortgage debt. The plaintiff, by an amendment to the bill, alleged that only twenty-four thousand dollars were advanced by the mortgagee, and that two thousand dollars were reserved by him as a bonus and as usurious interest. The defendant, in his answer to this amendment, alleged that he was wholly ignorant as to the alleged usury, and could neither admit nor deny it, but left the plaintiff to prove it; that, when he filed his answer, so far from claiming, or intending to claim, any usurious interest he was utterly ignorant, as he still was, except for the allegation

in the amendment to the bill, that he was claiming more than the principal sum advanced on said mortgage with the interest justly due thereon; that he always supposed and believed, and still supposed, believed and was informed, that the full value of the face of the mortgage note was advanced thereon; and he prayed that, if the plaintiff should prove that usurious interest was reserved by the mortgagee, the court might order the account made up on the basis of the sum actually advanced, which was all it was intended to obtain, and that the statutory penalties against usury might not be enforced against the defendant in his capacity as executor.

The case was referred to a master, who found that two thousand dollars were reserved on the mortgage note by way of usurious interest, but that the defendant had no knowledge thereof till it was set up in the amendment to the bill. The other facts found by the master are sufficiently stated in the opinion. The mortgagee, who had entered to foreclose, contended that he should be allowed as compensation, not only five per cent. on the amount of rents with which he was charged, but also five per cent. on the amount expended by him in repairs and improvements; but the master allowed only five per cent. on the amount of the rents. Both parties excepted to the master's report, and the case was reserved by *Wells, J.*, on the pleadings, report and exceptions, for the determination of the full court.

J. G. Abbott, (*B. J. Gerrish* with him,) for the plaintiff.

H. W. Paine & R. D. Smith, for the defendant.

COLT, J. Many exceptions are taken by both plaintiff and defendant to the findings of the master in matters of fact. The master himself submits to the court, as a question of law, what deduction from the amount found due on the mortgage shall be made upon his finding of usury; and the defendant raises a question of the competency of the plaintiff as a witness before the master, the other party to the original contract being dead, and also claims, in addition to the allowance of the master, as a compensation for his services in managing the property and collecting the rents, a percentage upon the amounts ex-

pended by him in repairs and improvements. We proceed to consider these legal questions in their order.

1. When a defendant, in an answer to a bill to redeem a mortgage, insists upon the payment of his debt, he avails himself of the means provided by law for the enforcement of the contract and the sum due him, when usury is shown, is subject to the same statute forfeiture as when he is seeking to enforce the usurious contract in a suit in which he is plaintiff. He becomes an actor in the suit to redeem, by the assertion in his answer of his right to all the money apparently secured to him by the usurious contract. This is the doctrine of *Hart v. Goldsmith*, 1 Allen, 145, affirmed in *Smith v. Robinson*, 10 Allen, 130.

In the case cited, the allegation of usury was made in the original bill, and denied in the answer. In the case at bar, it was after the original answer was filed that usury was first charged in the amendment filed to the bill. And the defendant, who was the executor of the original mortgagee, in substance answered to it, that he was ignorant of the alleged usury, but was informed and believed that the full face of the mortgage note was advanced thereon, without any usury reserved or taken, and asked that, if usury should be proved, the account might be ordered to be made up on the basis of the sum actually advanced.

It is claimed that under this answer, and with the fact that the defendant, as executor, had no knowledge of the original transaction, this case is to be distinguished from the others; and that the executor, within their meaning, is not to be regarded as an actor. But the difficulty is, that he sees fit to deny the usury, and puts the plaintiff to his proof. He cannot be allowed to take the chance of recovering his whole apparent debt, if the plaintiff fails in proving his allegation, without incurring the risk of forfeiture, if the plaintiff succeeds. He chooses to go to trial on that question, and still presses his exception to the finding of the master as to the actual fact of usury. In the opinion of the court, he must, within the scope of the cases cited, be regarded as a mortgagee, insisting upon the enforcement, to its full extent, of a contract against which a charge of usury is

made. The right of the plaintiff to amend his bill, and set up usury, on the coming in of the defendant's answer to the original bill, is already settled in this case. *Gerrish v. Black*, 99 Mass. 315. And it need not be discussed here. The usury being found, the defendant is subject to the statute forfeiture.

2. The right of the plaintiff to testify, after the death of the other party to the original note and mortgage, depends on the fact that the business was transacted with an agent, who is still living and competent to testify. St. 1865, c. 207. There was evidence before the master which sufficiently establishes this preliminary fact, without resort either to the testimony of the plaintiff, who distinctly affirms it, or to the declarations of David Dyer, the alleged agent himself, asserting his authority. It appeared that the mortgagee, who resided in Maine, was unable, from physical infirmity, to transact business himself, and was for the time staying at the house of Dyer, who was his son in law and partner in business, and who generally transacted his business in Boston. The mortgage note was in the handwriting of Dyer, who made an examination of the mortgaged premises, in company with the plaintiff, shortly before the time the mortgage was made, during which the giving of a mortgage thereon was the subject of conversation. The effect of this evidence is not destroyed by the testimony of Dyer, who, without positively denying the transaction, only says he has no recollection of it. *Dutton v. Woodman*, 9 Cush. 255.

3. We find nothing in the case to take it out of the rule adopted in *Gibson v. Crehore*, 5 Pick. 146, and *Tucker v. Buffum*, 16 Pick. 46, by which the master was governed in the compensation he allowed the defendant for services in managing the property and collecting rents. The rule is indeed not inflexible; but unless the master finds that the services were actually worth more, it will be followed. *Adams v. Brown*, 7 Cush. 222.

4. Both parties except to the master's report, as to the amount with which he has charged the defendant on account of rents since his entry for foreclosure.

There was a large number of witnesses examined upon this

question, and their evidence is fully reported. Upon a careful review of it, we are of opinion that the defendant's exception in this respect must be allowed. In this, we have not disregarded the suggestion, that, in questions of fact, the presumption is in favor of the master's decision. This is especially true, when the conclusion arrived at depends upon the degree of credit due to the witnesses, which is to be judged of, to a great extent, by the intelligence and honesty of their appearance on the stand. The force of the suggestion, however, is affected largely by the character of the fact found. If, for instance, the existence of a simple fact, capable of direct proof, is in issue, such as whether a demand for an account was made before the commencement of the suit, or whether a particular defect in the condition of a building on the premises existed at a particular time, and the evidence is conflicting, then the presumption in favor of the master's finding must prevail, unless it clearly appears that he made a mistake. On the other hand, when the finding is in the nature of a conclusion or inference of the master, drawn from a variety of facts and circumstances, as in cases where the question is what constitutes negligence, or what is reasonable cause or a reasonable time, then it is manifest that the weight of the master's report must be greatly diminished. In such questions, the same facts testified to by the same witnesses might lead different minds to different results.

The question passed upon here is, whether the defendant used reasonable care and diligence in leasing the mortgaged premises and collecting the rents. The master takes, as the standard, such care and diligence as a provident owner in charge of the property would exercise, and then estimates what the several tenements, from the evidence submitted, ought to have rented for during the several years of the defendant's possession, deducting in some instances a certain percentage for the time during which, through the scarcity of tenants, the premises with reasonable care and diligence on the part of the lessor would have been vacant through lack or change of tenants. By this process, which the report fully and lucidly states, the defendant is charged with the sum of \$18,473.33 for rents which ought to

have been received, being \$4,867.63 more than the rents which were in fact received.

In reaching this, the master, as against the actual results of the defendant's management, seems to have given too much importance to the testimony of the plaintiff's witnesses, who were called as experts to fix, with reference to the several tenements, the rent which in their opinion ought to have been received during several years which had passed. It is true, that under some circumstances such evidence is entitled to great weight, and may be the only evidence upon which the court can rely; as where it is necessary to ascertain the value of an occupation rent, as it is called, against a mortgagee who has entered into possession, and occupies and improves the estate in person; or where, not being himself in possession, he has kept false accounts or no accounts of rents received, or there is such misconduct as makes a resort to this kind of evidence necessary. But where the mortgagee enters only into the receipt of rent from tenants who hold under him, and, from the fact that he resides at a distance, must rely upon agents to manage the estate; and where there is a lack of other proof to show want of due care and diligence, it seems to us that such estimates ought not to control.

In the same paragraph in which Chancellor Kent defines the duty of a mortgagee in possession to be that of a provident owner, he also says he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his wilful default or gross negligence. 4 Kent Com. (6th ed.) 166. And it is said a mortgagee will not be obliged to account according to the value of the lands: he will not be bound by any proof that the land was worth so much, unless it can likewise be proved that he actually made that sum of it, or might have made it had he not been guilty of fraud or wilful deceit, as, if he turned out a sufficient tenant, &c.; for it is the laches of the mortgagor that he lets the land lapse into the hands of the mortgagee by the nonpayment of the money. 3 Powell on Mortgages, 949.

The law as thus stated, though it requires proof of a higher degree of negligence than is held necessary by this court to

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charge a mortgagee beyond the actual receipts, yet well sustains the conclusion to which we come, namely, that, without other proof of negligence, the estimates here offered are not sufficient to justify charging the defendant beyond the rents actually received by him. *Saunders v. Frost*, 5 Pick. 259. *Miller v. Lincoln*, 6 Gray, 556. *Hubbard v. Shaw*, 12 Allen, 120. *Hughes v. Williams*, 12 Ves. 493.

In the case at bar, it must have been contemplated by the original parties to the mortgage, that, in case of the plaintiff's default, the mortgagee, who lived in Maine, in taking possession of the estate, would be obliged to rely upon the management of agents. The executor and present defendant also resides in Maine. It does not appear that ordinary care and prudence were not exercised by him in the selection of the agent, and that reasonable exertions were not made to procure tenants by advertising and otherwise. There is no charge of bad faith; and there seems to have been no temptation to manage the estate, so far as rents were concerned, other than for the best interest of all concerned.

Upon the whole, we are of opinion that the mortgagee was held by the master to too strict liability for rents beyond those actually received, and the case is recommitted to him for revision in this respect. All other exceptions to the master's report are overruled.

Decree accordingly.



JOSEPH F. WILSON vs. GEORGE N. BLACK.

A writ of entry cannot be maintained against a tenant who holds an absolute deed from the demandant's grantor, prior to the deed to the demandant, although he has given a written agreement, not under seal, to reconvey to the grantor on performance of a condition, and the condition has been performed.

WRIT OF ENTRY to recover land in Chelsea. Plea, *nul disseisin*. At the trial in the superior court, Lord, J., directed a verdict for the tenant on facts which appear in the opinion and the demandant alleged exceptions.

J. O. Teele, for the demandant.

R. D. Smith, for the tenant.

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WELLS, J His grantor having possession, the demandant took sufficient title, under his deed, to enable him to maintain a writ of entry. But the tenant held a prior title by an absolute deed. The unsealed written agreement to reconvey did not constitute a defeasance at law. Performance of the condition of that agreement would not operate to revest the legal title in the grantor. It requires a reconveyance, and that can be enforced only in equity. Until the legal title is restored to the grantor or his assigns, the deed to the tenant gives him the better title, which must prevail at law. *Cranston v. Crane*, 97 Mass. 459. *Exceptions overruled.*

OTTO DRESEL & others vs. EBEN D. JORDAN.

If a married woman makes a written contract in her own name and her husband's, with a third party, for the sale and conveyance to him of land owned in part by her in her own right and in part by her husband, their joint execution of the deed of the land to the purchaser, before any indication of his intent to repudiate the contract, is a sufficient assent of the husband to the sale of her part of the land, and ratification by him of the contract for the sale of his part, to enable them to enforce specific performance, without evidence of her original authority to enter into the contract in his behalf.

A contract of executors, not in pursuance of their official duty, to sell and convey, with a clear and satisfactory title, land of the testator's estate, the title to which is in the heir subject to payment of the testator's debts and legacies and the charges of administration, is not necessarily void, but binds them individually; and if the terms of the contract imply that the title is to come from more than one source and may require more than one deed of conveyance, and the executors sell the land under license of the probate court, and then, to pass the title, tender to the other party a quitclaim deed of it from the purchaser at the sale, with a warranty deed from the heir, such party cannot avoid the contract, either on the ground of its original execution by the executors in their official name, or on the ground of his dissatisfaction with the form of their making title in its fulfilment.

For a vendor to enforce specific performance of the contract of sale, it is not essential that when he made the contract he should have had such title and capacity to convey the property, or such means and right to acquire them, as would have enabled him to fulfil it on his part, but is sufficient if he is able to convey the property when by the terms of the contract or the equities of the case he is required to do so in order to entitle himself to the consideration; and if time is not of the essence of the contract, nor made essential by an offer to fulfil by the purchaser and his request for a conveyance, the vendor will be allowed reasonable time and opportunity to obtain or perfect title.

The mere fact that the date of a deed in the chain of title to land is subsequent to the date of its acknowledgment will not justify a refusal to take a conveyance of the land on the ground that the title is not clear and satisfactory.

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An agreement to convey land subject to an existing mortgage, the amount of which is to be assumed by the grantee in part payment of the consideration for the conveyance, is not satisfied by conveying the land subject to a condition that the grantee shall pay the mortgage debt and save the grantor harmless and indemnified in respect to it; but a waiver of any objection to accept the conveyance in this form may be inferred from acts of the grantee.

BILL IN EQUITY filed October 16, 1869, by Otto Dresel, Anna L. Dresel, his wife, and Wendell Phillips and Caleb W. Loring, the latter two as executors and trustees under the will of Louisa Loring, mother of said Anna, to enforce specific performance by the defendant of the following written agreement:

"This agreement witnesseth that Otto Dresel and Anna L. Dresel, his wife, and Wendell Phillips and Caleb W. Loring, trustees and executors under the will of Louisa Loring, of the first part, agree to sell, and Eben D. Jordan, of the second part, agrees to buy, the dwelling-house numbered 76 Chestnut Street in Boston, together with the land belonging thereto, [here followed a description of the premises by metes and bounds,] being the same premises conveyed in a deed from Edward Cabot, dated September 12, 1866, and registered with Suffolk deeds, lib. 884, fol. 260, and from George Higginson, lib. 887, fol. 12, for the sum of \$22,000, payment to be made in the following manner: to wit, the said Jordan to assume the note of George Higginson, secured by a mortgage on the premises, for the sum of \$10,000, made September 12, 1866, to run for three years, with interest at six per cent. per annum, and to pay the balance, that is, \$12,000, in cash, on the day possession of the premises is given. Possession to be given, and the papers to be passed, on or about May 20 now next ensuing. Ten days to be allowed for examination of the title; and a clear and satisfactory title to be given, or the within agreement to be null and void.

"Made at Boston this 21st day of April, A. D. 1869.

"Anna L. Dresel.

"Otto Dresel, by A. L. D.

"Wendell Phillips, } Ex'rs under will
 "C. W. Loring, } of Louisa Loring.
 "E. D. Jordan."

The following facts appeared by the bill, answer and evidence, on which the case was reserved by the chief justice for the determination of the full court:

Edward Cabot, being seised of the premises in question, by his deed bearing date of September 12, 1866, referred to in the agreement, conveyed them to George Higginson for the consideration of \$20,000. The certificate of the acknowledgment of this deed by Cabot bore date of September 5, 1866, and attested that he acknowledged the deed on that day. Higginson, on September 12, 1866, after this conveyance, mortgaged the premises back to Cabot to secure payment of \$10,000 of the purchase money in three years from that date, and on October 8, 1866, conveyed them to Louisa Loring (who was a widow) and the plaintiff Anna L. Dresel, on condition that he should be saved harmless from the payment of this mortgage. On October 31, 1866, Louisa Loring and Anna L. Dresel conveyed an undivided third part of the premises to a third person, who on the same day conveyed the same to the plaintiff Otto Dresel. Louisa Loring died in 1868, leaving a will which was proved October 31, 1868, and of which the plaintiffs Phillips and Loring were on that day appointed executors. In this will, after giving certain legacies, she gave all the residue of her estate to Mrs. Dresel.

On April 21, 1869, (the date of the agreement in question,) subject to the condition in the deed from Higginson, Otto Dresel and Mrs. Dresel were thus each seised of an undivided third part of the premises, and Mrs. Dresel, as residuary devisee under her mother's will, of the other third, subject to payment of the debts, legacies and charges of administering the estate of the deceased. Otto Dresel was then absent in Europe, and Mrs. Dresel was living on the premises. The agreement was signed by all the parties, on that date, except that the name of Otto Dresel was subscribed by Mrs. Dresel, as indicated in the copy of it above set forth. It was the result of negotiations conducted with the defendant by James F. Curtis, a broker, who was employed by John G. King to sell the premises. Curtis was a witness for the plaintiffs, and on cross-examination, in

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reply to a question "Whom did King represent in this matter if you know?" he testified: "King represented Mrs. Dresel and Mr. Dresel, or perhaps I had better say he represented the owners of the estate, as they all wanted to sell."

It appeared by the plaintiff Loring's testimony, that, immediately after the execution of the agreement, he, having been advised that Benjamin F. Brooks and Joshua D. Ball, attorneys, would act for the defendant in examining the title, called upon Brooks and informed him that the premises were owned, one third by Mr. Dresel, one third by Mrs. Dresel in her own right, and one third by her as residuary devisee under her mother's will and subject to a lien for the debts of the testatrix; and proposed to give, in fulfilment of the agreement, a warranty deed by Mr. and Mrs. Dresel of the whole premises; but Brooks declined to regard such a deed as a satisfactory conveyance of them, and said that Loring "had better proceed in a legal manner." Thereupon Loring prepared a warranty deed of two thirds of the premises, to be executed by Mr. and Mrs. Dresel, which was expressed that the premises were "conveyed subject to a mortgage to Edward Cabot for \$10,000," describing the Higginson mortgage, "which said principal sum, with the interest due and to grow due thereon, is to be assumed and paid by said grantee and his representatives as his own debt, the same forming part of the consideration above expressed, and this deed is upon the condition that said Jordan shall pay said principal and interest of said mortgage debt, and our heirs, executors and administrators shall be forever indemnified and saved harmless from payment of said principal and interest and every part thereof;" and concerning the deed thus prepared by him he testified as follows: "I took it to Brooks. He examined it in my presence. He objected to the condition as to the payment of the mortgage. I informed him that Mr. and Mrs. Dresel and Mrs. Loring had taken the estate on the same condition, and we should have to follow the previous grant. I went to my office, and procured the deed from Higginson to Mrs. Loring and Mrs. Dresel, and took it to Brooks. Brooks would not examine it then; but said he would do so and inform me. I waited about

two days — more than one; and, not hearing from Brooks, and being in a hurry to get the deed to Mr. Dresel, I again called on Brooks. He gave me both the deeds, and said that he saw it was necessary to have the condition in our deed. I immediately sent or caused to be sent the deed to Mr. Dresel, who was then in Germany. Before sending it, I had it signed and acknowledged by Mrs. Dresel. About May 20 Jordan took possession of the house; and about May 27 Mrs. Dresel went to Europe. On May 31, I received Mr. Dresel's deed from Europe. I called the same day on Brooks, showed it to him, and offered to leave it with him."

Loring further testified: "Before this time, I had applied to the probate court for leave to sell the one third of the estate formerly belonging to Mrs. Loring, for the payment of legacies. I obtained such leave, and advertised it to be sold at auction on the premises on June 18. On June 17 I called at the office of Brooks & Ball, and saw them both together, notified them of the auction sale on the following day, and asked them if I should have the estate bid off in the name of Jordan. They did not authorize me to have it done so, and I informed them that I should have it bid off by another person, and would have him make a deed to Jordan." "I employed auctioneers to sell the estate under the order of the probate court, on June 18. As attorney for Mrs. Dresel, I directed Charles C. Cram to attend the auction sale, and bid for it one third of the price that Jordan was to pay for the premises, and, if any outsider should interfere, which I did not anticipate, to bid it in at any price, or to bid it off at any price. A deed was made out to Cram, in conformity to the sale, and a deed from Cram to Jordan, of date of June 18. On June 25, I called on Jordan, and tendered him the deeds of Dresel and wife, Phillips and Loring to Cram, and Cram to Jordan, and demanded payment of the consideration, the purchase money. I told Jordan that Brooks & Ball had not finished the examination of the title, but that I made this tender then, so that I should not be held in fault by any delay."

Copies of all the papers from the probate office, (including the record of the sale by auction, showing that Cram bid off

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Mrs. Loring's undivided third of the estate for the sum of \$7333.33,) and the deeds referred to by the witness Loring, were put in evidence by the plaintiffs. It appeared by Loring's testimony that the amount needful to be raised by the executors' sale, to pay debts, legacies and charges of administration, was about \$1300. The deed of the executors to Cram, in pursuance of the sale, was subject to a condition for the payment of the Higginson mortgage; and the deed from Cram to Jordan was a quitclaim deed in the usual form, also subject to the same condition.

During the summer and the early part of September 1869, Loring held various other interviews with Brooks & Ball and Jordan; and still another formal tender of the deeds of Mr. and Mrs. Dresel and Cram to Jordan was made by Loring to Jordan during the month of August. At one of these interviews, on September 2, Loring offered to procure from Mr. and Mrs. Dresel a warranty deed of the third of the premises which was conveyed by Cram. On September 13, Jordan, through his attorneys, advised the plaintiffs that he did not consider that the title to the premises was satisfactory, and refused to accept the deeds and pay the purchase money; whereupon this suit was brought. The other material facts appear in the opinion.

E. D. Sohier, for the plaintiffs.

B. F. Thomas, for the defendant.

WELLS, J. The first question to be determined is, whether there is any contract such as to bind the defendant. The writing sets forth the terms of a complete agreement, and it is signed by the party sought to be charged therewith. It is not essential that the writing should bear the signatures of the other party. *Old Colony Railroad Co. v. Evans*, 6 Gray, 25. To make it obligatory upon one party, however, it is necessary that the other shall have accepted or assented to the terms of the agreement it contains.

Mrs. Dresel being a married woman, her subscription of her own and her husband's name to the writing is not alone a sufficient assent to make a legal agreement. There is no direct evidence of previous authority from her husband. The broker who

negotiated the sale, and drew up and procured the execution of the agreement, testifies that he "was recognized by the Dresels as their agent for the sale of the house." His employment, however, appears to have been effected through a third party, Mr. King, the nature and extent of whose authority does not appear. The deed of conveyance, prepared in fulfilment of this contract, on the part of the sellers, was executed by Otto Dresel May 14, 1869, before the defendant had completed his examination of the title, or given any indication of a purpose not to be held by his undertaking to purchase the property. This was a sufficient confirmation of the authority previously assumed by Mrs. Dresel in making the original agreement, both in respect to his share of the estate, and the share held by her in her own right. The decision in *Melley v. Casey*, 99 Mass. 241, applies to conveyances, not to executory agreements. The decision in *Townsend v. Chapin*, 12 Allen, 476, applies to agreements to be enforced against the wife; which must necessarily be in writing, in order to comply with the statute of frauds. But no writing being necessary on the part of the sellers, the purchaser cannot escape from the obligation of a contract signed by him, because of an attempted but ineffectual execution of the instrument by the sellers. *Hunter v. Giddings*, 97 Mass. 41.

The deed signed by Otto Dresel embraced only two thirds of the estate. For the purposes of this decision, therefore, we may consider that the title to the other third was derivable only through the executors of Mrs. Loring. They are parties to the agreement of sale, and to the present suit. An objection is made that such an agreement by executors is illegal and void. It is not in pursuance of their official duty, and is excusable only on the ground that it was done in the interest of the residuary devisee, and without danger of prejudice to the rights of creditors or legatees. As a contract, it binds them individually, not as executors. To fulfil it, they must, in effect, become purchasers of the estate. If there exist a legal cause for a sale, they can become purchasers, subject to the liability to be held as purchasing in trust for the heir, or other party having the ultimate interest. Their entering into this contract does not necessarily

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involve any illegality of proceeding in their official character as executors, so as to render it void upon that ground. It is true that the contract, on their part, could not be enforced specifically; because the estate in which the title to the land stands is not bound by the agreement, and they cannot lawfully be restricted in the exercise of their official authority and duty by any such unofficial engagements. But they may be held liable in damages for the nonfulfilment of the contract.

This consideration leads to another objection urged by the defendant, namely, that there is a want of such mutuality as is requisite for an agreement entitled to specific enforcement. So far as this objection rests upon the ground that there was no equal and sufficient agreement on the part of the sellers, for any of the reasons already considered, no further discussion is necessary. Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfil the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able, in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance. The suggestion of such a rule in *Hurley v. Brown*, 98 Mass. 545, was foreign to the case there decided, and is not borne out by the authorities cited for it, namely, *Tendring v. London*, 2 Eq. Cas. Ab. 680, *Mortlock v Buller*, 10 Ves. 292, 315, and *Pipkin v. James*, 1 Humph. 325.

The case of *Pipkin v. James* was an action at law, to recover back the purchase money of "one ice-house and lot, \$140," included in a bill of sale with articles of personal property. The grounds of action were two: 1st. "that the contract is void by the (operation of the) statute of frauds and perjuries;" 2d. "that the defendant had not, at the time of the sale, nor yet has, any title to the property sold." The action was sustained upon both grounds.

The case of *Tendring v. London* is referred to in 2 Eq. Cas. Ab., as supporting the doctrine for which it is cited in *Hurley v. Brown*; but as the case itself is not reported, and has never been published, we are unable to learn what was the real point adjudged. The reason assigned — to wit, “for every seller that will have such a bargain executed must be a *bonâ fide* contractor” — indicates that the rule intended to be established was much less strict than the statement for the support of which it is cited.

In *Mortlock v. Buller*, no such question was decided or raised. The reference on page 315 is to an apparent expression of dissatisfaction by Lord Chancellor Eldon with the contrary rule, in case “a person carries an estate to market, not having any title at the time.” But he agrees that “it is much too late to discuss the question whether it would have been wholesome originally to have held that he should not have specific performance.”

On the other hand, the same learned chancellor, in *Jenkins v. Miles*, 6 Ves. 646, 655, remarks: “It is impossible to deny that, upon the old authorities, a specific performance might be obtained, if the title could be made good before the report. The court would execute the contract then, regard being had to the justice due to particular cases.”

In the later case of *Coffin v. Cooper*, 14 Ves. 205, he held that, if the master report that the plaintiff will have good title upon getting in a term, procuring administration, &c., the court will put him under terms to procure that speedily; and the motion of a defendant to be discharged, because the master reported that a good title could not then be made, was refused, the plaintiff having in the mean time obtained an act of parliament to enable him to perfect the title.

The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by the offer to fulfil by the other party, and request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases

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it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration. *Boehm v. Wood*, 1 Jac. & Walk. 419. *Wynn v. Morgan*, 7 Ves. 202. *Hoggart v. Scott*, 1 Russ. & Myl. 293. *Salisbury v. Hatcher*, 2 Y. & Col. Ch. 54. *Dutch Church v. Mott*, 7 Paige, 77. *Baldwin v. Salter*, 8 Paige, 473. *Seymour v. Delaney*, 3 Cowen, 445. *Hepburn v. Dunlop*, 1 Wheat. 179. *Richmond v. Gray*, 3 Allen, 25, and cases cited. *Barnard v. Lee*, 97 Mass. 92. Story Eq. §§ 776, 777.

In the present case, although a fixed time was named in the contract for conveyance of the title, the defendant was himself at no time ready to receive it until after the plaintiffs had, by the sale to Cram, enabled themselves, by means of a quitclaim deed from Cram, to transfer the whole title. The plaintiffs were not therefore at any time in default, in respect to the title to this third part of the estate.

The defendant cannot fairly object to the receipt of one third of the title through a deed from Cram. The very form and terms of the agreement imply that the title is to come from more than one source, and may require more than one deed of conveyance. The conveyance to Cram under the executors' sale, and release from Cram to the defendant, are the legitimate means of carrying into effect the contract of the executors with the defendant. The sale to Cram was for an amount more than sufficient to satisfy all debts and legacies; and the executors are chargeable with the amount, whether they ever receive it or not. A delivery to the defendant of a deed from Cram, in performance of the agreement of sale, being complementary to the part execution thereof by Mr. and Mrs. Dresel, and necessary to render the fulfilment by them available, will forever preclude them from any attempt to avoid the executors' sale. Besides, there was an offer to confirm the title thus made, by procuring a warranty deed from Mr. and Mrs. Dresel for delivery on the 1st of December, to which time the defendant had requested that the business of completing the transfer should be postponed for his

convenience in making the payments. As Mrs. Dresel was sole heir or residuary devisee of Mrs. Loring, this proposition would have cured all objections, both to the execution of the contract by the executors and to the form of making title in its fulfilment.

The objection to the inconsistency between the date of the deed from Cabot to Higginson, and the date of the certificate of acknowledgment, is not sufficient to justify a refusal to take a conveyance of the property. A date is not essential to the instrument of conveyance. It takes effect from delivery. If a date be written in the deed, it is not conclusive, but may be controlled by other recitals in the deed, or by extrinsic facts or circumstances. *Lee v. Massachusetts Insurance Co.* 6 Mass. 208. *Harrison v. Trustees of Phillips Academy*, 12 Mass. 456, 463. *Jackson v. Schoonmaker*, 2 Johns. 230. The certificate of acknowledgment is presumed to be correct, and will not be controlled by the date inserted in the deed. Even if that date was inserted subsequently, and indicates the true time of delivery of the deed, the discrepancy does not render the deed invalid. The real date of a deed is the time of its delivery; which may be subsequent to its acknowledgment, and even after registration. *Hedge v. Drew*, 12 Pick. 141. *Parker v. Hill*, 8 Met. 447.

An objection of real importance to the title offered to be conveyed is, that the deeds, proposed to be given, subjected the estate to a condition for the payment of the Cabot mortgage and indemnity of the grantors; whereas the agreement provided only for a sale subject to the mortgage, which was to be assumed in part payment of the purchase money. The title derived from Higginson seems to have been impressed with the same conditional character. Although proceedings to enforce the condition, by way of forfeiture, may be stayed upon payment after breach, yet the qualities, imparted to the estate by such a condition, are essentially different from those which result from a mortgage assumed merely as an incumbrance. *Sanborn v. Woodman*, 5 Cush. 36. This objection is fatal to the plaintiffs, unless it has been waived by the conduct of the defendant *Park v. Johnson*, 7 Allen 378.

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It appears from the testimony, that this fact in respect to the title was made known to the attorneys of the defendant very soon after the date of the agreement, and before the deed was sent abroad to be executed by Otto Dresel. Some objection was made to the condition; but after two days' consideration an answer was received which justified the plaintiffs' attorney in supposing that the objection would not be insisted on; and accordingly the deed was forwarded to Europe for signature, in the form in which it was submitted to the attorneys for the defendant. Mrs. Dresel vacated the house, and sold to the defendant the gas fixtures and portions of the furniture. The defendant proceeded in the further examination of the title, and did some acts looking to occupation; and when his purpose to retain the place for occupation was abandoned, he caused it to be advertised for sale. The plaintiffs' attorney having received the deed from Otto Dresel May 31, and notified the defendant's attorney thereof at once, objection was made on account of the date of the acknowledgment of the deed from Cabot to Higginson, and measures were taken to remove that objection. Various delays occurred, not by any fault of the plaintiffs, by which the conclusion of the business was postponed until the 1st or 2d of September; when the parties came together, and, to meet the defendant's convenience, arranged that \$4000 only of the purchase money should be paid down, and \$8000 remain until December 1, and that the title deeds should, in the mean time, be held by the plaintiffs' attorney, with proper security for their ultimate delivery upon payment of the balance of the purchase money. This arrangement, however, being made by the defendant's attorney, was subject to his determination upon an objection then for the first time made, and, as his attorney testifies, then for the first time known to him, namely, that the contract was signed, on the part of the sellers, by executors. No other objection was, at that time, made; and objection to the conditional clause, relating to the mortgage, had not been renewed since its first suggestion in April. On the 13th of September the objection raised in regard to the signature by the executors was insisted on. The defendant then refused to accept the conveyance and to complete the purchase.

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It does not appear whether the condition would or could have been released, if that objection had been insisted on. But the defendant might have avoided a forfeiture by payment of the mortgage debt when due; and the plaintiffs, by taking up the mortgage, might have enabled themselves to discharge the condition. The mortgage note was to fall due on the 12th or 15th of September. The plaintiffs were themselves exposed to the risks of forfeiture if the defendant did not complete his purchase; and his delay from April till September, by leading them to rely upon him to pay the mortgage debt, as part of his purchase money, and to omit other provision for its payment, tended seriously to embarrass them in the protection of their interest in the estate against such forfeiture.

The objection is not one which affects the value or cost of the estate, or the completeness of the title which the purchaser will acquire upon full performance of the terms of his agreement. It is a contingent liability; or, rather, a more peremptory and harsh security for payment of a portion of the purchase money, than was contemplated by the terms of the agreement. The conduct of the defendant, as above narrated, constitutes a clear and decisive answer to the objection as taken by way of defence to this suit. It is a waiver of the objection. *Gerrish v. Norris*, 9 Cush. 167. *Salisbury v. Hatcher*, 2 Y. & Col. Ch. 54. *McMurray v. Spicer*, Law Rep. 5 Eq. 527, 542.

In the opinion of the court, none of the objections made by the defendant to the contract, or to the title offered to be conveyed, ought to avail him in defence. The plaintiffs are therefore entitled to a

Decree for specific performance.

HENRY LEE vs. CHARLES K. KIRBY.

Inadequate consideration, or improvident formation of a contract, or decline in the value of its subject matter, is not, in general, in the absence of mistake, fraud or ambiguity reason for the refusal of a decree of specific performance.

The plaintiff and defendant in October 1865 made a written contract, by which the former agreed to sell a lot of land to the latter, and to advance to him, from time to time, sums of money for the purpose of building nine houses thereon, and the latter agreed to build the houses, and to pay for the land at the price of \$3.40 per square foot, and repay the advances, on or before December 1, 1866, with interest at six per cent. on the price of the land from November 1, 1865, and on the advances from the time they should be made. The price of the land was in fact arrived at in the negotiations which preceded the contract, by taking the land at \$2.50 per square foot, adding thereto a year's interest at four per cent. on that amount, six months' interest at four per cent. on the amount of the advances, and a bonus, besides a commission of two per cent. on both the price with these additions and the amount of the advances. Soon after this agreement, on the defendant's request for an extension of the time for building three of the houses, the plaintiff wrote to him, "Our agreement was on the basis of one year's interest upon the cost of the land, and average six months' interest on the advance; if you should desire an extension of a third of the cost of the land and one third of the whole advance, I shall be prepared to agree to it on the basis of our contract." The defendant replied, "Yours is before me, in which you give the basis of our agreement, and say you will be prepared to extend the time on one third of the cost of the land, and one third of the whole cash advance, upon the basis of our contract; all which I agree to." The defendant built five of the houses, paid for the land under them, and repaid the advances on them, according to the contract, but declined to build the other four houses. On a bill in equity to compel him to specifically perform the contract, the answer set forth the manner in which the price had been arrived at, and alleged that the contract had been modified by the subsequent correspondence, and that its enforcement against the defendant would be harsh and inequitable. *Held*, that the plaintiff was entitled to a decree for specific performance.

BILL IN EQUITY filed April 6, 1868. The bill alleged that the plaintiff, being the owner of a tract of land containing 17,920 square feet, on Marlborough Street in Boston, did, on October 14, 1865, enter into an agreement, under seal, with the defendant, by which the defendant agreed to buy and the plaintiff to sell the said tract of land on the following terms: "The price of said land to be \$60,928, with interest at six per cent. per annum from November 1, 1865, to the delivery of the deed; the deed to be delivered on December 1, 1866, or as much earlier as said Kirby will pay the price of said land and repay the advances made by said Lee as hereinafter provided; or said Kirby is to receive a deed of any one or more of the nine lots into which said land is to be divided, on paying said Lee the proportionate

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price therefor, and repaying said Lee the advances made by him on the lots so deeded;" "said Kirby agrees to build on said land, with reasonable despatch, and at his own cost, nine brick dwelling-houses" of certain specified dimensions and materials, "each house, exclusive of the land, to cost \$15,000, the first three houses to be finished ready for plastering the coming winter, if the weather will permit, the others to progress as rapidly as the weather will permit, and all to be ready for occupancy on December 1, 1866," "said Lee agrees to make advances to said Kirby on said houses as they progress, at the times and in the proportions set forth" in a certain schedule "to the amount of \$10,000 on each house, being \$90,000 in all, on which advances said Kirby is to pay interest at the rate of six per cent. per annum until the sale and transfer of said houses to said Kirby is completed; said Kirby agrees to keep said land and houses free from all liens or mortgages made or suffered by him, and to pay to said Lee said purchase money for said land with interest and all moneys paid and advanced by said Lee under this contract, on or before December 1, 1866; in case there be any neglect or delay on the part of said Kirby to build and complete said houses, then said Lee may furnish the materials, and employ other person or persons to build and complete said houses, and charge the cost thereof to said Kirby, with interest; and if the purchase money, and all advances made by said Lee, are not paid to him by said Kirby on or before December 1, 1866, then said Lee may sell said land and houses; and, after deducting from the proceeds of the sale the amount due him, he is to pay the balance to said Kirby or his legal representatives."

The bill further alleged that the plaintiff on December 1, 1865, at the request of Kirby, consented to extend the time for building three of the houses, and for paying the price of the land to be covered by the same, for a reasonable time after December 1, 1866, the time for making the advances by the plaintiff upon the three houses to be proportionately extended; that the defendant had built five of the houses, had received deeds of them, had paid a proportionate part of the purchase money and repaid

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the plaintiff's advances; that the plaintiff was ready to fulfil his part of the contract, and to make the advances agreed upon, if the defendant would go on and build the remaining four houses, or he was ready to convey the land, without its being built upon, "at the agreed price of \$3.40 a foot;" but that the defendant refused either to build or to purchase the land at said price. The prayer was that the defendant might be decreed specifically to perform his agreement.

The answer admitted the making of the contract and the building and purchase of the five houses; denied that the contract required that the defendant should at all events build upon the land; alleged that a long time had elapsed since the time when, if at all, the contract was to be performed; that the circumstances under which it had been made were materially changed; that the cost of materials and price of labor had both advanced, and were at least twenty per cent. higher than they were at said time; and "that it would now be inequitable and a hardship for the defendant to be required specifically to perform said contract;" "that the agreed price for the land was \$44,800, being at the rate of \$2.50 per foot; that he was to pay one year's interest thereon, at the rate of ten per cent. per annum; that the plaintiff was to make advances as the building of the houses progressed, not to exceed in all the sum of \$90,000; that the defendant was to pay six months' interest on the said sum of \$90,000 at the rate of ten per cent. per annum, and to pay a further sum of \$9900 as a bonus, being at the rate of \$1100 per house; that when said agreement was reduced to writing, there was added to said sum of \$44,800 a sum equal to four per cent. interest thereon for one year, said sum being the excess of one year's interest thereon at ten per cent., over the interest thereon for one year at six per cent.; that there was further added four per cent. interest for six months on said sum of \$90,000, being the excess of ten per cent. interest thereon over the interest thereon for said time at the then legal rate, and also said sum of \$9900, agreed to be paid as a bonus; that thereby said sum of \$44,800 was increased to \$58,292; that to avoid fractions this sum was reduced to \$58,240, being at the rate of \$3.25 per foot; that upon this last mentioned

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sum and the amount of said advances, namely, \$90,000, the defendant was to pay the plaintiff a commission of two per cent. per annum for one year, which was added to the price of the land increased as aforesaid; that with said aforementioned several additions the agreed price of said land was increased to \$61,204.80; that the fraction of a cent in the value per foot of said land, as determined from this sum, was rejected, and said sum was thereby reduced to \$60,928, the price mentioned in said agreement, and being at the rate of \$3.40 per square foot; that said last mentioned sum of \$60,928, or the proportionate part thereof for the several lots into which said land was to be divided, was to be paid only in case said houses were built and the plaintiff made said advances; and that, in the event of said houses not being built, and the plaintiff not being called upon to make said advances, the defendant was to have said land at the abovementioned rate of \$2.50 per square foot."

The answer further alleged that "said agreement was hard and unconscionable, and the defendant ought not to be required specifically to perform the same; that he lost large sums of money in the erection of the five houses built as aforesaid; that in June 1866 it was understood and agreed between him and Lee, that the contract was to be dropped, so far as related to the building of the houses by him, and the making of said advances by the plaintiff, after the completion of the beforementioned five houses, and that the defendant was to have said land at the beforementioned rate of \$2.50 per square foot;" and that, at the time of the extension of the agreement, (which the defendant admitted,) on December 1, 1865, "it was still understood that in the event of said houses not being built the defendant was to have the land at \$2.50 per foot."

The case was referred to a commissioner to take and report the evidence, and was reserved by *Morton, J.*, on the bill, answer and commissioner's report, for the determination of the full court, before whom it was argued in November 1869. The facts are stated in the opinion.

E. D. Sohler & F. V. Balch, for the plaintiff.

G. O. Shattuck & J. B. Thayer, for the defendant.

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AMES, J. The original contract appears to have been free from all ambiguity. There is no suggestion of any omission, mistake or fraud. It is not claimed that it was not fair and just in all its parts, or that it was harsh or unreasonable, or that it was attended at the outset with any circumstances that would be likely to prevent the court, in the exercise of its discretion, from ordering its specific performance on the application of either party. It was in view of certain mutual advantages that the price of the land was agreed upon; and so far as the original contract is concerned, it does not appear to be necessary or expedient to inquire by what computation, or in what precise mode, the parties arrived at the sum of \$3.40 per square foot as the price. They manifestly expected that all the dwelling-houses would be completed in a little over one year from the date of the contract; and they were looking to the sale of the lots and houses as the source from which the defendant would derive his profits and the funds with which he was to repay the plaintiff's advances. There is nothing in the contract that imports that the defendant was at liberty to build or not as he should elect, or that he was to take the land at one price if he should build, and at a different and lower price if he should not. His promise to build on each of the nine lots, according to the prescribed model, was unconditional, and he reserved no right to recede or stop short if the enterprise seemed likely to prove unprofitable. The provision that, if he should not complete the houses, the plaintiff might do so, and charge the expenses to the defendant, is a cumulative remedy only, and does not confine the plaintiff to that mode of enforcing the contract. *Dooley v. Watson*, 1 Gray, 414. *Hooker v. Pyncheon*, 8 Gray, 550.

The defendant however insists that the case does not stand upon the original contract, but upon a subsequent agreement by which it was waived or greatly modified. It became convenient to him, soon after the date of the contract, and after he had begun to prepare the foundations for six of the houses, to postpone operations upon the remaining three, and the evidence shows that he made a proposition to that effect to the plaintiff. The defendant insists that the effect of the written correspond-

ence, which thereupon took place between them, was wholly to abrogate the written contract to that extent, and remit the parties to a previously made oral agreement.

The plaintiff writes to this effect: "Our agreement was on the basis of one year's interest upon the cost of the land you purchased of me, and average six months' interest on the advance (that is, that the interest should not amount to more than six months on the whole advance). If you should desire an extension of a third of the cost of the land, and one third of the whole advance, I shall be prepared to agree to it on the basis of our contract." To this the defendant replies: "Yours is before me, in which you give the basis of our agreement, and say you will be prepared to extend the time on one third of the cost of the land, and one third of the whole cash advance, upon the basis of our contract; all which I agree to."

There must of course have been some preliminary negotiation, and it is admitted that the price at which the land was to be sold was arrived at in the manner indicated in the defendant's answer. But we do not find that there was any oral contract or independent agreement previous to the written contract, or that the case differs in any material particular from the common case in which parties, after arranging orally the terms upon which they are willing to agree, finally reduce their contract to writing for the purpose of showing the precise result of their negotiations, and excluding all preliminary offers and propositions. The subject of the correspondence was the extension of the time as to three of the houses, and upon that the plaintiff says, "If you should desire an extension," &c., "I shall be prepared to agree to it." There is nothing in either of the letters that implies that the houses were not to be built, and the advances not to be made. On the contrary, the extension was to apply as much to the advances as to the price of the land, which shows that the expectation was that all the houses would be built, though not at so early a period as was at first contemplated. There is no indication that, at that early period after the date of the contract, anything had happened to impair the prospect of a successful speculation, or that the defendant had changed

his mind as to going on with it. It appears to us therefore that the correspondence above mentioned does not amount to a waiver of the original contract, but to a notification from the plaintiff that if a partial extension of time should be desired he would be prepared to agree to it upon the "basis" (which may mean, upon the general rule or principle) of the existing contract. No specific time or period of extension having been spoken of on either side, nothing can fairly be inferred from the letters except that a postponement as to three of the lots, for a reasonable time, would be assented to by the plaintiff if desired by the other party.

It must be admitted that the parties have expressed themselves in such a manner in those letters, that their meaning is somewhat obscure. The plaintiff does not say how long an extension he would agree to, nor the defendant how long an extension he should desire. Each party speaks of the "basis of our agreement," and the "basis of our contract," in such a manner as to raise the question whether they intend to make a distinction between "agreement" and "contract," meaning by the former expression the preliminary negotiations by which the price of the land was determined, and by the latter the final contract as reduced to writing. Neither is it entirely clear what they mean by the cost of the land, or whether that word means the "cash price," or the price if sold on credit and coupled with an obligation to advance money for building purposes. It is also difficult to say whether, when they speak of the "basis of our contract," or agreement, they mean anything more than if they had said "one part of the agreement," or "one important element of the agreement." But if it was the intention of the parties in those letters to reduce the price of the land to \$2.50 per square foot, and to give to the defendant the option to buy three of the lots at that price, without building the three remaining houses, or to take them at the agreed higher price if he should decide to build the houses and so to require the advances, we can only say that they have wholly failed to express any such intention. It is difficult to believe that so great a change in a written agreement, carefully drawn up in due form

of law, and recently signed and sealed by the parties, would be made in so loose, careless and uncertain a manner. We can put no such interpretation upon the letters without doing violence to the terms in which the parties express themselves.

The defendant, however, insists in his answer that in June 1866 a new agreement was made between the parties, to the effect that the original contract "was to be dropped," so far as related to the building of the remaining houses after the completion of the five; that no further advances should be required of the plaintiff; and that the price of the land should be reduced, as to the four remaining lots, to \$2.50 per square foot. But we do not find, in the report of the evidence, any proof of this alleged new agreement. It is true that it appears that the defendant had found the enterprise, as far as he had gone with it, a losing one; that he reported to the plaintiff his unwillingness to carry it through as he had originally intended, and was told that he must act upon his own judgment. The plaintiff appears to have said that he should be glad to be relieved of the obligation to make any further advances; but we do not find it proved that he assented to a reduction of the price of the remaining lots of land, if the houses were not built. On the contrary, the price was charged at \$3.40 per square foot, in the accounts rendered by the plaintiff on the first day of December in each of the years 1866 and 1867, and it does not appear that the defendant expressed any surprise or made any objection, on receiving those accounts.

Another ground of objection on the part of the defendant is, that, as matters now stand, the contract is hard, unequal and oppressive, and that its literal enforcement against him would operate in a manner different from that which was in the contemplation of the parties when it was executed. In an application to a court of equity for a specific performance, a decree for such performance, on proof of the agreement, is not a matter of strict right, but is discretionary with the court, in view of all the circumstances. *Western Railroad Co. v. Babcock*, 6 Met. 346, 352. 1 Story Eq. § 742, and cases cited. It will not be directed, if it should be, under the circumstances, unreasonable to do so.

Wedgwood v. Adams, 6 Beav. 600. This unreasonableness does not admit of being settled by any general definition, but must depend upon the circumstances of the case. *King v. Hamilton*, 4 Pet. 310. We do not understand the defendant in the case before us to charge that there has been either fraud, surprise or mistake. As to the alleged hardships of the case, the general rule is, that inadequacy of consideration, exorbitance of price or improvidence in the contract, in the absence of fraud, ambiguity or mistake, will not constitute a defence. "A court of equity does not affect to weigh the actual value nor to insist upon the equivalent, in contracts, when each party has equal competence." Hart, Chancellor, in *Sullivan v. Jacob*, 1 Molloy 472, 477. To invalidate a contract on the ground of hardship, the inadequacy of consideration or exorbitance of price must be so gross as to shock the conscience, and the proof of it so great as to lead to a reasonable conclusion of fraud or mistake. *Coles v. Trecothick*, 9 Ves. 234. *Osgood v. Franklin*, 2 Johns. Ch. 1, 24. In the language of Chief Justice Shaw, 6 Met. 358, we must say that "we can perceive no such proof, nor anything approaching to it." The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. We do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances, but certainly the general rule is that a mere decline in value since the date of the contract is not to be regarded by the court in cases of this nature. *Low v. Treadwell*, 3 Fairf. 441. *Coles v. Trecothick*, 9 Ves. 234. *Revell v. Hussey*, 2 Ball & Beat. 287.

But the hardship upon which the defendant mainly relies depends in a great degree upon the manner in which the agreed price of \$3.40 per square foot was made up. He contends that somewhat more than one fourth part of that price was intended expressly as a compensation to the plaintiff for the inconvenience and trouble of raising and advancing a large sum of money on each lot; that in fact it was a commission upon a loan, and was incorporated into the price to disguise a charge which

otherwise would have been usurious; that, as events have taken such a course that no advance is now required, there is a failure of consideration as to that portion of the agreed price. He insists that he was really to pay a large bonus for a loan of money; and as he does not borrow the money, and gave seasonable notice that he should not borrow it, that it would be inequitable to compel him to pay the bonus, under whatever disguise it may be presented; and that a literal fulfilment of the contract would compel him to pay the plaintiff for sacrifices which he has never made, and inconveniences which he has never incurred. But it does not appear that the plaintiff has ever consented to any modification of the contract in this respect, or asked to be relieved of any part of the obligations which he thereby assumed. For the sake of selling his land at the contract price, he was willing to enter into the stipulations as to the proposed loan. For the sake of securing the proposed loan, the defendant was willing to buy at that price. The only question for the defendant was whether he would undertake to buy at that price, and on those terms. Upon that point he made his election. Can he now force the plaintiff to consent to abandon the contract, or reduce the price to \$2.50 per square foot, by offering to renounce what the plaintiff conceded for the sake of obtaining the price stipulated in the contract, which concession he still offers and claims to carry out? We do not see why the plaintiff has not, at this moment, a perfect right under the contract to proceed to build the four remaining houses himself, at the expense of the defendant, and to sell them on his account, charging him with the loss if they should sell for less than cost, including the agreed price of the land as a part of that cost.

The defendant's answer does not specifically charge usury as a ground of defence, but we have no doubt that usury may very properly be taken into consideration by the court, under an answer that insists upon the objection that the contract is hard, unconscionable and oppressive. It will hardly be contended, however, that there was not an actual sale of the land contemplated by the parties. It was not a mere cover for usury, like the case in which a loan is made wholly or in part, in goods at ex-

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orbitant prices. The price at which the defendant undertook to buy was a distinct and definite sum of money. *Beete v. Bidgood*, 7 B. & C. 453. There was no misrepresentation or fraud, no abuse of advantages, and no inequality of position of which he can complain. It can hardly be said upon the evidence that the price was exorbitant, and as it was at the time satisfactory to the defendant, it can hardly be material how it was made up. If there was an independent or collateral agreement to the effect that the defendant might buy for cash at a lower price, and if that collateral agreement was intentionally omitted from the written contract, and left as a matter of honorary obligation merely, it would not present a case of mistake, fraud or surprise upon which the court would refuse a decree of specific performance. *Irnham v. Child*, 1 Bro. Ch. 92, was a case in which a right to redeem was omitted from a written contract to convey, and left to an honorary understanding, in order to avoid the objection of usury. Lord Thurlow held that it was no bar to a decree for the specific performance of the written contract. 1 Sugden on Vendors, (7th Am. ed.) 181. 1 Story Eq. § 750, and cases cited.

In view of all the facts, we cannot say that the contract presents any features of ambiguity, surprise, mistake, omission, usury or hardship that should deprive the plaintiff of his equitable remedy. It is his duty to fulfil all its stipulations on his own part; and his right on those terms to insist that the defendant shall do all that he undertook to do on his part.

Decree for the plaintiff, with costs.

Parker v. Clark.

JAMES PARKER vs. MOSES CLARK.

A. sued B. for pulling down a wall built by A. in a lane. Pending the suit, they agreed, under seal, that whereas there were differences between them "as to the ownership and use" of the lane, and B. claimed "an interest in the fee" of the lane and also a right of way therein, and the suit was pending about the wall, and both were desirous of settling "all questions between them touching their respective rights in and to the use of" the lane, they would submit "all said questions, including said suit," to an arbitrator, and abide by his award. At the hearing before the arbitrator, B. offered evidence to prove title in himself in the fee of the lane; A. denied this claim of title; and the matter was made subject of argument. The arbitrator awarded that A. had a right of way in the lane, and B. had no right of way therein or to pull down the wall; and as referee under a rule of court in the pending suit, he assessed damages against B. for pulling down the wall. *Held*, in a suit in equity brought by B. to avoid both awards, (the question of jurisdiction being waived,) that both should be declared void, for the omission of the arbitrator to pass on the question of title in the fee of the lane.

BILL IN EQUITY to avoid two awards made by an arbitrator, the first under a sealed agreement of submission executed by and between these parties, and the second under a rule of the superior court in an action there pending between them. The facts are stated in the opinion.

D. Thaxter & F. Bartlett, for the plaintiff, cited *Houston v. Pollard*, 9 Met. 164; *McNear v. Bailey*, 18 Maine, 251; *Wakefield v. Llanellay Railway & Dock Co.* 34 Beav. 245; *Watson on Awards*, 195; 2 Story Eq. (10th ed.) §§ 1450, 1451, 1456, 1456 a; *Skipworth v. Skipworth*, 9 Beav. 135; *Rand v. Redington*, 13 N. H. 72; *Adams Eq.* 192, 193; *Gen. Sts. c.* 113, § 2; *Adam v. Briggs Iron Co.* 7 Cush. 361; *Clouston v. Shearer*, 99 Mass. 209.

J. P. Healy, for the defendant.

CHAPMAN, C. J. It appears that Clark brought an action of tort, in the superior court, against Parker, for pulling down a brick wall which Clark had erected near the westerly end of Gloucester Place in Boston. While the suit was pending, the parties made an agreement under seal. It recites that differences had arisen between them "as to the ownership and use" of the place, and Parker claimed that he had "an interest in the fee of said place," and "a right to use the same not merely

as a way in connection with his estate on said place, recently purchased by him of David A. Neal," "but also to use the same in going to and from Harrison Avenue and his estate on Washington Street" which bounds in part on said place, for all purposes, to be used in common with other tenants in common of the fee of said place, "which said claims the said Clark denies." It further recites that "there is a difference between said parties as to the boundary line between Gloucester Place and said Parker's said estate on Washington Street;" and also the controversy and suit respecting the pulling down of the brick wall. And it concludes that the parties are desirous of having "all questions between them, touching their respective rights in and to the use of the place, and as to the line" settled; and agrees to submit "all said questions, including said suit," to an arbitrator; and the parties consent to abide by and perform his award. The award made under this agreement fixes the westerly line of Gloucester Place; finds that Parker has no right of way in the place; that Clark has a right of way there; and that the removal of the wall by Parker was tortious; and assesses damages therefor under a rule of court which had been made in the pending action; and the arbitrator, as referee under the rule, makes an additional award of the same damages.

It is agreed that the plaintiff offered evidence before the arbitrator, tending, as he contended, to prove his title to the fee of two undivided third parts of Gloucester Place; that his claim was denied; and that this matter was made the subject of argument. But the arbitrator has omitted that subject in his award; by accident or oversight, as it is said. We cannot interpret the finding that "the plaintiff has no right of way in Gloucester Place" as equivalent to a finding that he has no interest in the fee. The two subjects are distinctly stated in the recitals of the agreement, and appear to have been separately presented at the hearing, and are not in their nature identical, though the ownership of an interest in the fee may be a ground for claiming a right of way. But it is not so of necessity. Making all presumptions in favor of the award, we cannot think that by a fair construction of it we can regard the question as determined by

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the exercise of the judgment of the arbitrator, applied definitely to that question. That an award which fails to decide all the material questions submitted is invalid, is a principle well established. See cases cited for the plaintiff.

The award of damages, under the rule of court, is so dependent upon the other award, that both must fall together.

It is not necessary to decide whether the court has jurisdiction in equity to declare the award void; for, though the plaintiff may have a remedy at law, (see *Bean v. Farnam*, 6 Pick. 269, 274,) yet the question of jurisdiction is waived. Nor need we decide whether the court from which the rule of reference issued has power to furnish a remedy to the plaintiff by setting aside the award for damages; for, the whole matter being before us in equity, the remedy may be made complete.

Both awards may be declared void in this suit; and each party will then be at liberty to enforce his rights as he may be advised.

Decree accordingly.

PACIFIC MUTUAL INSURANCE COMPANY *vs.* CHARLES CANTERBURY.

SAME *vs.* THOMAS SMITH.

A judgment creditor, whose debtor had entered into a recognizance under the Gen. Sts. c. 124, § 10, agreed that in case the surety should desire to surrender his principal a new surety might be examined and approved by the magistrate, and waived notice of the examination. The debtor appeared before the magistrate at the time appointed for such a surrender; the surety surrendering him was not present, nor did he procure the attendance of an officer; and the magistrate approved a new surety, and took his recognizance in lieu of the former one. *Held*, that there was a sufficient constructive surrender of the debtor; and that the first surety was discharged, and the second surety held, on the recognizance.

TWO ACTIONS OF CONTRACT on a recognizance under the Gen. Sts. c. 124, § 10, entered into by Richard W. Sears, as principal, and by Charles Canterbury, and afterwards in lieu of him by Thomas Smith, as surety. The cases were submitted together to the judgment of the superior court, and, on appeal, of this court, upon facts agreed substantially as follows:

Sears having been taken on execution upon a judgment in favor of the plaintiffs, and having entered into the recognizance with Canterbury as surety, subsequently notified the plaintiffs in writing of his desire to take on April 1 the oath for the relief of poor debtors, and on the notice the plaintiffs' attorney signed this indorsement: "I hereby accept service of the above notice, and consent that the examination may be postponed till Monday, April 12, at twelve o'clock, m.; and in case that the surety upon the recognizance heretofore entered into desires to surrender his principal, I agree that a new surety may be examined and approved by the commissioner, and waive notice of such examination." On April 1, Sears appeared before the commissioner, but there was no appearance for the plaintiffs, nor was Canterbury present, nor did he procure the attendance of any officer. The commissioner examined Smith and approved him as surety in lieu of Canterbury, took his recognizance, and adjourned the examination to April 12. On April 12 Sears appeared, but took his departure before the expiration of the hour appointed for the hearing, without being examined and without leave of the magistrate; whereupon he was defaulted and judgment rendered against him on the recognizance.

C. W. Loring & S. Snow, for the plaintiffs.

C. E. Allen, for the defendants.

AMES, J. By the terms of the Gen. Sts. c. 124, § 11, "a person taken on execution, and recognizing for his appearance to take the oath for the relief of poor debtors, may, if surrendered by his surety, recognize anew," &c. And by § 17 the magistrate may accept his recognizance pending the examination, and at any time after the debtor is carried before him. The only question, therefore, with regard to the defendant Canterbury would seem to be this, Was the debtor surrendered by his surety? It does not appear that any officer holding the precept by virtue of which the arrest was made was present to receive the debtor into actual custody, and it does appear that Canterbury was not personally present before the magistrate. But the plain inference from the agreement of the plaintiffs' attorney, indorsed upon the notification, seems to be, not merely that the examina-

tion was to be postponed for several days, but that there would be a movement on the part of the judgment debtor and his surety Canterbury to relieve the latter from his liability, and also that there was a consent on the part of the plaintiffs' attorney that Canterbury should be so relieved, provided another surety, satisfactory to the magistrate, should be substituted in his place. It is obvious that the surrender contemplated by the statute does not necessarily, and under all circumstances, mean a literal surrender into the custody of an officer. Under the agreement in this case, the presence of an officer would have been entirely needless and unimportant. There would have been nothing for him to do. The parties evidently did not contemplate a literal arrest, or anything more than a constructive surrender. The true meaning of the agreement manifestly is, that a new surety may be taken in place of the former one, in the same manner and with the same effect as if the judgment debtor had been brought before the magistrate, delivered into the custody of the officer holding the precept, and then allowed to recognize anew. This was an agreement which it was perfectly competent for the parties to make. The judgment creditor is always at liberty to waive formalities that are intended for his security, if he should see fit to do so. See *Mutual Safety Insurance Co. v. Woodward*, 8 Allen, 148; *Lord v. Skinner*, 9 Allen, 376. The agreement was made in the interest and for the benefit of Canterbury, and imports that the offer of the new surety was to be in effect for the purpose of relieving him. The substitution was not for the benefit of the debtor, or to render him any less or more liable than he was already. Under the agreement, the appearance of the debtor before the magistrate would have the same effect as if he were brought there by Canterbury. It must be assumed that he came there at the request of Canterbury, or at least in pursuance of his obligation to him. It seems to us, therefore, that Canterbury stands on the same footing as if he had made a formal surrender of his principal, and that he is not liable on his recognizance.

The same considerations that liberate him, however, are conclusive against the other party, Smith. It is not to be inferred

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from the facts agreed, that Smith's presence before the magistrate was accidental, or that he was ignorant of the true state of the case. If the magistrate could rightfully treat the presence of the debtor as a constructive surrender, (and under the agreement we think that he could,) he not only could, but was bound to, take a new recognizance. And upon that new recognizance, into which Smith voluntarily entered, he must be held liable in the action against him. In the suit against Canterbury, judgment must be given for the defendant, and, in the suit against Smith, judgment for the plaintiffs. *Judgment accordingly.*

ALFRED B. HARVEY vs. WILLIAM H. VARNEY & others.

Upon a bill in equity between partners to wind up the partnership, one of them who neglects or refuses to account fully for business of the firm, done by himself in a foreign jurisdiction, cannot, as a penalty, be denied his reasonable expenses of doing it, or sums otherwise owing to him from the firm, or be charged with interest with annual rests on actual or estimated balances in his hands; but in estimating the amount, expenses and profits of such business, and computing interest on such balances, if any interest thereon is chargeable, care should be taken, by making presumptions in favor of his copartners against him, to guard them from any injurious consequences of his concealment of facts.

Upon a bill in equity to wind up a partnership, a receiver will not be appointed to take possession of its assets in a foreign jurisdiction.

BILL IN EQUITY filed May 20, 1865, by a member of the partnership of Varney & Harvey, against the other members of it, namely, William H. Varney, Thomas J. Hunt, John Lane and Henry Hunt, to wind up the business of the firm, which was conducted at Boston and Abington in this Commonwealth, Evansville in Indiana, and New Orleans in Louisiana, and praying for the appointment of a receiver.

After the decision reported 98 Mass. 118, the cause was referred to Henry W. Paine, Esquire, as master, "to take a mutual account of all dealings between the plaintiff and the defendants of transactions of the parties in their partnership relations under the firm name of Varney & Harvey; of the separate accounts of the several parties with each other and the partnership; of the profit or loss of the business carried on by the partnership

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in Boston and Abington; of the profit and loss of the business carried on by John Lane for the partnership account, or in which said partnership was interested, in New Orleans; of the profit or loss of the business carried on at Evansville, by Thomas J. Hunt and Peter Semonin, for account of or in which said partnership was interested; and of all other accounts, transactions or dealings connected with or growing out of the partnership relations between the parties, and of the doings, dealings, tradings and business carried on by any one of said parties as partners, or in relation to partnership property or funds, or in which the said partnership had any interest; and for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all books of account, receipts, bills, vouchers and writings, in their custody or power, relating thereto, as the said master shall direct."

At October term 1869 the master made a report, of which the following are the material parts:

"For some time previous to the summer of 1861, the firm of Hunt & Lane, composed of Thomas J. Hunt and John Lane, two of the defendants, had been engaged in the business of manufacturing and selling boots and shoes. This firm became embarrassed. In August of that year, a new partnership was formed, composed of the said Hunt and Lane, Alfred B. Harvey, (the plaintiff,) and the two other defendants, William H. Varney and Henry Hunt, son of the said Thomas J. The partnership name was Varney & Harvey. The said Varney and Harvey had been employed as clerks by Hunt & Lane. When this partnership was formed, Hunt & Lane had goods on hand. These Varney & Harvey purchased, and gave their notes for them. At the same time, factors in San Francisco had goods in their hands consigned to them by Hunt & Lane. As these were sold, the proceeds were remitted to Varney & Harvey in Boston, and were used in their business. Neither Varney, Harvey, nor Henry Hunt, contributed any capital.

"In December 1861, Thomas J. Hunt went to Evansville, Indiana, where he established himself in the business of selling boots and shoes. He carried on this business till October 1862

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The goods which he sold were shipped to him by Varney & Harvey, and the larger part of them made at their factory in Abington. In his account, he charges himself with proceeds of sales amounting in the aggregate to \$34,395.51, and he credits himself with remittances, moneys paid Varney & Harvey on his account, expenses incurred in the prosecution of the business at Evansville, freights paid, loss by bad debts, and the amount of sundry notes made by Varney & Harvey. He claims to be allowed interest on these notes. The plaintiff contends that he is not, under the circumstances, entitled to interest. I have allowed him interest, and have charged him with interest on the balance of the account of the Evansville business in favor of the firm. In October 1862, Hunt sold to Peter Semonin his stock of goods in Evansville for about \$10,000. For this he took Semonin's note; and it was then agreed between them that they should carry on the business in the name of Semonin and for joint account. At first it was understood that Hunt should have two thirds and Semonin one third of the profits. Very soon it was agreed, that the profits should be equally divided between them. Hunt remained for two years at Evansville, aiding Semonin in the management of the business. In the fall of 1864, he returned to Massachusetts and commenced manufacturing boots and shoes for the house at Evansville. The sale was made with the knowledge of the partners; but they did not learn from Hunt the terms of the sale or the fact that he was to be a partner with the purchaser. Hunt swears, that, though he was engaged for two years in the business with Semonin, he did not know what profits were made during that time, though he thought some profits were made; that he has since the fall of 1864 twice visited Evansville, and has seen Semonin in Boston several times, but has received no profits and never ascertained what profits had been made, nor asked to be informed. The master is satisfied that large profits have been made, but has been furnished with no proof which would enable him to fix the amount.

"The defendant Lane went to New Orleans in September 1862. Varney & Harvey consigned to him boots and shoes,

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which Lane procured to be sold by Zanoni Stearn till January 1863, paying a commission of five per cent. He settled with Stearn, and was satisfied, as he testifies, that Stearn accounted to him for all the sales he had made. But he is unable to say whether he received from Stearn a detailed account of his sales and if he did, he swears that he cannot produce it. He thinks there was a profit, but cannot say how much. After this, he hired a store, employed clerks, and superintended the business himself. Varney & Harvey continued to send him goods, down to the dissolution of the firm by the withdrawal of Harvey in February 1865. He made remittances in gold and treasury notes, and in drafts. He purchased hides, cotton, sugar and molasses, which he shipped to Varney & Harvey. The firm charged him with the freight and other expenses, and gave him credit for the proceeds. The goods which he shipped to Varney & Harvey, and which they sold, amounted at the sales' prices to \$185,779. He says that he is unable to state what these articles cost him, and that if he had ever any memoranda of the cost, he has lost and cannot produce them. Whether anything was made on these shipments, taken as a whole, is left to conjecture. It was found that on some of these shipments profits were made. [Here the master enumerated seven different shipments, and the profits made thereon.] The aggregate of these profits I have charged to Lane. But I have not charged him with profits on any other shipments, because it was not proved what profits, if any, were made. He testifies that it is not in his power to state what profits were made on the boots and shoes which he sold. He wrote to the firm from time to time, urging shipments, saying there was a demand for their goods, and that he was selling at a profit of from twenty-five to fifty per cent. Several letters of like import were introduced in evidence. The numbers of the cases of goods consigned by the firm are set down in the invoices, with the prices set against them. Three books only (though I am satisfied that other books were kept) were produced by Lane, which were, as he said, in the handwriting of one or another of his clerks. These books purport to carry out against each case, by its number, the price for

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which it was sold. These books Lane said he believed to be correct. The first began May 1, 1863, and closed August 11 1863. The second began November 26, 1863, and closed March 4, 1864; and the third began June 1, 1864, and closed October 19, 1864. The aggregate of the sales shown by these books is \$196,061.78. The aggregate of the cost as shown by the invoices is \$150,487.63. The average profit shown on the sales contained in the first book is twenty-eight per cent.; in the second is thirty-one per cent.; and in the third is thirty-two per cent. The average profit on the sales in the three is thirty-one per cent. Whether profit was greater or less on the sales which do not appear in these books, it is impossible to determine with any degree of certainty. There was no satisfactory evidence of any decided change in the state of the market. The aggregate of the goods shipped by the firm to Lane at the invoice prices is \$403,001.72. By the burning of one vessel, the sinking of another, and the capture of a third, goods amounting at invoice prices to \$12,727.69 were lost; and a case of goat skins, valued in the invoice at \$336.77, shipped November 29, 1862, was not received; the aggregate loss being \$13,064.46. On February 15, 1865, Lane had on hand goods which at the invoice prices amounted to \$26,536.33. An account of the sales of these goods has been produced, and no profit would appear to have been realized on them, and I am not satisfied that they were sold at a loss. Deducting from the total of goods consigned the goods which were lost and the goods still on hand February 15, 1865, it appears that Lane had received from the firm goods at invoice prices amounting to \$363,400.93. I find that he made upon these goods a gross profit of thirty-one per cent., amounting in all to \$112,654.27. He paid for freight \$11,496.71. He testifies that he kept no account of expenses, and he produces none. He hired a store, and employed clerks, and kept his stock insured against loss by fire to the amount of \$25,000, for which he paid a premium of two per cent. He made bad debts to the amount of \$4706.90. He paid taxes and drayage, he says, but he does not say how much or furnish any means of approximating the amount. I have allowed him, for hire of

the store, \$8000; for clerk hire, \$9000; for payments for insurance, \$1500; for bad debts, which he says are not collectable, \$4706.90. But as he produces no evidence of what he paid for drayage or taxes, I do not allow any claim for them."

"Thomas J. Hunt holds sundry notes of the firm, amounting, without interest, to \$8678.49; and Lane holds sundry notes of the firm, amounting, without interest, to \$7137.71. Lane claims to be allowed interest on these notes from their maturity. The plaintiff contends that, as he has neglected to keep and produce proper books of account, which should show the profits made as well on the goods bought by him in New Orleans and shipped to Boston, as on the goods shipped by Varney & Harvey and sold by him in New Orleans, interest on these notes should not be allowed. But with hesitation I have allowed the claim, and I have serious doubts whether he should be credited with the principal of these notes; but the court will have the facts upon which these questions may be decided."

To this report both parties alleged exceptions. The plaintiff's exceptions were as follows:

"*First.* It appears by the evidence, that Thomas J. Hunt has the means, and is the only person having the means, of knowing the business at Evansville, carried on under the name of Semonin. He ought not therefore to be allowed to receive out of the assets of the firm the amount due him on notes reported by the master as held by him against the firm.

"*Second.* Each of the defendants should be enjoined from collecting any of the profits made in the business at Evansville, conducted under the name of Semonin; and a receiver should be appointed to take possession of the assets in which the firm are interested in Evansville, adjust and settle the accounts, collect all the assets and distribute the same under direction of the court.

"*Third.* It appearing that Lane wilfully and negligently refuses to furnish information in regard to the profits made in the business at New Orleans, he ought to be charged with interest with annual rests; and he ought not to be allowed to recover or receive any of the amounts found due from the firm to him un-

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der the master's report, either on the notes held by him or on accounts against the firm.

"*Fourth.* On the goods shipped to Boston from New Orleans by Lane, the firm are entitled to an allowance, not simply to an amount which the plaintiff has been enabled to show has been actually received, but Lane should be doomed to pay as profit a percentage on the whole amount of goods shipped, based upon any specific profit shown."

The material exceptions of the defendants were as follows:

"*First.* The prayer of the bill is for a final settlement of the accounts of the partnership, and the order referring the cause to the master required the taking of an account of all dealings of the partnership, and of the members of the same, in which the partnership was interested; and it appears by the report of the master, that a large amount of the property and assets of the firm are outstanding and uncollected in the hands of Semonin, and no proper, complete or final account can be taken, nor any final settlement between the parties be made, nor any final decree be made in the cause, until such property and assets shall have been realized and collected.

"*Second.* Because it appears by the report of the master, that debts to a considerable amount against the partnership are outstanding and unpaid, and, until such debts are paid, no proper, complete or final account can be taken, or final settlement be made between the parties, or any final decree be made in the cause."

"*Fourth.* Because the master has charged Thomas J. Hunt with interest upon the balance alleged to be due from him to the firm of Varney & Harvey, from October 1862 to the date of the decree.

"*Fifth.* Because the master has charged John Lane with a profit of thirty-one per cent. upon the goods consigned to him for sale by said Varney & Harvey, and has not allowed or given him credit for taxes and drayage.

"*Sixth.* Because the master has charged John Lane with interest upon the balance alleged to be due from him to said firm to the date of the decree.

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“Seventh. Because the master has charged John Lane with profits alleged to have been made upon goods and merchandise sent by him from New Orleans to Varney & Harvey.”

The case was reserved by *Gray, J.*, upon the master's report and the exceptions, for the consideration of the full court.

E. Avery, for the plaintiff.

H. C. Hutchins, for the defendants.

CHAPMAN, C. J. The object of the plaintiff's bill is, to procure a settlement of the affairs of a partnership which has been formed and managed in a very loose manner. The cause has been referred to a master, to whose report several exceptions are taken by each party.

The partnership was formed in this state in August 1861, and its business was at first carried on in Boston and Abington. In December 1861, the defendant Thomas J. Hunt went to Evansville, Indiana, and established a branch of the business there; and his son, Henry Hunt, came into the firm. They sent boots and shoes to Thomas J. Hunt, and he continued the business till October 1862, when he sold out his stock of goods to Peter Semonin for \$10,000. But he and Semonin have since carried on the business on their joint account. It has already been decided that the interest of Hunt in that business belongs to the firm. 98 Mass. 118. Of course, it was his duty to keep proper accounts of this business, and render them at reasonable times to his copartners. Story on Partnership, (6th ed.) § 181. This duty was the more important, because he had been intrusted by them to manage their affairs at a distant place, beyond the limits of the Commonwealth. We cannot appoint a receiver to take charge of the concern as against Semonin, nor would a receiver appointed by us have any power to act in a foreign jurisdiction. *Booth v. Clark*, 17 How. 322. The obligation of Hunt is similar to that of an agent, in respect to rendering accounts; and the account should be so made up in this case as to protect his copartners from being injured by his fraud or neglect. Story on Agency, (7th ed.) §§ 203, 204, 332, 333. *Dodge v. Tileston*, 12 Pick. 328.

Presumptions are against one who is bound to account and neglects to do so; the court inquires strictly into his irregularities, and deals with him severely. *Gray v. Haig*, 20 Beav. 219. When business is done at different places, it is the duty of each partner to furnish to the other all their accounts at the place where he resides, and endeavor to adjust them, and pay the balance when ascertained. *Beacham v. Eckford*, 2 Sandf. Ch. 116. If the neglect of a party has rendered accounts intricate, his claim to interest on a balance is sometimes denied. *Boddam v. Ryley*, 1 Bro. Ch. 239; *S. C.* 2 Bro. Ch. 2. In *Walmsley v. Walmsley*, 3 Jones & Lat. 556, a partner having possession of the partnership books fraudulently refused to produce them, and the master was unable to state the accounts. He charged the partner ten per cent. as presumed profits. His report was objected to on that account, but Lord Chancellor Sugden said the master had acted quite correctly, and if he had charged twenty per cent. he would have confirmed the report.

These authorities indicate a disposition of courts of equity to protect the firm from losses by reason of the neglect or refusal of a copartner to render an account of matters that have been specially intrusted to him, and they also indicate the means by which a master may make up an account in such a manner as to prevent the delinquent partner from making a profit by his delinquencies. But the plaintiff's exception to the report, because the master has credited Hunt with notes of the firm which are due to him, is not valid. The account cannot be properly made up without giving him credit for all items that are justly due to him. His refusal to account may raise presumptions that he has made profits; and of the extent to which such presumptions authorize charges to be made against him, the master is, in the first instance, the proper judge as to this, being careful to protect the firm from loss in consequence of his concealment of facts.

The second exception alleged is not an exception in substance and requires no separate consideration.

The third and fourth exceptions relate to the account of the defendant Lane, who carried on a branch of the business in New

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Orleans. His obligation to account to the firm is not less stringent than that of Hunt. These exceptions must be sustained, so far as they relate to charging him with profits on the principles stated above; but credit should also be given him for all reasonable expenses, as well as for other items that appear to be due to him. It does not appear from the report, that interest should be charged to him with annual rests. Whether it should be thus charged must depend upon whether he properly retained as a partner the balance which had come to his hands, or upon what use he made of it. The general rule is, that where there is no neglect, and no profit is made from the money retained, the partner holding it is not liable for interest upon it. But in determining this matter, presumptions should be made against a partner who renders no account.

The defendants' exceptions relate to matters which are governed by the principles stated above. Each party should be credited with expenses reasonably incurred in the prosecution of the business, and proper charges should be made to him, so that he may not make a profit by not accounting. The report should be recommitted to the master, in order that a full statement of the accounts may be completed; and upon the confirmation of his report, a receiver may be appointed, if necessary, who shall receive and apply to the payment of the debts due from the firm such sum as may be needed for that purpose.

Ordered accordingly.

After this decision, the case was settled by the parties without a further hearing.

COMMISSIONERS ON INLAND FISHERIES vs. HOLYOKE WATER POWER COMPANY.

The provision of the Rev. Sts. c. 44, § 23, and Gen. Sts. c. 68, § 41, declaring that acts of incorporation shall be subject to amendment, alteration or repeal at the pleasure of the legislature, reserves to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or other public or private rights.

After a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, and whose charter does not expressly exempt it from maintaining the dam without a fishway and is subject under the Rev. Sts. c. 44, § 23, and Gen. Sts. c. 68, § 41, to amendment, alteration or repeal at the pleasure of the legislature, has paid such damages, and constructed the dam without a fishway, so as to destroy the fishing rights above, and to impair fishing rights below, for the injury to which last no compensation has ever been made or provided, that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed for the purpose.

GRAY, J.* The material facts of this case, as appearing by the report of Mr. Justice Colt, before whom the hearing was had, are few and simple.

The defendants, under the authority conferred upon them by their charter, St. 1859, c. 6, are the owners by purchase of a dam across the Connecticut River, and the locks and canals connected therewith, at Holyoke in this Commonwealth, erected by the Hadley Falls Company in accordance with its charter, St. 1848, c. 222, and kept up ever since, for the purpose of creating and maintaining a water power for manufacturing and mechanical purposes.

The charter of the Hadley Falls Company provided that it should pay such damages to the owners of fishing rights then existing above the dam which it was thereby empowered to construct, as might be assessed by the county commissioners, and that either party might apply to them "to ascertain and determine the damages to said fishing rights," and might appeal from their assessment to a jury, as in cases of laying out high-

* The chief justice did not sit in this case, and it was argued before all the other judges in June 1870.

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ways. St. 1848, c. 222, §§ 4, 5. And such damages were duly assessed and paid.

It was admitted that, before this dam was built, shad were accustomed to pass up the Connecticut River beyond, as far as Turner's Falls, and were of value to citizens of the Commonwealth, being private owners of riparian fishing rights, for sale as food, and were a source of income to such riparian proprietors upon the river, both above and below the dam; and that the dam prevented the passage of fish up the river, and destroyed the fishing rights above.

It was proved at the hearing, that since the building of the dam the number of shad in the river below had gradually decreased from various causes; and that a small, but appreciable, portion of such decrease was due to the maintenance of the dam, which prevented the fish from passing up to their former spawning grounds above, and to some extent caused them not to return to the river after their annual passage to the sea. But it did not appear that any owners of fishing rights below the dam had ever claimed damages on this account.

The plaintiffs, as commissioners on inland fisheries, appointed by the governor and council, and pursuant to the authority conferred on them as such commissioners by the Sts. of 1866, c. 238; 1867, c. 344; and 1869, c. 384, § 2; after due notice to the defendant corporation, examined its dam, and determined the mode in which a fishway should be constructed therein, suitable and sufficient, in the opinion of the commissioners, to secure the passage of salmon and shad up the river and over the dam in their accustomed seasons. Such a fishway would cost about thirty thousand dollars, and, as was proved at the hearing, would not diminish the water power of the defendants except when they may desire to add to the present height of their dam by flashboards. The commissioners furnished the defendants with a plan and specification of such fishway, filed a copy of the same in the office of the secretary of the Commonwealth, and required the defendants to build and complete a fishway in accordance therewith, or to agree with the plaintiffs for the construction of such a fishway. But the defendants

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refused and neglected for thirty days to comply with this request, upon the ground that they were not required by law to do so, and that the Commonwealth had no power or right to command or require them to build such a fishway. The plaintiffs thereupon, in their own names, but in behalf of the Commonwealth, and in accordance with the St. of 1869, c. 422, filed this bill in equity to compel the construction of such a fishway.

The defendants contend that the statutes of the Commonwealth, under which they have been required to make this fishway, are inoperative and void, because they impair the obligation of the contract contained in the charter from the Commonwealth to the Hadley Falls Company, (whose rights the defendants have,) and so contravene that article of the Constitution of the United States which prohibits the states from passing any law impairing the obligation of contracts. The question to be determined therefore is, What was the contract between the Commonwealth and the Hadley Falls Company? This question must be answered by the application, to the charter of that company, of well settled principles of constitutional law and of the construction of statutes, which it will be convenient to state, before proceeding to a particular consideration of the terms of this charter.

In England, where the powers of the legislature are unfettered by a written constitution, and no act of a prior parliament can abridge the power of a subsequent one, there could be no doubt of the authority to pass a statute requiring the owner of any dam to erect and maintain such fishways as commissioners appointed for the purpose might prescribe. 1 Bl. Com. 90, 160, 161. *Hodgdon v. Little*, 14 C. B. (N. S.) 111, and 16 C. B. (N. S.) 198. *Rolle v. Whyte*, Law Rep. 3 Q. B. 286, 306.

In the United States, it has been settled for more than half a century, by the decisions of the supreme court, that a grant or charter from a state legislature is a contract, within the meaning of the article of the Constitution which declares that no state shall pass any law impairing the obligation of contracts. *Fletcher v. Peck*, 6 Cranch, 87. *Terrett v. Taylor*, 9 Cranch, 43. *Dartmouth College v. Woodward*, 4 Wheat. 518. In a still ear

lier case, Chief Justice Parsons, delivering the judgment of this court, clearly stated the true rule, saying: "We are satisfied that the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." *Wales v. Stetson*, 2 Mass. 143, 146.

But no act of the legislature is to be declared invalid by the courts, as a violation of a paramount and controlling article of the Constitution, unless the repugnancy between the two is manifest and unavoidable. When a statute has been passed with all the forms requisite to give it the force of law, it must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. *Fletcher v. Peck*, 6 Cranch, 87, 128. *Dartmouth College v. Woodward*, 4 Wheat. 518, 625. *Norwich v. County Commissioners*, 13 Pick. 60.

In this country, as in England, every grant from the sovereign power is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. The rights of the public are therefore not to be presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter. The grant of a franchise from the Commonwealth for one public object is not to be unnecessarily interpreted to the disparagement of another. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548. *Perrine v. Chesapeake & Delaware Canal Co.* 9 How. 172, 192. *Richmond, Fredericksburg & Potomac Railroad Co. v. Louisa Railroad Co.* 13 How. 71. *Cleveland v. Norton*, 6 Cush. 383, 384. *Boston v. Richardson*, 13 Allen, 146, 156. It is upon this principle that it has been held that a general authority to lay out highways will not warrant the laying out of a highway over navigable waters; that a charter for the construction of a turnpike or railroad from one place to another will not authorize the grantees to obstruct an existing highway, unless such obstruction is necessary to give a reasonable effect to the statute; and a grant of land covered by tide water does not affect the power and duty of the legislature to protect the public rights of navigation and fishing over it. *Commonwealth v. Coombs*, 2 Mass. 489

Wales v. Stetson, Ib. 143. *Springfield v. Connecticut River Railroad Co.* 4 Cush. 63. *Commonwealth v. Alger*, 7 Cush. 53.

As was said by Chief Justice Shaw, in *Commonwealth v. Essex Co.* 13 Gray, 239, 247: "It is plainly within the province of the legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide waters, and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. It sometimes happens that the full enjoyment of two public rights would, to some extent, interfere with each other; as where a highway, turnpike or railroad crosses a navigable or boatable stream. It is then for the legislature to determine which shall yield, and to what extent, and whether wholly, or in part only, to the other; and such questions will ordinarily be determined by the legislature, according to their conviction of the greater preponderance of public necessity and convenience."

By the law of Massachusetts, the erection and maintenance of a mill-dam to raise a water power for manufacturing and mechanical purposes is doubtless a public use, for which private property and rights may be taken, making due compensation. *Hazen v. Essex Co.* 12 Cush. 475. *Commonwealth v. Essex Co.* 13 Gray, 249, 250. *Talbot v. Hudson*, 16 Gray, 417, 422. But the right to have migratory fish pass, in their accustomed course, up and down rivers and streams, though not technically navigable, is also a public right, and may be regulated and protected by the legislature in such a manner, through such commissioners or other officers, and by means of such forms of judicial process, as it may deem appropriate; and every grant of a right to maintain a mill-dam across a stream where such fish are accustomed to pass is subject to the condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implication in the grant. This is settled by a series of cases, and was indeed admitted by the learned counsel for the defendants at the argument. *Stoughton v. Baker*, 4 Mass. 522. *Commonwealth v. Chapin*, 5 Pick. 199. *Vinton v. Welsh*, 9 Pick. 87. *Common-*

Wright v. Alger, 7 Cush. 98-101. *Commonwealth v. Essex Co.* 13 Gray, 247-250.

The legislature of the Commonwealth, before the granting of the charter of the Hadley Falls Company, had declared that every act of incorporation, passed since the 11th of March 1831, should "at all times be subject to amendment, alteration or repeal, at the pleasure of the legislature," with a proviso that no such act, containing an express limit of its duration, should be repealed, unless for some violation of the charter, or other default. This statute, first introduced into the general legislation of the Commonwealth by St. 1830, c. 81, and reenacted in the Rev. Sts. c. 44, § 23, and the Gen. Sts. c. 68, § 41, has been as much a part of all charters since granted as if inserted therein; and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional prohibition against impairing the obligation of contracts. The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights.

Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation. *Sherman v. Smith*, 1 Black, 587; *S. C. nom. In re Lee & Co.'s Bank*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution. *Massachusetts General Hospital v. State Assurance Co.* 4 Gray, 227. Railroad

corporations may be compelled, by general or special laws, to make changes in the level, grade and surface of the road-bed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated by the original charter, or the general laws in force when that charter was granted. *Roxbury v. Boston & Providence Railroad Co.* 6 Cush. 424. *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.* 4 Allen, 198. *Commonwealth v. Eastern Railroad Co.* 103 Mass. 254. *Albany Northern Railroad Co. v. Brownell*, 24 N. Y. 345; overruling *Miller v. New York & Erie Railroad Co.* 21 Barb. 513, cited for the defendants.

In the light of the principles thus established, we proceed to examine more particularly the provisions of the charter of the Hadley Falls Company.

The first section creates the corporation "for the purpose of constructing and maintaining a dam across the Connecticut River, and one or more locks or canals in connection with the said dam; and of creating a water power to be used by said corporation for manufacturing articles from cotton, wool, iron, wood and other materials, and to be sold or leased to other persons and corporations, to be used for manufacturing or mechanical purposes, and for the purposes of navigation;" and declares that it "shall have all the powers and privileges, and be subject to all the duties, liabilities and restrictions, set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes." The second section authorizes the corporation to hold real estate of a certain value, and limits the amount of its capital stock. The next two sections are as follows:

"SECTION 3. Said corporation is hereby authorized and empowered to construct and maintain a dam across said river at South Hadley, at any point between the present dam of the Proprietors of the Locks and Canals on Connecticut River and the lower locks of said proprietors, and of a height sufficient to raise the water to a point not exceeding the present level of the water above said last mentioned dam.

"SECTION 4. Said corporation shall pay such damages to the owners of the present fishing rights existing above the dam which the said company is herein empowered to construct, as may be awarded by the county commissioners of the counties in which said rights exist."

By section 5, "The Hadley Falls Company, or any of the owners of said fishing rights, may at any time apply to said county commissioners to proceed to ascertain and determine the damages to said fishing rights;" and on such application, the county commissioners, after public notice and hearing, "shall determine and award the damages to the said fishing rights, within sixty days from the application to them for that purpose; subject however to an appeal to a jury from such assessments, in the same manner, and with like proceedings, as in cases of assessments of damages by county commissioners for land taken for highways; and all expenses accruing under such application to and determination of the county commissioners shall be borne by the Hadley Falls Company."

By section 6, "for the purpose of reimbursing said corporation, in part, for the cost of keeping said locks and canals in repair, and tending the same," it is authorized, with the consent of the Proprietors of Locks and Canals on Connecticut River, to charge tolls on merchandise, boats and rafts.

No express authority is given by this charter to maintain a dam without a fishway. Its terms and provisions do not preclude the inference that the legislature contemplated the construction of a dam with a suitable passage for fish, so as not unnecessarily to impair the public right in that regard; and that, if the corporation should not make proper fishways, they might be compelled to do so by more specific legislation. The assessment of damages to fishing rights previously existing above the dam is quite as consistent with a partial interruption and injury of those rights, as with their utter destruction. The legislature may well have thought that a dam across the Connecticut River, with any kind of fishway which could be made, would to some extent interfere with the passage of fish, and injure the fishing rights above. But it is admitted that the dam

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as actually constructed and maintained, has utterly destroyed those fishing rights. No provision whatever is made for compensation for injuries caused, by the construction and maintenance of the dam, to fishing rights in the river below. The fact that the owners of such rights have not claimed such damages, or were not even aware of the injury done to them, affords no reason why the legislature, upon being satisfied, by larger knowledge or scientific investigation, that there are such rights, of value to the public, requiring protection, should not legislate accordingly.

The scope and effect of this statute, and the extent of the contract thereby made between the Commonwealth and the corporation, may be best seen and understood by comparing it with the legislation in the *Case of the Essex Company*, 13 Gray, 239, upon which the defendants principally rely to sustain their defence.

The original charter of the Essex Company, besides making it a corporation, and authorizing it to construct and maintain a dam across the Merrimack River, with provisions substantially corresponding to those contained in the first three sections of the charter of the Hadley Falls Company, expressly required the Essex Company to "make and maintain, in their dam so built by them across said river, suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish;" and provided that such fishways should be made to the satisfaction of the county commissioners. St. 1845, c. 163, §§ 5, 7. The Essex Company accordingly constructed the dam with a fishway to the satisfaction of the county commissioners. In 13 Gray, 250, the court guardedly abstained from expressing an opinion upon the question, "whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the legislature could, by further legislation, have required the company to construct such other fishways."

By the St. of 1848, c. 295, the Essex Company was authorized to increase its capital stock, upon the express condition tha

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"said company shall be liable for all damages that shall be occasioned to the owners of fish rights, existing above the said company's dam, by the stopping or impeding the passing of fish up and down the Merrimack River by the said dam;" that such damages should be assessed by the county commissioners, and, if either party should be dissatisfied with their assessment, by a jury; and that nothing in the seventh section of the original charter should be deemed or taken as a bar to any claim for such damages. This act was made subject to acceptance by the corporation, and was duly accepted; and in accordance with it large sums of money, amounting to more than twenty-five thousand dollars, were paid by the Essex Company to various owners of fish rights above the dam, as damages for hindering or impeding the passage of fish by the dam with such fishways.

In that case, the court, taking into consideration the facts, (offered to be proved by the corporation, and therefore regarded by the court as having the same bearing as if actually proved,) that, at the time of the passage of the second act, the dam had been in operation some time, with the fishway prescribed, and had proved to be unsuitable or insufficient to accomplish the proposed purpose of providing for the passage of the fish; and also considering that the legislature, in passing it, acted both in behalf of the public and in behalf of all those riparian owners whose fish rights would be damnified by the defendants' dam; held that that act, having been so passed by the legislature and accepted by the corporation, constituted a contract, which exempted the latter from the obligation of making and maintaining a suitable and sufficient fishway, and which had been executed on the part of the corporation by the payment of a large sum of money to the parties whose fish rights were injured, and was binding on the Commonwealth; and therefore the legislature could not, either under the general power to protect and regulate the fisheries, or under the power to alter, amend and repeal charters, afterwards require the corporation to do the acts which, by the terms of the contract so made and performed, it had been exempted from doing.

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In the *Case of the Essex Company*, the corporation had built a fishway in its dam, as required by the legislature, and to the satisfaction of the county commissioners, and had afterwards been granted an enlargement of its charter, upon the consideration that it should pay the damage caused to the owners of fishing rights by the dam as already built, with a fishway known to the legislature to be insufficient; it did not appear that any fishing rights below the dam were injured; and the court expressly assumed that the corporation had indemnified all parties damnified in their several fisheries; and, under those circumstances, held that the right to maintain the dam with the existing imperfect fishway had been paid for and had vested in the corporation, and that the contract between the Commonwealth and the corporation, thus executed, could not be afterwards impaired without violating the Constitution of the United States.

But in the case at bar, it not only appears that there are fishing rights below, which are injured by the dam, and for the injury to which no compensation has ever been made or provided; but no fishway whatever has been constructed; and the legislature has never, before passing the statute now sought to be enforced, exercised the power of defining what fishway the defendants should make; nor has it ever authorized or approved, by any expression or implication, the construction or maintenance of a dam without a fishway. In all these respects, this case differs from that of the *Essex Company*.

The other cases cited for the defendants are equally unavailing to support their position. In *Central Bridge v. Lowell*, 15 Gray, 106, the St. of 1843, c. 50, declaring that the sum of ten thousand dollars was a portion of the cost of the original bridge not yet reimbursed and repaid to the proprietors under their original charter, and, together with the expense of rebuilding the bridge, should constitute the capital stock of the bridge corporation, which it was held could not be afterwards repealed by the legislature, had been made subject to acceptance, and had been actually accepted, both by that corporation and by the city within whose limits the bridge was, and thus constituted a contract between the city and the bridge corporation; and it was

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also in amendment of a charter which had been granted in 1824, and which therefore was not subject to alteration, amendment or repeal at the pleasure of the legislature.

In *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.* 2 Gray, 1, the plaintiffs' charter, which was held to constitute a contract between them and the Commonwealth that no other railroad should be authorized to be made from Boston to Lowell, contained an express provision to that effect, and no reservation of power to the legislature, except to regulate the tolls, and was granted before the enactment of the general provision upon that subject in the St. of 1830, c. 81. So in *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, the decision that a charter to build a toll bridge over navigable waters, with draws of a certain width, was unconstitutionally infringed upon by a statute requiring the corporation to make draws therein of a greater width, was put upon the grounds that the width of the draws had been expressly prescribed by the charter, that the bridge had been built accordingly, and that no power had been reserved in the charter, or by the general laws in force when it was granted, to alter, amend or repeal it.

The cases in which a railroad corporation has been held by this court to be entitled to recover compensation from another railroad corporation, authorized by subsequent statute to cross its track, were decided upon the ground that the legislature manifested no intention by the second charter to alter, amend or repeal the first, and on considerations similar to those upon which it had been previously held that a charter to construct a railroad was not to be presumed to authorize the taking either of lands or easements belonging to the Commonwealth, without compensation. *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 107, 113. *Old Colony & Fall River Railroad Co. v. Plymouth*, 14 Gray, 155. *Grand Junction Railroad & Depot Co. v. County Commissioners*, Ib. 553.

The decisions of the supreme court of the United States in *McGee v. Mathis*, 4 Wallace, 143, and *Von Hoffman v. Quincy* Ib. 535, related to the power of taxation; and in each of them there was a specific clause of exemption or benefit in the orig-

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inal legislative act, upon the faith of which contracts had been executed between the corporation and third persons. It is well settled by a series of decisions of the same court that a legislative exemption from taxation is not to be inferred without most explicit words. *Providence Bank v. Billings*, 4 Pet. 513, 524. *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376. *Christ Church v. Philadelphia*, 24 How. 300. *Thomson v. Pacific Railroad Co.* 9 Wallace, 579.

It only remains to consider the cases, cited for the defendants, which have arisen in the state of Connecticut.

In *Enfield Toll Bridge Co. v. Hartford & New Haven Railroad Co.* 17 Conn. 40, it was held that a charter granted by the legislature of Connecticut in 1798, to build and maintain a toll bridge for one hundred years, or until the expenses of its construction and maintenance should be reimbursed, with a proviso that no person or persons should have liberty to build another bridge within certain limits on the same river, constituted a contract, the obligation of which was impaired by granting to a railroad corporation the right to erect a bridge within those limits, to be used exclusively for railroad travel, and over which the railroad corporation should not permit any other passing. Upon that case it may be remarked, 1st. It does not appear that any power of altering or amending the original charter had been reserved by the legislature; 2d. The charter of the bridge company contained an express stipulation that no other bridge should be authorized to be built at that place; 3d. The judgment that the bridge or viaduct of a railroad corporation was such another bridge is in direct conflict with the recent decision of the supreme court of the United States in *Bridge Proprietors v. Hoboken Co.* 1 Wallace, 116.

In *Washington Bridge Co. v. State*, 18 Conn. 53, the original charter of the bridge company, which fixed the width of the draw in the bridge, and which was held to be violated by a subsequent act requiring them to make a draw of greater width, reserved a power of regulating the bridge and tolls to the legislature, only in the event, which had not come to pass, of the corporation having been reimbursed the moneys expended in

building the bridge, with interest thereon at the rate of twelve per cent. annually; and the intermediate act of the legislature, accepted by the corporation, which was held by the court not to affect the original provision as to the width of the draw and to leave those whose rights of navigation might be impaired to such remedies as the law had provided, relieved the corporation from some burdens, and made their grant exclusive for a certain distance upon the river, besides providing that nothing therein contained should be so construed as to impair the rights, privileges and immunities of persons using and navigating the river.

The case of *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, 17 Conn. 79, and 10 How. 511, upon which much stress was laid by the defendants, was as follows: In 1808, the general assembly of Connecticut passed an act, incorporating the Hartford Bridge Company, and authorizing it to build a bridge across the Connecticut River between the towns of Hartford and East Hartford, to the satisfaction of commissioners appointed by the assembly, and to take tolls thereon; and providing that "whenever the said tolls shall reimburse to said company the sums advanced by them in building said bridge, and the expense of lighting, maintaining and repairing said bridge, and of collecting the toll, with an interest of twelve per cent. per annum on the same, the said bridge and the rate of toll shall be subject to such regulations and orders as the general assembly shall think proper to make;" "that nothing in this grant shall now or at any future time in any way lessen, impair, injure or obstruct the right to keep up the ferries established by law between the towns of Hartford and East Hartford;" "and also that the grant may receive such alterations from time to time by the general assembly as experience may evince to be necessary or expedient." The bridge company accepted this charter, and built the bridge to the satisfaction of the commissioners. In 1818, the bridge having been carried away by a flood, the legislature passed an act providing that when it should have been rebuilt by the corporation to the satisfaction of the same commissioners, the ferries before mentioned (the privilege of keeping one half of which had been in 1783, by

the act separating East Hartford from Hartford, granted to East Hartford "during the pleasure of the assembly") should be discontinued; and the bridge was rebuilt accordingly. The general assembly by subsequent acts declared so much of the act of 1818 as provided for the discontinuance of the ferries to be repealed. The supreme court of Connecticut held that the act of 1818 was constitutional and valid as against the town of East Hartford; but, by a majority of the court, that the acts which undertook to repeal so much of that act as discontinued the ferries were unconstitutional and void, as impairing the obligation of the contract between the state and the bridge corporation, contained in the act of 1818; and that the act of 1808, upon a comparison of all its provisions, restrained the legislature from making any regulations materially affecting the prescribed revenues of the corporation until it should have been reimbursed as therein provided. Upon a writ of error sued out by the town of East Hartford, the supreme court of the United States affirmed the judgment, upon the ground that the decision in favor of the validity of the act of 1818 was correct, and that the decision against the validity of the subsequent legislation could not be revised by that court. The whole result of the case is, that the only point decided by the supreme court of the United States upon the validity of either of the acts of the legislature of Connecticut was, that an act discontinuing a ferry which had been granted during the pleasure of the legislature was valid; and the decision of the majority of the state court against the validity of the acts which undertook to revive the ferry was based upon the peculiar language of the charter of the bridge company.

The chief justice of Connecticut, in delivering the first opinion in that case, assumed that if the legislature had manifested an intention to reserve an unlimited control over the charter, by using the language ordinarily employed in reserving such a power — "This act may at any time be altered, amended or repealed by the general assembly" — the conclusion of the court must have been different. 16 Conn. 176. And in *English v. New Haven & Northampton Co* 32 Conn. 240, which is later

than any of the cases in that state cited for the defendants, the court held that when the legislature had reserved a general power of altering, amending or repealing a charter, it might impose any additional condition or burden, connected with the grant, which it might deem necessary for the welfare of the public, and which it might originally and with justice have imposed.

Upon the whole case, taking into consideration the terms of the charter of the Hadley Falls Company, and the power of alteration, amendment and repeal previously reserved to the legislature by the public statutes of the Commonwealth, we are unanimously of opinion that the legislature has not surrendered or restricted its inherent power of regulating and protecting the fisheries on the Connecticut River, and, in so doing, of providing for the maintenance of a suitable fishway in the dam erected by that corporation; and that the recent legislation compelling the making of such a fishway does not impair the obligation of any contract of that corporation or its assigns with the Commonwealth or any other party. *Decree for the plaintiffs.*

C. Allen, Attorney General, & *M. Williams, Jr.*, for the plaintiffs.

W. Gaston, and *F. Chamberlin*, (of Connecticut,) for the defendants.

JOSIAH M. JONES & others vs. BOARD OF ALDERMEN OF THE CITY OF BOSTON.

SAME vs. SAME.

FREDERICK JONES & others vs. SAME.

SAME vs. SAME.

An omission of the aldermen of Boston to allege, in an order altering a street, that the alteration was made under the St. of 1866, c. 174, is no ground for quashing the proceedings on *certiorari*, as not conducted under that statute, if the order was passed while it was in force, and the record shows that they intended to, and did, proceed in conformity with it.

The liability of estates abutting on a street in Boston altered under the St. of 1866, c. 174, to be assessed under § 5 for the expense of the alteration, proportionally to the benefit

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which they received from it, accrued on the passage of the order making the alteration, is to be estimated as of that date, and is not affected by the repeal of that section by the St. of 1868, c. 276, § 2.

In the absence of evidence to the contrary, it is to be presumed that an adjudication by the aldermen of Boston under the St. of 1866, c. 174, § 5, of the benefit received by abutting estates from the alteration of a street, and their assessment of the expense accordingly, were made as of the date of the order for the alteration.

An overvaluation by the aldermen of Boston, under the St. of 1866, c. 174, § 5, or the St. of 1868, c. 276, § 1, of the benefit received by real estate from altering a street, as the basis of an assessment thereon for the expense of the alteration, is no ground for quashing the proceedings on *certiorari*, but the remedy of the owner is by petition for a jury.

An order of the aldermen of Boston under the St. of 1866, c. 174, § 5, assessing for the expense of altering a street estates abutting thereon and benefited by the alteration, which lays the assessment on the estates named in a schedule annexed to the order and entitled "Schedule of assessments upon the estates that were benefited by the alteration," imports that the schedule includes all the abutting estates which were benefited.

An omission of the aldermen of Boston to allege, in the record of altering a street under the St. of 1866, c. 174, that their assessment of the expense of the alteration upon abutting estates thereby benefited was laid on all such estates, is no ground for quashing the proceedings on *certiorari*, in the absence of any allegation, in the petition for the writ, that the assessment was in fact not so laid, and of any evidence that the omission injured the petitioner.

The St. of 1866, c. 174, § 5, construed in connection with § 1, requires the aldermen of Boston, in assessing, for the expense of laying out or altering a street, abutting estates thereby benefited, to lay the assessment ratably upon all such estates; and is constitutional.

It is no ground for quashing on *certiorari* proceedings of the aldermen of Boston altering a street, under the St. of 1866, c. 174, that, by a clerical error in the preamble of their adjudication of the benefit received by abutting estates, the date of the assessment of damages is substituted for the date of the order making the alteration.

The provision of the St. of 1868, c. 276, § 1, that in no case shall assessments upon real estate for special benefits received from the laying out or alteration of a street in Boston, exceed the amount to be paid by the city for such laying out or alteration, construed in connection with the St. of 1866, c. 174, § 2, limits the assessments only to the whole amount of the cost of the laying out or alteration, which the city pays in the first instance, without any deduction on account of the partial reimbursement which it may derive from such assessments.

It is no ground for quashing on *certiorari* proceedings of the aldermen of Boston altering a street, under the St. of 1866, c. 174, as amended by the St. of 1868, c. 276, which repealed § 5 of the former statute, that the schedule of their assessment of the expense of the alteration upon real estate specially benefited by it purports to be made in pursuance of the provisions of the repealed section and of § 1 of the St. of 1868.

The remedy by petition for a jury, given by § 7 of the St. of 1866, c. 174, to any party aggrieved by doings of the aldermen of Boston under that statute, extends also to their doings under it as amended by the St. of 1868, c. 276.

MORTON, J. These are petitions for writs of *certiorari* to quash the proceedings of the board of aldermen of Boston in the matters of the widening of Matthews Street and High Street in

that city. In two of the cases, the proceedings were commenced in 1867,—before the amendment of the St. of 1866, c. 174,*

* The material parts of the St. of 1866, c. 174, which was passed April 23, 1866, and entitled “An act concerning the laying out, altering, widening and improving the streets of Boston,” are as follows :

“SECTION 1. The board of aldermen of the city of Boston shall continue to have full power and authority to lay out, widen, discontinue, change the grade of, or otherwise alter, any street within said city, and for these purposes may take any land, and may remove the whole or part of any building which in their judgment it may be necessary to take and remove, and may assess upon the estates abutting on any street which may be laid out, such portion of the expense of such laying out, widening, discontinuance, change of grade, or other alteration, including all damages sustained by any person or persons thereby, as is hereinafter provided; and their determination so to do shall be adjudicated in the same manner, and upon like notice to parties interested, as is provided by law in other cases of laying out, widening, discontinuance, change of grade, or other alteration of streets.”

SECTION 2 provided that, in making an estimate of the expense which might be assessed upon the abutting estates, all damages sustained by any person should be estimated, including damages for land and buildings taken, and in estimating the value of land cut off for said purposes, the land should be estimated at its value before the alteration of the street and such estimate should not include the increased value occasioned merely by such alteration.

SECTION 3 provided that the damages so estimated should be paid to the persons entitled thereto, in the manner provided by law in other cases of laying out or altering streets.

“SECTION 5. Whenever, in the opinion of the board of aldermen, any estate abutting on any street which may be laid out, widened, discontinued, graded or altered, by said board under this act, including the estate so cut off, shall receive any benefit and advantage from such laying out, widening, discontinuance, change of grade, or other alteration, then the said board may adjudge and determine the value of such benefit and advantage to any such estate, and may assess upon the same a portion of the expense of any such laying out, widening, discontinuance, change of grade, or other alteration, including the damages mentioned in the second section of this act, but not exceeding in amount one half the amount of such benefit and advantage.”

SECTION 6 provided that all assessments made under this act should constitute a lien on the real estate so assessed, to be enforced in the manner provided by law for the collection of taxes; and might be apportioned into three equal parts, and the payment distributed over the three next ensuing years.

“SECTION 7. Any party aggrieved by the doings of the board of aldermen, under this act, shall have the like remedy by petition, for a jury or otherwise,

by the St. of 1868, c. 276;* in the other two, the proceedings were commenced after the St. of 1868, c. 276, went into effect.

I. We will first consider the questions raised in the two cases first referred to.

1. The first objection, made by the petitioners to the validity of the proceedings, is, that the board of aldermen had no right to assess any portion of the expenses of the improvement upon the abutting estates, because the widening was not made under the St. of 1866, c. 174, and such right to assess existed only in cases where the street was laid out or widened "under this act." This argument assumes that the widening in this case was not under this act; but the petition shows that the contrary was the fact. The widening was made after the act took effect; all the proceedings indicate that the board of aldermen intended to,

and with the same limitations as to the time of bringing such petition, as in other cases of laying out, widening, discontinuance, change of grade, or other alteration of streets in the county of Suffolk."

* The material parts of the St. of 1868, c. 276, which was passed and took effect June 4, 1868, and was entitled "An act in amendment of an act concerning the laying out, altering, widening and improving the streets of Boston," are as follows:

"SECTION 1. Wherever any street in the city of Boston shall be laid out, widened, extended, discontinued, graded or altered, and, in the opinion of the board of aldermen of said city, any real estate, including any a part of which may have been taken for such purpose, shall receive any benefit and advantage therefrom, beyond that general advantage which all real property in the said city may receive therefrom, the said board may adjudge and determine the value of such benefit and advantage to any such estate, and may assess upon the same a proportional share of the expense of such laying out, widening, discontinuance, grading or alteration, including damages paid under the second section of the act of which this is in amendment: *provided*, that the entire amount assessed for such benefit or advantage upon all the estates shall not exceed in amount one half the amount of such adjudged benefit and advantage, but in no case shall such assessment exceed the amount to be paid by the said city for such laying out, widening, discontinuance, grading or alteration.

"SECTION 2. The fifth section of the one hundred and seventy-fourth chapter of the acts of the year eighteen hundred and sixty-six, is hereby repealed but this repeal shall not affect any rights or liabilities which have already accrued under the section hereby repealed."

and did in fact, proceed under this act; and the final order of assessment expressly recites that the assessments are made "in pursuance of the provisions of section 5 of chapter 174 of the acts of 1866." Whether the order of July 12, 1867, widening Matthews Street, contains a similar recital or not, does not appear. If it does not, it is immaterial, and furnishes no ground for *certiorari*.

2. The petitioners contend that the aldermen had no right to assess upon their estates any part of the expenses of the improvements, because the fifth section of the act of 1866, conferring this right, was repealed before the assessment was laid. The St. of 1868, c. 276, § 2, repeals said fifth section, but provides that "this repeal shall not affect any rights or liabilities which have already accrued under the section hereby repealed." In the cases we are considering, the adjudications widening the streets were made in July 1867. The right of the petitioners to damages, and their liability to be assessed for benefits received by the widening, accrued at the time of the widening. The assessment of the damages, and the adjudication of the amount of benefit which has been received, must of necessity be made at some time subsequent to the widening. But they merely declare the damages sustained, or the benefit received, by and at the time of the widening. The liability to assessment is not created by the adjudication of the aldermen, but by the fact that benefit is received from the widening; and it accrues at the time of the widening, and is to be estimated as of that date. *Whitman v. Boston & Maine Railroad*, 7 Allen, 313. *Meacham v. Fitchburg Railroad Co.* 4 Cush. 291. *Parks v. Boston*, 15 Pick. 198. It follows from these considerations, that the liability of the petitioners to be assessed was not affected by the act of 1868, and that the proceedings of the board of aldermen in this respect were not erroneous.

3. The objection that the adjudication of benefit and the assessment are erroneous, because they are made as of a date subsequent to the date of the widening, cannot be sustained. The final adjudication laying the assessment in these cases was made December 31, 1868. As we have before suggested, the

assessment must, from the nature of the case, be laid at a date subsequent to the widening. Neither the act of 1866 nor the act of 1868 fixes any limit of time within which the assessment must be laid, and it is not alleged that there was any unreasonable delay in making the assessment. But the ground of objection is, that the aldermen have estimated the benefit received at the time of the adjudication, and not at the time of the widening. But this is not made to appear. The language of the order is, that the assessment is laid "upon the estates that were benefited by the widening," indicating that the board estimated the benefits which were received by and at the date of the widening. We cannot presume that they adopted an erroneous principle, or included any illegal elements in their computation, in the absence of any allegation or proof to that effect.

Another answer to this objection is that, if the aldermen erred in their estimate of the amount of benefit received, it would not be a ground of *certiorari* to quash the whole proceedings, but the petitioners' remedy would be by an application for a jury to revise their finding.

4. The next objection is, that the adjudication is merely that "the estates named" have been benefited, and it does not find that these are all the estates benefited; and the petitioners argue therefrom that the aldermen assumed the right to select what estates they pleased, and assess upon them, instead of assessing ratably upon all the estates benefited. There is, however, no allegation in the petition that, in fact, the assessment was not laid ratably upon all the benefited estates. This objection proceeds upon an erroneous construction of the order of the aldermen. The order is, "that the estates named in the said schedule be, and they hereby are, respectively charged with the sums severally named against them." The schedule referred to is a "schedule of assessments upon the estates that were benefited by the widening of" the street in question. We think this fairly imports that it is a schedule of all the estates benefited by the widening.

Besides this, in the absence of any allegation to the contrary,

we must presume that the aldermen did in fact assess upon all the benefited estates, as they were required by law to do. Such being the fact, any inaccuracy of statement or omission to state a fact, in their record, not in any way injuring the petitioners, would be no ground for quashing the proceedings upon *certiorari*. *Monterey v. County Commissioners*, 7 Cush. 394.

5. The petitioners contend that the fifth section of the act of 1866, under which the assessments in these cases were laid, is unconstitutional. The constitutionality of an act of the legislature, authorizing the imposition of a proportional assessment or tax upon those who are benefited by a local improvement such as the laying out or widening of a street, for the purpose of paying the cost of such improvement, is not now an open question in this Commonwealth. *Dorgan v. Boston*, 12 Allen, 223. The attempt to distinguish the case at bar from the case of *Dorgan v. Boston* is founded upon an erroneous construction of the fifth section of the act of 1866. If, as suggested by the petitioners, this section authorized the board of aldermen, at their pleasure, to select some of the estates benefited by the improvement, and lay an assessment upon them, and not upon all ratably, it would be difficult to uphold it as constitutional. But such is not the necessary or reasonable construction of this section. The first section of the act of 1866 provides that the board of aldermen "may assess upon the estates, abutting on any street which may be laid out, such portion of the expense of such laying out, widening, &c., as is hereinafter provided." The fifth section provides that they may assess upon any abutting estate, which receives any benefit from the laying out, widening, &c., a portion of the cost not exceeding one half of the amount of the adjudged benefit. Construing the two sections together, we think the language fairly imports that the assessment is to be laid ratably upon all the abutting estates which receive any benefit. The respondents acted upon this view in the cases at bar; and we are of opinion that such is the reasonable construction. The objection, therefore, that the fifth section is unconstitutional, cannot prevail.

6. It is objected that the adjudication of December 31, 1868, of the benefit received by abutting estates from the widening of Matthews Street, is erroneous, because it recites in the preamble that the widening was made in pursuance of an order passed December 2, 1867. In fact, the widening was made under an order passed July 12, 1867, and the damages were estimated December 2, 1867. This appears in the schedule which is a part of the adjudication. It is entirely clear that the error complained of is merely a clerical error which could injure no one; and it furnishes no ground for quashing the proceedings. A petition for a writ of *certiorari* is addressed to the discretion of the court, and the writ will not be granted on account of formal or technical errors, where no substantial injustice is done to the petitioners. *Pickford v. Lynn*, 98 Mass. 491.

II. The foregoing considerations dispose of all the questions in the two cases in which the proceedings were commenced in 1867. Some of the same points arise in the other two cases, but they also involve several other questions, which we will now consider.

1. The petitioners contend that the proceedings, in the second case of Frederick Jones and others, are erroneous, because the amount assessed for benefit is larger than one half of the expense of the widening. The last clause of the first section of the act of 1868 is as follows: "but in no case shall such assessment exceed the amount to be paid by the said city for such laying out, widening, discontinuance, grading or alteration." The petitioners claim that this clause limits the amount to be assessed to a sum equal to the amount ultimately to be paid or borne by the city, after deducting from the cost the sums recouped by the assessments upon benefited estates; or in other words, to one half of the expense of the laying out or widening. The language of the statute is not entirely free from ambiguity. It is to be construed in connection with the act of which it is an amendment. The third section of the act of 1866 provides that the damages sustained by the laying out or widening, &c. shall be paid by the city to the persons entitled thereto, in the same manner as is provided by law in other cases of laying out,

widening or altering streets. Thus the whole expense of the laying out, widening, &c., is to be paid in the first instance by the city, and we are of opinion that the provision that the assessment shall not "exceed the amount to be paid by the said city for such laying out," &c., means the whole amount which the city is obliged to pay as the expense or cost of the improvement. Such seems to be the natural and obvious meaning of the language. It is true that the provision is not necessary, as the right, given by the earlier provisions of the statute, to assess a proportional share of the expense, would, by necessary construction, limit the amount of the assessment to the amount of the expense; but we are inclined to think that this provision was inserted to prevent any inference, from the terms of the proviso, that, in cases where one half of the benefit exceeds the cost, the city could assess more than the whole expense. Upon the whole, we are of opinion that the construction claimed by the respondents is the correct one, and that the proceedings of the board of aldermen were not erroneous in this respect.

2. The petitioners object, that the board of aldermen have estimated the value of all the benefit and advantage to the estates named in the schedule, and not merely the benefit and advantage from the improvement "beyond that general advantage which all real property in the said city may receive therefrom." There are two answers to this objection. In the first place, it does not appear that they have, in fact, estimated any benefit except the special benefit accruing to the estates beyond the general advantage to all the real estate in the city. It is not alleged in the petition. They adjudge that the estates have been benefited; and it is to be presumed that in estimating the value of such benefit they proceeded according to law. We cannot presume that any illegal element entered into their computation. But further, the proper remedy of the petitioners, if they are aggrieved by the amount assessed against them, is by an application for a jury to revise the findings of the aldermen, and they cannot rely upon it as a ground for *certiorari*. *North Reading v County Commissioners*, 7 Gray, 109.

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3. It is further objected, that the schedule of assessment purports to be made out "in pursuance of the provisions of section 5 of chapter 174 of the acts of 1866, and section 1 of chapter 276 of the acts of 1868." But this is a mere formal and technical error, which could not injure the petitioners. The proceedings were, in fact, in conformity to the act of 1866 as amended by the act of 1868, and the recital that they were in pursuance of the fifth section, which had been repealed, is immaterial and furnishes no reason for quashing the proceedings.

4. The only remaining point taken by the petitioners is, that the act of 1868 is unconstitutional, because it makes no provision by which a party aggrieved by the doings of the aldermen may have a trial by jury. This position is untenable. The act of 1868 is an amendment of the act of 1866, and the two must be construed together as one legislative act. The proceedings of the board of aldermen, in the cases we are considering, were under the act of 1866 as amended, and the seventh section of that act applies, and makes provision for an appeal to a jury by any party who is aggrieved.

Upon the whole, we are of opinion that all the petitions must be dismissed.

Petitions dismissed.

P. W. Chandler & J. B. Thayer, for the petitioners.

J. P. Healy & C. H. Hill, for the respondents.

**PRESIDENT AND FELLOWS OF HARVARD COLLEGE vs. BOARD
OF ALDERMEN OF THE CITY OF BOSTON.**

An assessment by the aldermen of Boston upon land of Harvard College, under the Sts. of 1866, c. 174, and 1868, c. 276, of a part of the expense of altering a street, proportional to the benefit received by the assessed land from the alteration, is a "civil imposition," within the meaning of that term in the clause of the college charter of 1650, exempting from all civil impositions, taxes and rates, lands of the college not exceeding a certain annual value; and if at the time when the land was acquired by the college, before the adoption of the Constitution of the Commonwealth, it was within the limit of the exemption, and continued within it until and at the time when the Constitution was

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adopted, the college is entitled to continue to hold it exempted, notwithstanding that its annual value now greatly exceeds the limit, and that the college holds other lands, also exceeding the limit, in value, aside from lands exempted under the general tax acts.

PETITION for a writ of *certiorari* to quash proceedings of the aldermen of Boston laying an assessment on real estate of the petitioners for the expense of widening Devonshire Street in that city.

The petition alleged that the petitioners were owners in fee of a parcel of real estate, situated on Washington Street and extending to Devonshire Street in Boston; that this estate was devised to them by the following provision in the will of Henry Webb, who died in 1660: "*Item*. I give and bequeath unto Harvard College, next and immediately after my decease, my house and land, which I lately purchased of Henry Phillips, and was the late house of Samuel Oliver deceased, with such deed or deeds that concern the same, and the yearly rent whereof, to be improved, after the due and necessary repair thereof is provided for, to be, forever, either for the maintenance of some poor scholars, or otherwise for the best good of the college, to be improved by the care and discretion of the President and Overseers of the College, and approbation of the overseers of this my will;" that the petitioners forthwith accepted, and became seised in fee and possessed of the said estate, and have always since so continued seised and possessed thereof, in trust for the uses and purposes set forth in the will; that in the act incorporating the petitioners, passed at a general court held at Boston in 1650, it is provided "that all the lands, tenements and hereditaments, houses or revenues, within this jurisdiction," to the petitioners appertaining, "not exceeding the value of five hundred pounds per annum, shall from henceforth be freed from all civil impositions, taxes and rates;" and that at the time the petitioners became possessed of the estate devised to them by Henry Webb, and for many years thereafter, all the lands, tenements and hereditaments, houses and revenues, appertaining to them, did not exceed the value of five hundred pounds per annum. It further alleged that on April 11, 1868, the board of aldermen passed an order for the widening of Devonshire Street

in the rear of said estate; that the street was widened in pursuance of the order; and that afterwards, on November 8, 1869 the board passed another order, wherein and whereby the said estate was assessed and charged the sum of forty-five hundred and forty-one dollars and forty cents, for the benefit adjudged by said board to have accrued to said estate by the widening. And finally it alleged "that the said order of the board of aldermen, in assessing and charging said estate of the petitioners the said sum, is erroneous and unlawful, because, under the provision of their act of incorporation aforesaid, the said estate is freed from all civil impositions, taxes and rates; and no tax or other civil imposition has ever been paid by the petitioners on the same, nor has any tax, or civil imposition, or rate, ever before been assessed or charged upon said estate; and the said order of said board of aldermen is, in other respects, wrongful, unlawful, erroneous and void; and by the aforesaid wrongful, unlawful, erroneous and void order, the petitioners have been greatly injured."

A copy of the second order of the respondents was annexed to the petition, by which it appeared that the expense of the widening was \$391,237. The schedule annexed to it was entitled a schedule made "in pursuance of the provisions of § 5 of chapter 174 of the acts of 1866, and § 1 of chapter 276 of the acts of 1868," and set the benefits to the various estates at the total sum of \$470,550.75, and assessed on them in the aggregate one half of that sum, namely, \$235,275.37, — the benefit to the petitioners' estate being estimated at \$9082.80, and assessed (as alleged in the petition) \$4541.40.

The respondents answered, admitting that the petitioners were seised and possessed of the estate in question; that it was devised to them at the time and in the manner and upon the trusts and for the uses set forth in the petition; and that at the time it was devised to them, and at the time they became seised and possessed of it, their lands, tenements and hereditaments, houses and revenues, did not exceed the value of five hundred pounds a year. But it alleged "that, by their charter, the petitioners are not exempted or freed from civil impositions, taxes

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or rates, on their lands, tenements and hereditaments, houses or revcnues, beyond the value of five hundred pounds, or two thousand four hundred and twenty dollars, a year; and that now their said estates greatly exceed that value; and that they are possessed of other estates, now of that value, which are by law exempted from taxation, and the value of the estate described in said petition now greatly exceeds that sum." And it further alleged that the sum assessed upon the said estate was not a tax, but one half of the amount of the benefit which the respondents adjudged had accrued, and which had in fact accrued, to said estate by reason of the widening of the street; that the respondents were authorized and required to assess the same thereon under the provisions of the St. of 1866, c. 174, and the St. of 1868, c. 276; and that the petitioners' charter does not exempt them from the payment thereof. Wherefore it finally alleged "that the respondents' said record, adjudication and assessment, and all their proceedings in the premises, are in every respect conformable to law."

The case was reserved by the chief justice, on the petition and answer, for the determination of the full court, and was argued in June 1870 before all the judges but *Morton, J.*

The material parts of the statutes relied upon by the respondents, are printed *ante*, 463, 464, in the report of the case of *Jones v. Aldermen of Boston*. Those of the petitioners' charter are printed below, in the margin.* For the entire charter, see Anc. Chart. 77-81; 4 Mass. Col. Rec. (part 1) 12-14.

* "The Charter of the President and Fellows of Harvard College, under the seal of the Colony of Massachusetts Bay, and bearing date May 31, A. D. 1650. Whereas, through the good hand of God, many well devoted persons have been, and daily are, moved and stirred up to give and bestow sundry gifts, legacies, lands and revenues, for the advancement of all good literature, arts and sciences, in Harvard College, in Cambridge, in the county of Middlesex, and to the maintenance of the President and Fellows, and for all accommodations of buildings, and all other necessary provisions that may conduce to the education of the English and Indian youth of this country in knowledge and godliness. It is therefore ordered and enacted by this court and the authority thereof, that for the furthering of so good a work, and for the purposes aforesaid, from henceforth that the said college in Cambridge, in Middlesex, in New

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E. R. Hoar & L. S. Dabney, for the petitioners, cited *Hardy v. Waltham*, 7 Pick. 108; Const. of Mass. part 2, c. 5, § 1 *Thompson v. Lapworth*, Law Rep. 3 C. P. 149; *Dorgan v. Boston*, 12 Allen, 223; *State v. Charleston*, 12 Rich. 702; *McComb v. Bell*, 2 Minn. 295; *Schenley v. Allegheny*, 25 Penn. State, 128; *Williams v. Detroit*, 2 Mich. 560; *Woodbridge v. Detroit*, 8 Mich. 274; *People v. Brooklyn*, 4 Comst. 419; *Brewster v. Syracuse*, 19 N. Y. 116; *Burnett v. Sacramento*, 12 Cal. 76, *Egyptian Levee Co. v. Hardin*, 27 Missouri, 495; *In the matter of Dorrance Street*, 4 R. I. 230; *Anderson v. Kerns Draining Co.* 14 Ind. 199; *Webster v. Alton*, 9 Fost. 369; *Nichols v. Bridgeport*, 23 Conn. 189; *State v. Jersey City*, 4 Zab. 662;

England, shall be a corporation, consisting of seven persons, to wit, a president, five fellows, and a treasurer or bursar;" "which said President and Fellows for the time being shall forever hereafter, in name and fact, be one body politic and corporate in law, to all intents and purposes, and shall have perpetual succession, and shall be called by the name of President and Fellows of Harvard College, and shall from time to time be eligible as aforesaid; and, by that name, they and their successors shall and may purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements or hereditaments, within this jurisdiction of the Massachusetts, not exceeding the value of five hundred pounds per annum, and any goods and sums of money whatsoever, to the use and behoof of the said president, fellows and scholars of the said college; and also may sue and plead, or be sued and impleaded, by the name aforesaid, in all courts and places of judicature within the jurisdiction aforesaid." "And also that the president and fellows, or major part of them, with the treasurer, shall have power to make conclusive bargains for lands and tenements, to be purchased by the said corporation for valuable consideration." "And further, be it ordered by this court and the authority thereof, that all the lands, tenements and hereditaments, houses or revenues, within this jurisdiction, to the aforesaid president or college appertaining, not exceeding the value of five hundred pounds per annum, shall from henceforth be freed from all civil impositions, taxes and rates; all goods to the said corporation, or to any scholars thereof, appertaining, shall be exempted from all manner of toll, customs and excise whatsoever; and that the said president, fellows and scholars, together with the servants and other necessary officers to the said president or college appertaining, not exceeding ten, — viz., three to the president and seven to the college belonging, — shall be exempted from all personal civil offices, military exercise or services, watchings and wardings and such of their estates, not exceeding one hundred pounds a man, shall be freed from all country taxes and rates whatsoever, and no other."

Methodist Church v. Baltimore, 6 Gill, 391; *Case of the County Levy*, 5 Call, 139; *Lockhart v. Harrington*, 1 Hawks, 408; *Williams v. Cammack*, 27 Mississippi, 209; *Maloy v. Marietta*, 11 Ohio State, 636; *Sutton v. Louisville*, 5 Dana, 28; *Lexington v. McQuillan*, 9 Dana, 513; *Nichol v. Nashville*, 9 Humph. 252; *Soens v. Racine*, 10 Wisc. 271; *Giles v. Hooper*, Carth. 125; *Brewster v. Kidgell*, Ib. 438; *The King v. Scot*, 3 T. R. 602; *Williams v. Pritchard*, 4 T. R. 2; *Eddington v. Borman*, Ib. 4; 4 Mass. Col. Rec. part 1, 327; *New York v. Cashman*, 10 Johns. 96; *Astor v. Miller*, 2 Paige, 68; *Sharp v. Speir*, 4 Hill, 76; *Bleecker v. Ballou*, 3 Wend. 263.

J. P. Healy & C. H. Hill, for the respondents. 1. The rule of construction to be applied to this exemption is well settled. The language of a grant like this charter—a free gift from the government—if ambiguous, is to be construed against rather than in favor of the grantee. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 461, 462, 468, 469, and 11 Pet. 420, 544–548. *Mills v. St. Clair County*, 8 How. 569. Chitty on Prerog. 391 *et seq.* 3 Cruise Dig. (Greenl. ed.) tit. 27, § 29, note. This rule applies *a fortiori* when the subject matter of the grant is a prerogative right or power enjoyed by the sovereign in trust for the benefit of the whole public. *Martin v. Waddell*, 16 Pet. 367 411. *Commonwealth v. Roxbury*, 9 Gray, 451, 492. And pre-eminently to a power of such vital importance to the whole community as the power of taxation. *Providence Bank v. Billings*, 4 Pet. 513, 561, 563. *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376. *Ohio Insurance & Trust Co. v. Debolt*, 16 How. 416, 435, 436. All statutes exempting property from taxation are construed strictly, and never extended beyond “the narrowest meaning” “which will fairly carry out the intent of the legislature.” *Christ Church v. Philadelphia*, 24 How. 300, 302. *The Queen v. Aylesford*, 2 El. & El. 538. *People v. Roper*, 35 N. Y. 629, 633–635. *Commonwealth v. Easton Bank*, 10 Penn. State, 442, 449, 450. *Cincinnati College v. State*, 19 Ohio, 110. See also *South Congregational Meeting-house v. Lowell*, 1 Met. 538; *Commonwealth v. Bird*, 19 Mass. 443, 446; *Miller, J.*, in *Washington University v.*

Rouse, 8 Wallace, 439, 441. This principle applies most forcibly to a charter granted, like this, when the right to modify or revoke it was unquestionable, and when the legislature could have had no intention of binding itself by an irrevocable contract.

2. The natural and popular meaning of the language of this exemption is clear. The college is entitled to enjoy forever, free from taxation, property not exceeding in value five hundred pounds a year, and no more. The contrary decision in *Hardy v. Waltham*, 7 Pick. 108, gives a forced and artificial meaning to the clause.

We assume that the license, in the former part of the charter, to hold lands to an amount not exceeding in value five hundred pounds a year, covers any increase in value beyond that amount, of lands owned before the limit was reached. 2 Inst. 722. *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, 758. But that license, though similar in terms, is different in nature from this exemption. All restrictions on the right of a corporation to hold lands are derived from the statutes of mortmain, and rest on principles of feudal policy; and those statutes do not extend to cases of increase in value, because mere increase in value does not conflict with that policy. See *Giblett v. Hobson*, 3 Myl. & K. 517, 525, 526. Neither the rule nor the exception has application to a provision like this exemption; and as there are no statutes of mortmain in Massachusetts, the license to hold lands is in fact a restriction on the common law rights of the college, and not a grant, and must be interpreted by different rules from those applying to a grant of an extraordinary privilege touching one of the two most essential powers of sovereignty.

Nor is the fact that the limit of the restriction is also the limit of the exemption conclusive that whatever construction is given to the one must be given to the other. The restriction applies only to real estate; the exemption extends to personal property. Besides, a condition of things now exists as to both, which could not have been in the contemplation of the legislature when the charter was granted, and for which no provision is made therein, In adjudicating upon the rights of the college under the new

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and unforeseen increase in value of its property, the court will give to each clause that construction which the nature of the subject matter demands. It will so far extend the license by construction as to allow the college to retain its estates notwithstanding their increase in value; while, as established canons of interpretation forbid that the exemption from taxation should be extended by implication, it will restrict that to the original amount named.

This exemption attaches either to the college or the land. If to the college, it has no connection with any particular parcel of land, and the petitioners' construction is untenable. If to the land, it follows the land into the hands of any purchaser, and all lands of which Harvard College was ever seised before its income amounted to five hundred pounds a year are forever exempted from taxation. *New Jersey v. Wilson*, 7 Cranch, 164. *Osborne v. Humphrey*, 7 Conn. 335. *Colchester v. Kewney*, Law Rep. 1 Ex. 368, and 2 Ex. 253.

The fact that this particular estate has never been taxed is immaterial. The usage of local public officers is inadmissible to aid in the construction of general tax laws. *The King v. Hogg*, 1 T. R. 721. *Dwight v. Boston*, 12 Allen, 316, 323. And as to this statute, no contemporaneous or prescriptive construction could be given to it, as no question calling for such construction could arise on it until the college had property yielding an income of five hundred pounds a year, which was not till after the Revolutionary War; and before and long after that time all the college property, in common with the property of all colleges in the state, was exempted from taxation by the annual tax acts. As to recent times, a usage which has been caused by *Hardy v. Waltham* cannot fairly be pleaded in support of that decision.

If it is asked, how is the college, under the respondents' construction, to enjoy the benefit of the exemption, the answer is, by making an election as to the property to which it desires that the exemption should apply, and by giving the assessors, in all places where it has property, notice accordingly. Since however it always has been, and probably always will be, the policy

of the legislature to exempt the college from taxation to an amount far beyond what is required to satisfy the exemption in its charter, this difficulty is of little practical importance.

There is nothing peculiar to *Hardy v. Waltham* which should entitle it to extraordinary weight as an authority. On the contrary, it was a case of novel impression; the opinion specifies no reasons for the decision; and it cannot be sustained on principles of construction consistent with the subsequent cases of *Charles River Bridge v. Warren Bridge* and *Commonwealth v. Roxbury*, *ubi supra*. Since the principle of the decision is erroneous, the decision itself should be overthrown. *Mersey Docks v. Cameron*, 11 H. L. Cas. 443, 477. And especially should this be so with a decision which has erroneously limited the constitutional powers of the legislature, and which therefore the legislature itself cannot remedy.

3. The assessment laid on the petitioners' estate in this case is not included within their exemption from taxation. It is said that these assessments for local improvements can only be sustained constitutionally as taxes; but that proves nothing. The word "tax" must be allowed its broadest signification, when used in the grant of the power of taxation to the legislature in the Constitution; while in this charter it ought to have no more extended a meaning, to say the most, than can fairly be put upon it with reference to the subject matter. This court has repeatedly recognized the doctrine that the same words must bear different constructions as they appear in statutes or contracts and even in different statutes. *Dole v. New England Insurance Co.* 6 Allen, 373, 391-393. *Hamilton v. Boston*, 14 Allen, 475, 482, 483. A great part of the labors of courts in interpreting statutes consists in confining broad words to the limits of the purpose in the minds of the legislators.

In this exemption the more indefinite word "impositions" precedes "taxes," and is therefore limited in meaning by it. Besides, it is common learning that when words are coupled together the broader and inartificial word is confined in its meaning to the subject matter included within the narrower one the meaning of which is well defined. *Copulatio verborum indicu*

quod accipiantur in eodem sensu. *Guild v. Richards*, 16 Gray, 309, 323. *Saltonstall v. Sanders*, 11 Allen, 446, 470. If the technical meanings of the words are to govern in construction, "imposition," "tax" and "rate" had all acquired well settled meanings at common law, before their use in this charter, which do not include taxes like that now in controversy. 2 Inst. 60, 532, 533. Com. Dig. Prerogative, D, 48. *Termes de la Ley*, Tax and Talliage. Toml. Law Dict. Tax, Rate. *Brewster v. Kidgell*, 12 Mod. 166. *The Queen v. Aylesford*, 2 El. & El. 538. But without regard to technical rules, these words are to receive a reasonable construction. They are used in a nearly synonymous sense, and the repetition is only an instance of antiquated tautology. While full effect is to be given to the purpose of the legislature, they cannot be allowed by implication to relieve the petitioners from just burdens, incident to all property and from which the general court could not have contemplated exempting the college. Will it be pretended that they exempt the land from the liability of having buildings on it destroyed to stop a conflagration? Or is the college, or are its tenants, relieved from the duty of keeping their pavement free from snow and ice under the city ordinance? Full effect is given to the purpose of the legislature, when the college is relieved from ordinary taxation, — from those burdens, general and local, which lessen the value of property, and are levied for the support of the government, and the return for which is found in the protection and advantages which the taxpayer, in common with other subjects, receives from the government.

Assessments under the Sts. of 1866, c. 174, and 1868, c. 276 imposed in proportion to the "benefit and advantage" derived from the street improvement, are taxes differing so radically from ordinary taxation that they ought not, in justice, to be included within an exemption from taxation, when not specifically mentioned. This "benefit and advantage" is valuable property which can be set off in payment of private property taken for public uses. *Meacham v. Fitchburg Railroad Co.* 4 Cush. 291. And if so, it is difficult to see how a recoupment of one half of its value, that is to say, of one half of a new property created

for the landowner by the improvement, can be deemed an imposition or burden within the purpose of this exemption. The landowner must always be left richer than he was before the improvement was made.

The cases of covenants in leases, to pay taxes on the demised premises, are directly analogous. It is well settled that the broad words generally used in these must receive a reasonable construction to effectuate the purpose of the parties to them, and are not given their broadest meaning to include other and widely different taxes and impositions. *Brewster v. Kidgell*, Carth. 438; *S. C.* 12 Mod. 166, and 1 *Ld. Raym.* 317. *Hopwood v. Barefoot*, 11 Mod. 237. *Davenant v. Bishop of Salisbury*, 1 Vent. 223; *S. C.* 2 Lev. 68. *Walson v. Home*, 7 B. & C. 285. *Baker v. Greenhill*, 3 Q. B. 148. A covenant to pay taxes imposed on land does not cover taxes imposed on the owner in respect of the land. 2 *Platt on Leases*, 172, and cases cited. *Palmer v. Power*, 4 Irish C. L. 191. *Twycross v. Fückburg Railroad Co.* 10 Gray, 293. And generally it does not cover taxes in the nature of assessments for local improvements. *Southall v. Leadbetter*, 3 T. R. 458. *Palmer v. Earith*, 14 M. & W. 428. *Tidswell v. Whitworth*, Law Rep. 2 C. P. 326. *Love v. Howard*, 6 R. I. 116. The construction of broad words like these, in statutes also, excludes assessments for local improvements. *Sharp v. Speir*, 4 Hill, 76. *Baldwin v. Oswego*, 2 Keyes, 132. *Pray v. Northern Liberties*, 31 Penn. State, 69.

But this very question has been very frequently passed upon by the courts, and their decisions have been uniformly in our favor. Taxes for local improvements are not included when property is exempted from taxation, whether by general or special laws. *Guardians of Bedford Union v. Bedford*, 7 Exch. 777. *Crowley v. Copley*, 2 Louisiana Annual, 329. *In re Mayor, &c., of New York*, 11 Johns. 77. *Northern Liberties v. St. John's Church*, 13 Penn. State, 104. *Lefevre v. Detroit*, 2 Mich. 586. *Second Universalist Society v. Providence*, 6 R. I. 235. *Ottawa v. Free Church*, 20 Ill. 423. *Lockwood v. St. Louis*, 24 Missouri, 20. The same construction has been put upon exemptions from taxation in the charters of corporations

even when expressed in broader words than this one is, as "from all taxes, charges and impositions," "any tax or public imposition whatever," "taxation of every description." *Paterson v. Society for Establishing Useful Manufactures*, 4 Zab. 385. *State v. Collectors of Newark*, 2 Dutcher, 519. *Baltimore v. Greenmount Cemetery*, 7 Maryl. 517. *Canal Trustees v. Chicago*, 12 Ill. 403. *In the matter of College Street*, Supreme Court of Rhode Island, 1868. The petitioners have cited no case to the contrary. Many of these decisions are independent of the others; and this remarkable uniformity of authority in England and America seems to amount almost to conclusive proof that the result in which they concur is the only one tenable, in whatever light the question may be viewed or however it may arise.

WELLS, J. By the colony law of 1650, incorporating Harvard College, the corporation was authorized to "purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements or hereditaments within this jurisdiction of the Massachusetts, not exceeding the value of five hundred pounds per annum." It was also provided "that all the lands, tenements and hereditaments, houses or revenues, within this jurisdiction, to the aforesaid president or college appertaining, not exceeding the value of five hundred pounds per annum, shall from henceforth be freed from all civil impositions, taxes and rates; all goods to the said corporation, or to any scholars thereof, appertaining, shall be exempt from all manner of toll, customs and excise whatsoever; and that the said president, fellows and scholars, together with the servants and other necessary officers to the said president or college appertaining, not exceeding ten, viz: three to the president and seven to the college belonging, shall be exempted from all personal civil offices, military exercise or services, watchings and wardings, and such of their estates, not exceeding one hundred pounds a man, shall be freed from all country taxes and rates whatsoever, and no other."

Two questions are presented for our decision in this case: *First*. Whether this exemption in favor of the college applies to assessments upon its lands under the Sts. of 1866, c. 174, and

1868, c. 276, for the expenses of widening streets upon which they abut. *Second.* Whether the exemption attaches to the particular estate to which this controversy relates, and extends to the whole amount of that estate, notwithstanding the facts that its present value greatly exceeds the original limit of the exemption, and that the college holds other lands, also exceeding that limit in value, aside from lands exempted by the provisions of the general tax acts.

I. The terms of the exemption are as broad as language can make them. "All civil impositions, taxes and rates" include burdens and duties, to be rendered in money or otherwise, imposed by the civil authority, either specifically upon the lands, or upon the owner or occupant in respect thereof, as well as those contributions to the public revenue exacted from citizens and subjects according to their several abilities; the measure of those abilities being rated by the estimated value of their real and personal estates. That it was intended to be made thus broad, without reservation or qualification, is made apparent by the restricted manner in which the other exemptions, provided for in the same section, are defined. The association and order of the terms used may indicate that "civil impositions" are to be limited to such as are in the nature of taxes; but at the same time they show that the taxes thereby intended are not to be taken in a narrow or restricted sense.

The assessment laid by the board of aldermen of Boston upon this estate of the college, for the expenses of widening Devonshire Street, is, in the strictest sense, a "civil imposition." It is, in its legal character, a tax; for it is levied, and can only be levied, under the power of taxation confided by the Constitution to the legislature, and exercised by the board of aldermen under authority delegated to them by the legislature. *Dorgan v. Boston*, 12 Allen, 223. *People v. Brooklyn*, 4 Comst. 419. *Burnett v. Sacramento*, 12 Cal. 76. *Brewster v. Syracuse*, 19 N. Y. 116. *Nichols v. Bridgeport*, 23 Conn. 189. That this is the essential character of such an assessment is recognized by most if not all of the decisions. But in the interpretation of covenants, and statutes of exemption, a distinction is often

made between ordinary taxation in the usual mode, for general expenditures or current revenue, and that which is special and local in its character and purpose. In a covenant for the payment of taxes by a lessee, it is to be ascertained by construction what was contemplated by the parties in the use of the terms employed. Those terms are not necessarily to be taken in their strict legal signification. In a lease for years, especially if for a short term, containing a covenant that the tenant shall pay all taxes assessed upon or in respect of the premises during the term, it would hardly be supposed that the parties intended that the lessee should pay an extraordinary assessment laid upon the premises in view of the permanently increased value of the estate by reason of a public improvement in its vicinity, unless the terms used were such as to admit of no other construction. The contrary presumption is stronger or weaker according to the length of the term of lease. It may be affected by the character, situation and condition of the estate, the mode and purpose of the occupation by the tenant, and by all the circumstances of the particular case. Much weight is sometimes given to the consideration that the assessment in question is of a kind in use or authorized at the time the covenant was entered into; or, on the other hand, of a novel and newly authorized nature. By the aid of such surrounding circumstances, very general words in a covenant may doubtless be construed in a limited sense. But when the words appear to have been chosen advisedly, and are such as to indicate an intent to provide for all possible forms of taxation, all other considerations yield to the intent of the parties, as manifested in the terms of their contract. Such covenants have been held to require a tenant for years to pay assessments like the present. *Walker v. Andrews* 3 M. & W. 312. *Giles v. Hooper*, Carth. 135. *Thompson v. Lapworth*, Law Rep. 3 C. P. 149. *Bleecker v. Ballou*, 3 Wend. 263.

But it is obvious that considerations like these, although of much importance in the construction of the terms of a covenant, have little or no applicability to the interpretation of a statute containing like words in a provision for exemption. In the lat-

ter case, words so used are the language of the body by whose authority alone taxes and impositions in the nature of taxes can be levied. They import, not a contract of indemnity, or of payment or release of taxes to become due, but a renunciation of the taxing power. They are not used with reference to present and temporary conditions, but have respect to the indefinite future. Unless limited in terms, or by the effect of collocation, recitals or coördinate provisions, an exemption from taxation by statute must imply freedom from the imposition of taxes, not only in the forms and modes already established and in use at the time, but in all forms and modes in which the legislature may from time to time see fit to exercise the power, or authorize it to be exercised, over property within its jurisdiction. The question of exemption must be determined by the essential character of the imposition sought to be made, and not by the basis or mode of its distribution, or the form of its assessment.

It will be seen that the foregoing proposition does not apply to exemptions contained in what are called general tax acts. The effect of such an exemption upon an assessment like the present one, we have no occasion now to consider. Several of the decisions relied upon by the respondents relate to exemptions of that character. This is true of the case of *The Mayor &c., of New York*, 11 Johns. 77, which has been followed in its reasoning, as well as in its result, by nearly all the cases in which it has been held that an assessment for a local improvement is not included in a general exemption from taxation.

The opinion of Chief Justice Bradley of Rhode Island *In the Matter of College Street*, a copy of which is attached to the brief of the respondents, reviews the authorities in which such a restricted interpretation had been put upon words of exemption, in some cases contained in general laws, in others forming a special provision in a legislative charter, and follows the review with this statement: "The principle upon which all these decisions rests does not authorize any distinction in the meaning of the same words of exemption when used in a private charter, from that which they have when used in a general statute."

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In the case then under consideration, there was a general exemption from taxation, applicable to the property in question, and also a provision in the charter of the college that "the college estate" "shall be freed and exempted from all taxes." It was held that neither provision freed the college estate from an assessment made thereon for the expenses of widening a street. As the terms of the exemption in that case were somewhat narrower than in the case before us, we need not discuss the propriety or correctness of that decision. But the ground on which it is mainly supported, and which we suppose to be "the principle" referred to as that upon which all the decisions cited were said to rest, does not meet with our concurrence. As stated in the same opinion, the principle is, that such assessments "are, both in the theory of the law and in fact, but the return of a portion of the benefit specially conferred by the improvement;" and that "provisions for exemption from taxes or impositions, whether existing in general statute laws or in special charters, are not to be deemed to include assessments for the improvement primarily of certain special localities, and derived from and carved out of the benefit conferred upon those special localities by these improvements." It must be conceded that, in several of the cases cited, similar propositions are announced.

An application of this doctrine was made in a case in New Jersey, which seems to us to illustrate its fallacy. In *State v. Newark*, 3 Dutcher, 185, a railroad corporation being required to pay a direct tax to the state, it was provided that no further or other "tax or imposition shall be levied or imposed upon the company." By the law authorizing commissioners to widen streets, and assess the expenses thereof upon the parties made liable therefor, it was provided that whenever the track of any railroad was laid in any street so to be widened, the commissioners might assess upon the corporation owning such track so much of the expenses of the widening as they should deem equitable and just; and the rest upon adjoining proprietors, in proportion to the advantages received thereby. A portion of the expense of widening a street through which the track of a railroad extended was assessed to the railroad corporation di

rectly, and another portion was assessed to certain lands owned by the corporation adjoining the street. It was held that so much of the assessment as was made to the corporation directly, in respect of its track running through the street, was a tax, and void because contrary to the law which provided for exemption; but that so much of the assessment as was made in respect of its lands adjoining the street, on the ground of a corresponding benefit thereto, was not a tax, and was not in violation of the provision for exemption.

Notwithstanding the number and respectability of these decisions, which have been followed in several states, we are constrained to regard such impositions differently. In our view, their character as a tax or otherwise does not depend upon the mode in which the distribution is made, or the reasons which justify, or may be assigned for, the particular mode of distribution adopted. If the object be one of public necessity, convenience or interest, and the expenditure one which may properly constitute a public burden, the assessment to meet the expenditure is not the less a tax because, in the distribution of public burdens, that particular expenditure is imposed upon a part only of the persons or property subject to taxation within the Commonwealth, and that part designated or ascertained by local limits, or relations of vicinity to or benefit from the proposed improvement or object of expenditure. *Dorgan v. Boston*, 12 Allen, 223. In whatever mode the distribution is made, the imposition is to be sustained, upon the ground that the mode is adopted by the legislature in the legitimate exercise of its proper function to apportion the burden with reference to the benefit to be received from the expenditure. This is effected, after first determining the district within which to assess the amount, sometimes by an assessment upon all polls and estates within that district, according to their number and value; sometimes by an assessment upon the lands included within the district, or abutting upon the improvement, according to the value of those lands; sometimes according to the area thereof, or the extent of frontage upon the improvement. In either of these modes, if the expenditure be for a public object, it is still taxation.

Under the statutes in question, the subjects of taxation are ascertained in like manner; but the ratio of assessment is sought to be fixed by an estimation of actual benefit to each estate. It is not necessary, for the purposes of this suit, to maintain the propriety, or even the validity, of this mode of exercising the power of taxation. It is enough to show that it is an attempted exercise of that power, and therefore a civil imposition, in the sense of the clause of exemption. Its validity as such has, however, been sustained in the recent case of *Jones v. Aldermen of Boston*, *ante*, 461.

The improvement in question is manifestly and avowedly one undertaken as a matter of public convenience and necessity. We need not consider whether it could be justified as a measure intended for the improvement of private property, and directed to that end, like the provisions for improvement of meadows, to which it is compared in the decisions before referred to. It is decisive against that view of the case, that neither the statute nor the proceedings of the aldermen are based upon any such ground, but distinctly regard it as a measure of public concern — as much so as any action authorized or taken for laying out, altering or constructing highways or streets.

Our conclusion is, that an assessment of the cost of a public improvement so authorized and made, whatever may be the mode of its distribution and levy, is a civil imposition within the meaning of the exemption in the statute relating to Harvard College.

II. The second question presents itself in two aspects: 1st. As affected by the fact that the corporation holds other property more than sufficient in amount to exhaust the right of exemption, thus raising the question whether the exemption attaches to or can be applied for the protection of this particular estate; 2d. As affected by the increased value of the property to which this controversy relates.

1. This estate was acquired by the college in the year 1660. It is admitted that, at that time, it was within the limit, and covered by the operation of the provision for exemption. The

identity of the property, thus originally covered by the exemption, with that upon which the disputed assessment was laid, is not denied. It is alleged in the petition, not denied in the answer, and was assumed in the argument, that "no tax or other civil imposition has ever been paid" by the corporation, or "ever before been assessed or charged upon said estate." These facts, that the estate was acquired and originally held under the statute assurance of exemption, and that the immunity, so secured, was enjoyed, without any claim to the contrary, down to the time of the adoption of the Constitution of the Commonwealth, have an important bearing upon the interpretation of the provisions of part 2, c. 5, § 1, of that instrument, as affecting this question. It is therein declared that the President and Fellows of Harvard College and their successors, in their corporate capacity, shall have and enjoy all the rights, immunities, &c., which they then had or were entitled to have and enjoy; and the same were ratified and confirmed unto them. It is also declared that all "gifts, grants, devises, legacies and conveyances" theretofore made to said college "are hereby forever confirmed" unto them "according to the true intent and meaning" of the donors.

In *Hardy v. Waltham*, 7 Pick. 108, it was held that these provisions applied to the immunity enjoyed by the college in respect to its lands previously acquired, and which had been until then protected from taxation under the exemption contained in the St. of 1650. That decision was in 1828. The legislation of the Commonwealth, before and since that time, accords with the result in that case.

By St. 1813, c. 113, the corporation was authorized to take and hold real estate "to the clear yearly value of twelve thousand dollars, in addition to what they are now by law authorized to hold, and in addition to the public buildings of the said university occupied by the students and for other public purposes."

In the acts to ascertain the ratable estate within the Commonwealth, Sts. 1810, c. 79, 1820, c. 64, and 1830, c. 130, all the estates belonging to Harvard College were excepted. And in the annual tax acts a similar general exemption was made.

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with certain exceptions in favor of local taxation in Cambridge. *Harvard College v. Kettell*, 16 Mass. 204. Sts. 1821, c. 107, § 6; 1830, c. 151, § 6. This course of legislation led to the adoption of the qualified general exemption contained in the Rev. Sts. c. 7, § 5.

These considerations, as well as the force of the salutary rule *stare decisis*, would impel us to follow the legal results of the decision in *Hardy v. Waltham*, even if we were of opinion that otherwise, as an original question, a different construction from that adopted by the court, in the opinion in that case, should be put upon the terms of the statute of 1650.

This construction of the exemption does not involve the result suggested by the respondents, that the right must consequently pass from the college to the purchaser of the property, in case of a conveyance. That may be the case where the exemption is coupled with a grant of the land, and thus made a quality of the title that is derived from the government which confers the exemption. But this is strictly a provision of immunity to the college in respect of its lands, and cannot enure to the benefit of any other party by virtue of any title he may acquire therein.

For the same reason it will remain for the benefit and protection of the corporation after a sale of the lands to which it originally applied. In what manner and to what extent the corporation will be entitled to make it available in that event, does not concern us now.

We do not consider the question whether the legislature might constitutionally repeal or modify an exemption like that in the statute of 1650; because, in the first place, the statute under which this assessment was made does not indicate any intention so to repeal or modify it; and in the next place, this exemption is itself fortified by a constitutional protection, as was decided in *Hardy v. Waltham*.

2. The considerations already mentioned seem to be equally applicable to the case in its other aspect, namely, as affected by the increased value of the estate upon which the assessment was laid.

That, however, which is most decisive to our minds, is the fact that the exemption is coupled in the same statute with the grant of authority to take and hold real estate; and the extent of the privileges thus conferred, both that of proprietorship and that of immunity from public burdens, is defined by precisely the same measure. This would indicate the intent of the statute to be, that lands acquired and held under the authority therein granted were to be held with the privilege of exemption so coupled with the grant. That being so, whatever right or power there might be in the Commonwealth, in case of an advance in the value of the lands beyond the established limit, to require the corporation to reduce its possessions, or to withdraw the exemption from the excess, so long as that power is not exercised all lands properly acquired under that authority may be legally held under it, with the accompanying privilege of immunity, notwithstanding such subsequent advance in value.

This last consideration, which doubtless influenced the decision in *Hardy v. Waltham*, seems to us to vindicate the correctness of the law as declared in that case. The result must follow, that the exemption, as applied to this estate, extends to the entire value of the estate.

We deem it proper to advert to one feature in the St. of 1866, c. 174, which, although an additional reason for carefully weighing the grounds of decision, we have not been able to regard as affecting the principle which should govern.

The statute separates the estimation of benefits from the assessment of damages, and requires that damages in full shall first be paid, without any deduction on account of the benefit to the property of the party by reason of the improvement; whereas, in the ordinary mode of laying out or altering streets or ways, the damages and benefits are both included in one estimate, and set off against each other, and the award is only of the excess of damages over and above the amount of the benefits.

This deduction of benefits is sometimes classed with civil impositions in the nature of taxes, and referred to the taxing power for its justification. But we are satisfied that it is equally con

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sistent with, and may be supported under, the right of exercise of the power of eminent domain. The damages thus awarded are properly an estimate of the amount of injury occasioned to the claimant as the net result of the whole proceedings in their effect upon his estate.

But in this statute the legislature has seen fit, by clear and unequivocal provisions, to make the assessment of the expenses upon the estates benefited a civil imposition in the nature of a tax. It does not affect its character, that it might have been accomplished, in great part, by way of deduction from the damages to the respective estates. To the landowner it may operate as a deduction or set-off, in substantial result. But in mode of proceeding it is distinct from and independent of any previous award of damages in his favor. It was manifestly intended to stand upon some independent ground of authority. We think it must be regarded as an exercise by the legislature of its authority to distribute public burdens, under the taxing power. An assessment so made is a civil imposition, from which this estate is to be held exempt. *Certiorari to issue.*

JOHN A. CODMAN vs. EARL W. JOHNSON.

In a lease for twenty years of land on which the lessee covenants to erect permanent buildings, and the contract for which was negotiated after the passage of the St. of 1866, c. 174, his covenant to pay "all taxes and assessments, whether in the nature of taxes now in being or not, which may be payable or assessed in respect of the premises, or any part thereof, during said term," binds him to pay the whole amount of an assessment on the premises, under that statute, for a part of the expense of altering a street on which they abut, proportional to the benefit received by them from the alteration.

CONTRACT by the lessor of a parcel of real estate abutting on Devonshire Street in Boston, on a covenant of the lessee in the indenture of lease, which was dated June 1, 1868. In the superior court the case was submitted on the pleadings, without argument; judgment was ordered for the defendant; and the plaintiff appealed. The facts appear in the opinion. The case was argued in writing in this court in November 1870.

W. S. Dexter & W. P. Walley, for the plaintiff.

J. P. Healy, for the defendant, cited the same authorities which are given in the report of his argument in the preceding case *ante*, 480.

WELLS, J. The covenant in the lease, upon which this action is brought, is that the lessee shall pay "all taxes and assessments, whether in the nature of taxes now in being or not, which may be payable or assessed in respect of the premises, or any part thereof, during said term." The lease was for the term of twenty years from June 1, 1868. The lessee was to erect certain permanent buildings upon the premises. A previous agreement for the lease, made in February 1868, contained the covenant that the lessee should "pay all taxes, assessments, and repairs during the term."

In April 1868, the board of aldermen of the city of Boston duly ordered and adjudged that Devonshire Street should be widened. In November 1869, such widening having been accomplished, the value of the benefit to the premises leased was determined by the board of aldermen, and a sum equal to one half of the amount thereof was assessed upon the estate covered by the lease, as the portion of the expenses of the widening to be paid by that estate. The St. of 1866, c. 174, under which this was done, authorizes such an assessment to be laid upon "any estate abutting on any street which may be laid out, widened, discontinued, graded or altered" under the act. The plaintiff claims that this assessment comes within the terms and operation of the covenant in the lease. The defendant contends that it is an extraordinary assessment, not contemplated by the parties and not intended to be embraced in the terms of the covenant, and therefore, having paid such proportion of it as corresponds with his interest in the estate, that he is not liable for anything further.

That this assessment is in the nature of a tax cannot, we think, be questioned. It is local and special, it is true; but the object of the expenditure is a public one, for which taxation is authorized. Its burden is made proportional and reasonable, in the sense of the constitutional restriction in that particular, by

imposing it, or a portion of it, upon estates especially benefited beyond the common benefit to the public generally. The mode of attaining this end is within the legitimate province of the legislature; and whether it be accomplished by a general public tax, or by distributing the burdens upon smaller municipal organizations or upon districts especially constituted or designated for the purpose, the assessment, which results from such distribution, takes its essential character from the power of government under which it is made. The term "assessment" is applied to impositions of this nature because they are levied in respect to particular estates, to distinguish them from the ordinary ratable taxes. But both are assessments in respect of the mode of ascertaining the amount to be paid; and both are taxes in respect of the power under which they are imposed. *Harvard College v. Aldermen of Boston, ante, 470.*

We see nothing in this case to support the argument that the term "assessment," in the covenant of the lessee, was used in a sense which would not include the assessment for which the action is brought. The lease was for a long term, such as to justify the tenant in undertaking to bear the expense of permanent improvements; and he did so undertake, in other respects. The assessment was made under a law in force before the contract was negotiated; and for an improvement already in contemplation when the lease was signed. It was laid upon the estate leased, and is therefore "in respect of the premises;" and by the statute a lien thereon is given to secure its payment.

The position of the defendant is not maintained by the authorities cited in its support. That which comes nearest, *Tidswell v. Whitworth*, Law Rep. 2 C. P. 326, must stand upon its own peculiar features, which distinguish that case from a long line of authorities upon the subject, as declared by Smith, J., in *Thompson v. Lapworth*, Law Rep. 3 C. P. 149.

The case of *Twycross v. Fitchburg Railroad Co.* 10 Gray, 293, resembles somewhat *Tidswell v. Whitworth*. The burden was imposed upon the owner personally. It was indeed imposed "in respect of the premises" leased; but it was not levied on the estate, nor made a lien upon it. It was held therefore

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not to come within the terms of the covenant, which was "to pay all taxes and duties levied or to be levied thereon during the said term."

In the present case the assessment comes precisely within the terms of the covenant; and we think the covenant must be construed as intended to apply to such assessments.

The judgment of the superior court must therefore be reversed; and the case will stand for further proceedings in that court. As the question is now presented to us, the plaintiff is entitled to recover the balance of the assessment, but upon appeal from a judgment for the defendant we cannot order a judgment for the plaintiff.

Judgment reversed.

STERNE MORSE vs. SHADRACH R. BRACKETT.

On exceptions taken by the plaintiff at the trial of an action for a balance of the price of a lot of eight bales of wool alleged to have been sold by him to the defendant, in defence against which it was set up that the plaintiff warranted the wool to be of a particular kind, but one bale was not of that kind, and so was returned by the defendant, it was decided that the evidence showed that the contract of sale was an entire contract, which the defendant could not rescind in part. After this decision the defendant amended his answer so as to allege that the bale of wool which he returned was distinct and different in kind from the other bales, and was returned on the ground that it was not included in the contract of sale. *Held*, that the amendment gave the defendant no right to have the question whether the contract of sale was an entire contract submitted to the jury at a second trial on substantially the same evidence, although the contract was oral.

CONTRACT to recover \$190.08 as a balance of the price of a lot of eight bales of wool alleged to have been sold by the plaintiff to the defendant; against which it was set up in defence, that the plaintiff warranted the lot as combing pulled wool, but one of the bales was not that kind of wool, and so was sent back by the defendant.

The case was first tried, in the superior court, before *Lord, J.*, and a verdict returned for the defendant; and exceptions alleged by the plaintiff were sustained, as reported 98 Mass. 205-208, on the ground that the contract of sale of the lot of eight bales (which was oral) was an entire contract, which the defendant

could not rescind in part. At the second trial, *Vose, J.*, directed a verdict for the plaintiff for the full amount of his claim; and exceptions alleged by the defendant were sustained on the ground that the judge "should have left the question of damages to the jury, with instructions that, if a warranty and breach of it had been proved, they should allow the defendant, by way of deduction from the agreed price, the difference between the actual value of the article sold and what would have been its value if it had corresponded with the warranty." See 98 Mass. 208-210. After this decision the defendant amended his answer by alleging that the wool which he returned to the plaintiff was "an article distinct and entirely different in kind from the other bales which he purchased and paid for," and that "said returned bale happened to be among the said bales of combing pulled wool through the fraud or mistake of the plaintiff or of some person for whom the plaintiff is responsible, and without any fault on the defendant's part;" by denying that "said returned bale constituted any part of the sale to him, or that he is in any way responsible for it;" and by further alleging that "he returned said rejected bale to the plaintiff upon the ground that it was not included in their agreement, and that he never bought it."

At the third trial, before *Wilkinson, J.*, the evidence was substantially identical with that given at the former trials. "Under the evidence, the defendant contended that it would be legal for the jury to be allowed to pass upon the questions, whether the agreement was or was not an entire contract, and also as to whether there was in fact any sale of said rejected bale to the defendant; but the court ruled otherwise." The defendant also requested instructions, which the judge refused, based on the assumption that the evidence would warrant the jury in finding that the bale in dispute was delivered as a part of the lot of eight bales through the fraud or mistake of the plaintiff. He further requested instructions "that the value of the rejected bale to the defendant, under the circumstances of this case, is the true measure of damages," and "that, if the jury find a warranty and a breach of it, it will be legal for them to calculate

any damages in the reduction of the plaintiff's claim, which the defendant actually suffered by the plaintiff's failure to fulfil his contract." These, also, the judge refused, and instructed the jury "that, as a warranty and breach of it had been proved, they should allow the defendant, by way of deduction from the agreed price, the difference between the actual value of the article sold and what would have been its value if it had corresponded with the warranty." The jury found for the plaintiff, and assessed damages in the sum of \$144.41. The defendant alleged exceptions.

R. B. Caverly, for the defendant, argued that, as the contract of sale was oral, the amendment of the answer gave the defendant a right to have the question of the entirety of the contract submitted to the jury at the third trial; and generally that the defendant was entitled to all instructions requested by him.

J. C. Dodge, for the plaintiff.

COLT, J. This case (now for the third time) comes before the court upon substantially the same evidence as was given at the former trials. Its legal effect is the same; and it was held by this court that it proved an entire contract of sale, for the eight bales of wool, which the defendant could not rescind in part only, on discovering that one of the bales was of a different kind from that for which it was bought. The question of the entirety of the contract, after this decision, could not be submitted to the jury.

Nor was there any evidence which would justify submitting to the jury the question whether the defendant bought the bale which he returned. There was no dispute that the subject matter of the sale included all the eight bales.

In regard to the several instructions asked for on the ground that the bale in question was delivered to the defendant through the fraud or mistake of the vendor, we see no evidence in the case which made such instructions necessary.

As to the rule of damages, the instruction given was in the words of the rule stated in the former decision. See 98 Mass. 205, 210.

Exceptions overruled.

ROMULUS J. DALTON & another vs. RICHARD P. GODDARD & others.

Factors wrote to traders, who proposed to consign goods to them for sale, that they were satisfied that they were taking no risk in advancing eighty per cent. on the invoice, and requested that the goods might be sent to them. After receiving the goods, they wrote again, asking if the consignors understood that the invoice prices were to be guaranteed. The consignors replied that they did not expect the factors to guarantee over eighty per cent. and drew on them for that amount. The factors paid the draft, and then sold the goods for a sum which, after deducting their commissions and other charges, would yield less than eighty per cent. of the invoice prices. *Held*, that in accounting with the consignors they were not entitled to be allowed any charges, by way of commissions or otherwise, which would reduce the proceeds of the goods to the consignors below said eighty per cent.

CONTRACT to recover a balance on an account growing out of a consignment of clothing by the defendants to the plaintiffs for sale on commission.

The case was submitted to the judgment of the court on agreed facts, by which it appeared that in 1867 the plaintiffs were auctioneers and commission merchants in Cincinnati, and the defendants were clothiers in Boston; that in August and September of that year letters and telegrams passed between them (the material parts of which are stated in the opinion); that on or about August 19 the defendants consigned to the plaintiffs a quantity of clothing invoiced at the price of \$4,989.25, and on August 31 drew on the plaintiffs for \$3,991.40, being eighty per cent. on said invoice price, and the plaintiffs paid the draft; that the plaintiffs sold the clothing for \$4,029.20, and spent \$60.70 for drayage and other charges on it; that in paying the draft and charges the plaintiffs spent \$22.90 more than the proceeds of the goods; and that the usual and proper commissions on sales of such goods at Cincinnati were seven and one half per cent., or in this case \$302.19.

If the plaintiffs were entitled to recover commissions and the other charges, judgment was to be rendered for them for \$325.09, or if to recover the other charges without commissions, judgment was to be rendered for them for \$22.90, and in either

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alternative, with interest from an agreed date; otherwise, the defendants were to have judgment.

F. A. Brooks, for the plaintiffs.

W. G. Russell, for the defendants.

BY THE COURT. Until August 15 the parties had not agreed upon the terms of a contract. On that day the plaintiffs wrote, "We are satisfied that we take no risk in making the advance of eighty per cent. on your invoice of August 7," and requested the defendants to send them the goods at their earliest convenience. On the 27th of August they asked by telegraph, "Do you understand we have purchased your goods and guarantee invoice prices?" To this the defendants replied the same day, "Do not expect you to guarantee over eighty per cent." Letters passed showing that it was not a sale, but a consignment of goods for sale on those terms; and the plaintiffs sold the goods without giving notice that they expected different terms. They accepted the defendants' draft for that amount, and the substance of the guaranty was, that the defendants should receive at least eighty per cent. of the invoice price for their goods. The plaintiffs took the risk that the goods would bring that amount; and the defendants are not liable to pay the plaintiffs any charges which would reduce the price to a lower amount.

Judgment for the defendants.

JACOB K. LUNT vs. ELIAS E. DAVISON & another.

The determination by the pilot commissioners, under the St. of 1862, c. 176, § 4, of the sufficiency of evidence of misconduct of a pilot in Boston harbor to warrant his suspension from office till the next meeting of the trustees of the Boston Marine Society, is not subject to revision on mandamus by this court; and if the pilot is notified of his suspension and has an opportunity to be heard before the trustees at the meeting, and they then decide that his commission ought to be revoked, and the commissioners accordingly revoke it, the revocation is final.

MANDAMUS to the pilot commissioners, on a petition of Jacob K. Lunt, dated August 1, 1868, which alleged that he was appointed a pilot in the harbor of Boston September 21, 1841

and again July 30, 1855, and held commissions accordingly at the time of the enactment of the St. of 1862, c. 176, by § 1 of which he was continued in office; that he acted in the office ever since his original appointment, never resigned it, and knew no reason why he should not be permitted fully to enjoy all its rights and privileges; but that the pilot commissioners now denied his right to act therein; and he prayed for the writ for the purpose of reinstating him in the enjoyment of those rights and privileges.

The return of the commissioners to the first writ admitted that on May 4, 1868, the petitioner was a duly commissioned pilot in the harbor of Boston, but alleged that on that day, "in the exercise of the authority and discretion conferred upon them by law, upon satisfactory evidence to them of misconduct, carelessness and neglect of duty as a pilot on his part as such pilot, they did suspend him until the meeting of the trustees of the Boston Marine Society then next ensuing, and on said day notified said trustees and him of the said suspension; that said trustees, at their next ensuing meeting, to wit, on May 5, 1868, did decide that his commission as such pilot ought to be revoked, and on said day duly notified the commissioners of their decision; and that the commissioners, after being so notified of the action of the trustees in this behalf, on May 18, 1868, did revoke his commission as such pilot, and on said day duly notified him of their said action; all of which actions and doings of said commissioners and trustees were in due course of law;" wherefore the commissioners said that from and after said May 18, and at the time of his petition, the petitioner was not a pilot in the harbor or port of Boston, and had no right to exercise and enjoy said office for that harbor.

To this return the petitioner alleged the following exceptions:

"1. That the respondents do not in their answer allege any particulars or acts of misconduct, carelessness or neglect of duty.

"2. That they do not allege that they ever heard, examined into or decided any complaint against said petitioner, for any acts of misconduct or omissions of duty by him as a pilot.

"3. That they allege that they suspended the petitioner, and afterwards revoked his commission as pilot, in the exercise of 'the authority and discretion,' conferred upon them so to do, on evidence satisfactory to them of misconduct, carelessness and neglect of duty.

"4. That they had no authority, as is claimed by them, to suspend and revoke the commission of the petitioner as pilot, at their discretion, without finding him guilty of specific misconduct, carelessness or neglect of duty, upon evidence satisfactory in law, and upon giving the petitioner an opportunity to be heard in his defence."

The case was thereupon heard by *Morton, J.*, and reserved for the determination of the full court.*

D. E. Ware, for the petitioner.

M. Storey, for the respondents.

WELLS, J. At common law, there was no traverse to the return, upon a writ of mandamus. The utmost certainty was required in such returns. For any failure in this respect, the

* SECTION 1 of the St. of 1862, c. 176, provides that "all persons holding commissions as pilots in this Commonwealth shall continue to hold the same until the same are revoked or the authority to act under the same is suspended as provided herein."

SECTION 3 authorized the governor to appoint two pilot commissioners on the recommendation of the trustees of the Boston Marine Society.

"SECTION 4. The said commissioners shall grant commissions for pilots in the harbor of Boston to such persons as they shall deem competent to receive them, and who have been approved by the trustees of the Boston Marine Society. They may, upon satisfactory evidence of misconduct, carelessness or neglect of duty, suspend until the meeting of the trustees then next ensuing any pilot who now holds or may hereafter hold a commission as pilot for the harbor of Boston; and if the said trustees at their said next meeting shall decide that such commission ought to be revoked, the said commissioners may revoke the same, or may at their discretion continue the suspension of such pilot until the next stated meeting of said trustees and no longer for the same offence. They shall receive and hear complaints by and against pilots for the harbor of Boston, and examine into and decide the same; and generally they shall exercise within the harbor of Boston the same jurisdiction and have the same powers as are now exercised by the commissioners of pilots, except so far as the same are limited by the provisions of this act."

objection was taken by way of exceptions to the sufficiency of the return. If the party suing the writ desired to falsify the return, he could do so only by an action on the case. The English statutes relating to mandamus did not apply to the courts of this country; and such proceedings in this Commonwealth were held to be governed by the common law. *Howard v. Gage*, 6 Mass. 462. By the practice act, the action for false return was abolished, and it was provided that "the person suing the writ may, by an answer, traverse any material facts contained in such return, or demur thereto." St. 1851, c. 233, §§ 51, 52. St. 1852, c. 312, §§ 38, 39. Gen. Sts. c. 145, § 13.

Regarding the exceptions filed by the petitioner in this case as intended for and equivalent to a demurrer, admitting all the facts set forth in the return, the question is, whether those facts justify the removal of the petitioner from his office or appointment as pilot.

From the return of the commissioners, it appears, 1st. that they received evidence, satisfactory to them, of misconduct, carelessness and neglect of duty on the part of the petitioner; 2d. that they thereupon suspended him until the next meeting of the trustees of the Boston Marine Society; 3d. that the petitioner was notified thereof; 4th. that the trustees, at their next meeting, did decide that his commission ought to be revoked; and 5th. that the commissioners thereupon revoked his commission.

This is in strict, literal compliance with the provisions of the St. of 1862, c. 176, § 4, for the removal of pilots for the port of Boston. The objections are, that it does not appear that the petitioner was found guilty of any specific act of misconduct, carelessness or neglect of duty; nor that he had notice of, and opportunity to be heard in his defence upon any complaint setting forth the charge made against him.

The petitioner contends that it should appear from the return what the acts of misconduct or neglect were, of which the commissioners had evidence satisfactory to them, in order that the court might determine whether those acts constituted in law such an offence as to justify the suspension and removal. We

have no doubt that, in ordinary cases of amotion, this ought to be and is the rule. But the provisions of this statute are peculiar; and we are inclined to think that it was the purpose of the legislature to make the tribunal, therein provided, the final and exclusive arbiter in the matter of removals from the office of pilot. The power, both of appointment and removal, for the port of Boston, is confided to the commissioners, subject to the approval and revision of the trustees of the Boston Marine Society. The causes of removal are very general and indefinite, — "misconduct, carelessness or neglect of duty." It is only requisite that the evidence of either of these should be satisfactory to the commissioners. From the nature of the case, this involves not merely the credibility and sufficiency of the proof of the facts relating to the conduct of the pilot, but also the question whether the facts so proved furnish satisfactory evidence of misconduct, carelessness or neglect of duty. The propriety of the conduct of a pilot, in the performance of his official duties, as observed by the commissioners or shown by evidence brought to them, can be judged of best by men having constant familiarity with the circumstances and requirements of the service. If from neglect, inattention, or any want of faithfulness, the service of a pilot should fall short of that which is due to the responsibilities of the position, we think the terms of the statute would authorize the commissioners to regard that deficiency as satisfactory evidence of carelessness or neglect of duty, although no specific act of misconduct should be alleged. The protection against arbitrary removals, without sufficient cause, is to be found in the revision of the action of the commissioners by the trustees of the Boston Marine Society, at their next meeting.

The petitioner was notified of his suspension, and had an opportunity to be heard before the trustees upon the question of his removal, if he saw fit to avail himself of it. We must presume that the hearing before the trustees was fairly conducted; that the grounds of the suspension were properly laid before them, and were adjudged by them to be sufficient and proper causes for the removal. We do not think that adjudi

cation is open to revision in this court, either upon the sufficiency of the alleged causes of removal, or the sufficiency of the allegations.

This conclusion is confirmed by the provisions, in the same statute, for the removal of pilots at other ports. By §§ 9, 10, any pilot for the ports of Salem, Marblehead and Beverly, or the port of Newburyport, may be removed from office by the governor and council, whenever the marine societies of those ports respectively shall certify "that he is incapable of discharging the duties of said office, or is otherwise unsuitable to be continued therein, or that the public interest requires that he should no longer remain in office." Pilots at other ports are removable at any time at the pleasure of the governor and council.

The subsequent clause in § 4 of this statute, requiring the commissioners to "receive and hear complaints by and against pilots for the harbor of Boston, and examine into and decide the same," is a distinct provision from that relating to removals, and, like § 11 of Gen. Sts. c. 52, has reference to other objects. No inference should be drawn therefrom as to the formality of proceedings looking only to the exercise of the power of removal.

Upon these considerations, the court are of opinion that the peremptory writ should be

Refused.

GEORGE WARREN & another vs. ALFRED SKOLFIELD.

The master of a ship in Liverpool agreed with brokers, who did business there and in Boston, that they should load her for a voyage to Boston, for a fixed commission, and she should be consigned to them there and discharged at a certain wharf by their stevedore; that, should she put into a port for repairs or otherwise, she should be consigned to their agents; and that they should collect all the freight and general average in Boston, and take additional commissions thereon. They accordingly loaded her with goods of various owners, and were paid the first named commission. On the voyage, she put into a port of distress, where they had no agents, and was condemned and sold. The master chartered other vessels there to transport the goods to Boston; and borrowed money on a respondentia bond, and agreed with the obligee to consign the cargoes to an indorsee of the bond. When these vessels arrived in Boston, the brokers demanded that they should

discharge at the wharf specified in the agreement made in Liverpool; but he did not comply with the demand, and denied their right and refused to enable them to collect the freight and general average. *Held*, that, even if he had authority to make the agreement with them in Liverpool, yet they could not maintain an action against his owners for the additional commissions, and for damages on account of the failure to discharge at the specified wharf.

The master of a vessel in a foreign port has not implied authority to bind the owners by an agreement with brokers, who are loading her for a voyage for a fixed commission, that she shall be consigned to them at the port of destination, with a right on their part to supply the wharf and stevedore for her discharge, and collect all freight and general average for an additional commission.

CHAPMAN, C. J. This is an action of contract, in which the plaintiffs, who are copartners doing business in Liverpool, England, and in Boston, Massachusetts, claim against the defendant, who was part owner of the ship *Rising Sun*, certain commissions and general average charges, and damages.

1. Two of the owners of the *Rising Sun* resided in Alabama; the others, including the defendant, resided in Maine.

Captain Orr, who was master of the ship, made a contract with the plaintiffs at Liverpool June 29, 1866, by which they were to load the ship on the berth for Boston; the ship to be consigned to them at Boston, and to be discharged at Constitution Wharf, or such other wharf to be named by them where she could lie afloat, by the consignees' stevedore. It was further agreed, that, should the ship "put into a port for repairs or otherwise," she was to be consigned to the plaintiffs' agents, and their agents in Boston were to attend to the collection of all freight and general average, upon which they were to have a commission of two and a half per cent. For their services at Liverpool, the plaintiffs were to receive a brokerage of five per cent.; which was paid. In this action they claim to recover commissions on the freight of the cargo, and general average charges, and damages because the cargo was not discharged at Constitution Wharf.

But the events upon which they would be entitled, by the terms of their contract, to recover the charges above stated, at the termination of the voyage, never occurred. The ship was loaded at Liverpool with a large cargo, belonging to and shipped to different persons; and the ship sailed. But instead of pro-

ceeding to Boston, she was compelled by the perils of the sea, in September, to put into the port of St. Thomas, in the West Indies, as a port of distress, and was there condemned and sold. Thus the freight upon which the commissions were to be charged was never earned. The plaintiffs had no agent at St. Thomas, and the captain was therefore compelled to seek aid from other agencies. The master was obliged to transport the cargo by means for which the contract had made no provision. He chartered two ships, which took most of the cargo; and sent the rest on board a third ship. When the ships arrived at Boston, the plaintiffs claimed that their respective cargoes should be discharged at Constitution Wharf; but the master did not assent to this, and the cargoes were discharged elsewhere. The plaintiffs also claimed the right to collect the freight and general average charges; but this was not assented to. The master had a right to resist these claims; for the freights and charges belonged to other voyages, made in other ships, and the contract did not, by its terms, apply to them. A contingency had happened which the contract did not provide for.

The master had borrowed money at St. Thomas of William Murta on a respondentia bond; and it was agreed between the master and the obligee, that he should consign the cargoes from St. Thomas to the agents of the Bank of America of New York, to whom the bond was indorsed. This agreement was indorsed on each of the charter parties there made. The master had a right to enter into this obligation, as against the plaintiffs, and acting as he was bound to do for the interest of the owners. *Stearns v. Doe*, 12 Gray, 482.

These views are independent of the question whether the master had implied authority to make such a contract as the plaintiffs are seeking to enforce.

2. By all the authorities, the master is the agent of the owner for the purpose of enabling him to carry on the trade in which the ship is engaged in the usual manner, but his authority is limited to that object. If he exceeds his authority, his acts are not binding on the owner. In *Lemont v. Lord*, 52 Maine, 365, 390, it was held that he had no right to intermeddle with the

cargo on the safe termination of the voyage. It does not appear to be usual or reasonable that a broker, who receives his brokerage for loading the ship at the port of departure, may also take the master's stipulation that the cargo shall be consigned to him at the port of destination, with the right on his part to supply wharf and stevedore for the discharge, and attend to the collecting of all freight and general average, for a stipulated commission; and that the master has implied authority to bind the owner by such an agreement. We think the implied authority does not extend so far as this.

Judgment for the defendant.

J. D. Ball, for the plaintiffs, cited Story on Agency, (7th ed.) §§ 36, 116, 160 a, 161, 162; *Stearns v. Doe*, 12 Gray, 482; *Negus v. Simpson*, 99 Mass. 388; *Huntington v. Knox*, 7 Cush. 371; *Bank of British North America v. Hooper*, 5 Gray, 567; *Eastern Railroad Co. v. Benedict*, Ib. 561; *Searle v. Scovell*, 4 Johns. Ch. 218; *Mumford v. Commercial Insurance Co.* 5 Johns. 262; *Shipton v. Thornton*, 1 Per. & Dav. 216, 233.

H. C. Hutchins, for the defendant, besides authorities cited for the plaintiffs, cited Story on Agency, (7th ed.) § 118; 2 Parsons on Shipping, 8; Maude & Pollock on Shipping, (3d ed.) 112-114; *Lemont v. Lord*, 52 Maine, 365; *Hurry v. Hurry*, 2 Wash. C. C. 145; *The Sir Henry Webb*, 13 Jur. 639; *Reynolds v. Jex*, 7 Best & Smith, 86; *Walsh v. Purvan*, 8 Exch. 843; *Grant v. Norway*, 10 C. B. 665; *Liddard v. Lopes*, 10 East, 526; *Thwing v. Washington Insurance Co.* 10 Gray, 443, 457; *The Waldo*, Daveis, 161; 2 Phil. Ins. (5th ed.) § 1684; 1 Arnould on Ins. (8d ed.) 350.

**SUN MUTUAL INSURANCE COMPANY vs. JOHN G. HALL &
another.**

An abandonment of insured property to the insurers relates back from the time of their acceptance of it to the time of the loss, and enables them to sue in their own name for the property or its proceeds.

The master of a vessel, whose damaged cargo was sold in a port of distress, transmitted the proceeds, with directions to hold them to his credit, to a creditor of the owners of the vessel, who were not the owners of the cargo; and the creditor received them with notice that they belonged to the owners of the cargo, but nevertheless credited them upon the debt owing to him. Insurers of the cargo, who had accepted an abandonment and paid its owners as for a total loss, then sued the owners of the vessel for said proceeds and summoned the creditor as trustee; and before judgment in the trustee process, never having intended to confirm his appropriation of them, they brought suit for them directly against him, he having meanwhile made no change in his position in the matter. *Held*, that the pendency of the first suit was no bar to the prosecution of the second.

CONTRACT for the proceeds of a draft. At the trial in the superior court, before *Lord, J.*, without a jury, it appeared that the plaintiffs were insurers of a cargo of sugar shipped on the schooner *Minnie Arnold* from Havana for New York in November 1868, and owned by *Wylie, Knevals & Company* of the latter city; that the schooner, being disabled on the voyage, put into St. Thomas on January 1, 1869, and the cargo, being damaged, was sold by recommendation of a board of survey, for the benefit of whom it might concern; that on February 23, *Wylie, Knevals & Company*, upon receiving a letter from the master informing them of the loss, made an abandonment to the plaintiffs, who paid them for a total loss in four instalments, on February 24, March 9, March 20, and April 7; that part of the proceeds of the sale was spent by the master in St. Thomas in repairs on the schooner and otherwise, and the draft was purchased with the balance and sent by him to the defendants in Boston, who received it March 8, accompanied with a letter in which he wrote "It is likely, should I not succeed in obtaining a paying freight, that I will proceed to Turk's Island for a cargo of salt on vessel's account, with which I intend to proceed to your port; you will in the mean time have

the adjustment made out against my arrival, holding the amount herein remitted to my credit. You will of course act for the interest of the vessel in my absence as regards the freight, &c.;" that, about the same time, the defendants received from the master accounts, protests and papers, which they handed to an average adjuster, who prepared from them a general average statement, dated April 29; and that, after paying the adjuster's fees, they placed the balance of the proceeds of the draft to the credit of the owner of the schooner, who was indebted to them at the time.

It further appeared that the plaintiffs commenced a suit against the owner of the vessel, summoning these defendants as his trustees, by writ dated April 26, entered at the same term with the present action, and now pending, with a declaration containing two counts for money expended at St. Thomas in repairing the schooner, and a third count for the entire sum which appeared by the average adjustment to be due to the plaintiffs from the sale of the sugar. The adjuster's fee was also charged in the general average adjustment, a copy of which was put in evidence by the plaintiffs.

"The judge found, on all the evidence, that the plaintiffs had not intended to confirm any appropriation made by the defendants of said proceeds on their books, or to waive any right of action against the defendants. It appeared that no motion had been made for an order of notice to the principal defendant named in said writ, who resided in Nova Scotia, and upon whom no personal service had been made, or to charge the defendants as his trustees for the amount of the draft, of which their answer disclosed their receipt, together with their appropriation of the proceeds of it, accompanied by a denial of any other fund. The defendants testified that they made no change in their position in the matter between the service of the two writs. The judge found, as matters of fact, that the defendants received the draft with notice that it belonged to the owners of the cargo; that the general average adjustment was procured for the purpose of enabling the owner of the vessel to make a claim for a partial loss upon the insurers of the vessel; that the defendants

had sent it to the owner; and that the plaintiffs had no interest in having it made and derived no benefit from it."

It also appeared "that the defendants had had a business connection for about a year with the schooner; had furnished her with supplies, secured a cargo, procured insurance on the same, and acted as the general agents of the schooner when she came to Boston; that they had for four years acted as consignees, and furnished supplies for vessels belonging to the owner of the schooner; that they received a letter from Wylie, Knevals & Company inquiring about the schooner, which they answered February 24, 1869, stating that they had received no intelligence concerning any disaster to her; that they never afterwards made any communication on the subject to Wylie, Knevals & Company, or to the plaintiffs; and that the plaintiffs, before commencing this action, made a demand on them for the proceeds of the draft."

The defendants requested the judge to rule, "that the suit should have been commenced in the name of Wylie, Knevals & Company, and not in that of the plaintiffs; that the suit by the plaintiffs against the owner of the vessel, in which these defendants were summoned as trustees, was a waiver in law of any right to maintain the present action, and a confirmation in law of the appropriation by the defendants of the proceeds of the draft to the credit of the owner of the vessel; and that the plaintiffs could not in any event recover more than the balance remaining after deducting from the proceeds of the draft the amount due to the defendants from the owner of the schooner." The judge refused so to rule; the verdict was for the plaintiffs; and the defendants alleged exceptions.

C. S. Lincoln, for the defendants.

L. S. Dabney, (*R. H. Dana, Jr.*, with him,) for the plaintiffs.

CHAPMAN, C. J. The abandonment, from the time it was accepted, related back to the time of the loss, and put the insurers in place of the owners. 2 Phil. Ins. § 1708. *Clark v. Wilson*, 103 Mass. 219. The master of the vessel, in the discharge of his duties to all parties interested, had purchased the draft in question with the proceeds of the cargo and sent it to the de

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defendants, who had notice that it was the property of the plaintiffs. They ought to have sent the draft or its proceeds to the plaintiffs, whose property it was; or to Wylie, Knevals & Company, who would have received it for the plaintiffs. But this action should not have been brought by Wylie, Knevals & Company, for they had no right to the proceeds as against the plaintiffs. It is properly brought in the name of the plaintiffs, who were the owners of the draft and its proceeds.

The action of the plaintiffs against the owner of the vessel, in which they summoned these defendants as trustees, is no waiver of the plaintiffs' rights, as against the defendants. No judgment has been rendered in it; there was no intention on the part of the plaintiffs to confirm the appropriation of their funds which the defendants had made; and no change has been caused by it in the position of the defendants. There is no principle upon which this action can be barred by the proceeding.

The plaintiffs are entitled to recover, upon the facts found by the judge, the whole proceeds of the draft and interest.

Exceptions overruled.

WILLIAM T. BRAMHALL vs. SUN MUTUAL INSURANCE COMPANY

A policy of insurance on a vessel to a port of discharge and until she be moored twenty-four hours in safety does not cover a loss occurring after she has lain three weeks at a place to which she was destined as a place of discharge, where she has discharged a substantial part of her cargo, and at which similar vessels uniformly discharged in whole or in part; although one of her owners, being present at the port, intended to take her into an inner basin in the same port to complete her discharge.

CONTRACT on a policy of insurance on the ship George Washington, for a voyage from Liverpool to the Chincha Islands "and thence to a port of discharge in Spain," and to continue until she should be safely arrived at such port of discharge and be moored twenty-four hours in good safety. The case was submitted to the judgment of the court on agreed facts, of which the material parts were as follows :

"In the prosecution of this voyage, the ship sailed from the Chincha Islands, with a cargo of guano, to Valencia in Spain, to discharge, where she arrived at her anchorage on February 5, 1867. The port of Valencia is an open roadstead, exposed on the easterly side to winds and seas, but with good anchorage and holding ground. All vessels at this port are discharged into lighters; and, until the time hereinafter mentioned, the only place of discharge for vessels arriving there was at the anchorage ground, where the *George Washington* came to anchor, and lay until the date of her loss. Vessels in the condition of the *George Washington*, on reaching this anchorage, and before commencing to discharge any part of their cargo, are fully entered at the custom-house, and their papers delivered to the consul of their country. Toward the close of the last century, the Spanish government began some works for the convenience of lighters delivering cargo from vessels at the anchorage ground, and, eventually, for the better protection of shipping. By the year 1854, the basin formed by these works had so far advanced that small coasting vessels of about fifty tons could lie inside the wharf or mole. Since 1854, said works have gradually advanced, until in 1867, when the *George Washington* was lost, the basin, though not completed, was accessible to vessels drawing not over sixteen feet; and vessels of larger draft, discharging at the anchorage, generally, but not uniformly, came into the basin after sufficiently reducing their draft, for greater convenience of lightering and taking in ballast. But, with this qualification, the place of discharging guano ships remains now, as it has ever since the commencement of that trade been, at the anchorage ground, where they are discharged into lighters furnished by the consignees at the expense of the ship, by stevedores from shore, and without the assistance of the crew. For this reason vessels, after anchoring at the place of discharge, sometimes discharge a part of their crew, retaining only enough to protect the ship. The time usually occupied in discharging a ship of the *George Washington's* tonnage varies from four to six weeks, according to the weather and the pleasure of the consignees.

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"On the arrival of the *George Washington* at Valencia, she drew about twenty-two feet of water, and came to anchor, under the direction of the port authorities, at the usual place of anchorage and discharge for vessels of her size and draft, and was duly entered at the custom-house. The master lodged his ship's papers with the United States consul, as required by law; notified the consignees of his readiness to discharge; discharged his ship-carpenter and part of his crew, and, as soon as lighters were furnished by the consignees, which was about three days after the ship reached her anchorage, she commenced discharging, and lay thereafter at anchor in good safety during the remainder of the month of February, and until about March 3, 1867, several other guano vessels lying meanwhile in the immediate vicinity, discharging.

"Within a fortnight after the discharging commenced, the master of the *George Washington* left Valencia and returned home, arriving in Boston the same day the ship was lost at Valencia. After the master's departure, the mate, and such of the crew as had not been discharged, remained in charge of the vessel; one of her owners, John Taylor, being at the time on shore at Valencia, whither he had gone to look after the general business of the ship, to collect her freight, and to seek future employment for her. The plaintiff can prove, if admissible and material, that Taylor intended to take the vessel into the inner basin to complete her discharging.

"On March 3, 1867, while the *George Washington* lay at her anchorage, in charge of the mate, with no master, and with only part of her crew on board, one of the vessels lying near her went adrift in a gale, and dragged toward the *George Washington*, and the mate, to avoid a collision, which he deemed imminent, slipped her chains, and the vessel was driven on to the beach and there went to pieces. When the vessel went on shore, she had on board the mate, the cook, a carpenter shipped at Valencia for the next voyage, and eleven seamen, out of the ordinary crew of eighteen men. Prior to her loss, the *George Washington* had discharged and delivered in safety to the consignees 766 tons of guano out of the 2000 tons, or thereabouts.

which constituted her cargo; and freight, amounting to upwards of \$18,000, on the cargo so delivered, was paid to Taylor by the consignees of the cargo."

F. C. Loring, for the plaintiff.

R. H. Dana, Jr., & J. D. Bryant, for the defendants.

GRAY, J. A vessel arrives at a port of discharge when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place, a policy insuring her until arrival at a port of discharge terminates, and cannot be extended or revived, after she has discharged part of her cargo there, by her removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo, or for any other purpose. This rule has long been established, so far as to exclude the continuance of the risk to a second port under a policy insuring a vessel to a single port of discharge. *Leigh v. Mather*, 1 Esp. 411. *Coolidge v. Gray*, 8 Mass. 531. *Dodge v. Essex Insurance Co.* 12 Gray, 65. *Fay v. Alliance Insurance Co.* 16 Gray, 455. 1 Phil. Ins. §§ 955, 962, 993. The removal, after discharging part of her cargo at a place at which she has anchored for the purpose, to another place in the same port, is within the same principle.

The case of *Whitwell v. Harrison*, 2 Exch. 127, is decisive of this question. In that case, the policy was upon a ship from Liverpool to Quebec, and thence back "to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in safety." The ship was chartered to take on board a cargo of lumber at Quebec and proceed therewith to Wallasey Pool in the River Mersey, or as near thereto as she could safely get, and there discharge her cargo. She came into the Mersey, and being unable, by reason of her too great draft of water, to get into Wallasey Pool, anchored abreast of it, and proceeded for several days to discharge her cargo and raft it into the port, and, while doing so, fell over and sustained damage. It was proved that the captain always intended to take the ship into Wallasey Pool with as much of the cargo on board as she could safely carry there. Upon these facts, Baron Rolfe (after-

wards Lord Cranworth) ruled that the underwriter was not liable, and directed a verdict for the defendant. In a judgment delivered by Baron Alderson, the court of exchequer (of which, besides these two able judges, Barons Parke and Platt were then members) refused a new trial, upon the ground that the place of anchorage was the intended place for the discharge of the cargo, and that the vessel had therefore clearly arrived at her port of discharge, and had been moored there twenty-four hours in safety before the accident occurred.

Anchoring for the purpose of discharging cargo at a place to which the ship is destined for that purpose, and at which ships usually discharge cargo, is equally an arrival at a port of discharge, although the place is not within any harbor. It is not necessary to refer to cases of time policies, for it is clear that such a place is a port, within the meaning of the description of the voyage insured in a voyage policy. *De Longuemere v. New York Insurance Co.* 10 Johns. 120. *Sea Insurance Co. v. Gavin*, 4 Bligh, N. S. 578; S. C. 2 Dow & Cl. 129. *Lindsay v. Janson*, 4 H. & N. 699. *Harrower v. Hutchinson*, Law Rep 4 Q. B. 523, and Law Rep. 5 Q. B. 584.

We find nothing inconsistent with these views in the decisions cited by the learned counsel for the plaintiffs. In *Dickey v. United Insurance Co.* 11 Johns. 358, *Zacharie v. Orleans Insurance Co.* 17 Martin, 637, and *Samuel v. Royal Exchange Assurance Co.* 8 B. & C. 119, the vessel had been obliged by order of the port authorities, or stress of weather, to anchor without reaching any place at which she intended to remain or to discharge any part of her cargo.

In *Brereton v. Chapman*, 7 Bing. 559, the only point decided was, that the lay days allowed by a charter party for the ship's discharge were not to be reckoned from her arrival at the entrance of the port, although she there removed a portion of her cargo into lighters because she drew too much water to proceed with her entire cargo; but it was admitted on all hands, and declared by the court, that they would run from the time of her arrival at the usual place of discharge. That case appears to us, as it did to the court of exchequer in *Whitwell v. Harrison*, not

at all to affect this question, and for the reason stated by Baron Alderson: "There the vessel was still in progress to the ultimate place for the discharge of her whole cargo, and all that was done was to put on board lighters a portion of the cargo, in order that the vessel might be enabled thereby without delay to proceed with them to the usual place of discharge." 2 Exch. 135. It may be added that it appears by the fuller report of *Brereton v. Chapman*, in 5 Moore & Payne, 526, that, upon arrival within the entrance of the harbor, the master reported the vessel, and told the consignee that she was aground and in an unsafe situation, and that it was necessary that a lighter should be sent down in order that by taking out a part of the cargo she might get up to the quay.

In *Taber v. Nye*, 12 Pick. 105, which was upon a seaman's contract for a whaling voyage "from New Bedford and back to New Bedford," it was only decided that the voyage had not terminated by the grounding of the vessel, without casting anchor or furling sails, on a bank outside of the harbor, though within the legal limits of the town and port of New Bedford, and remaining there a few hours, after which she floated and was brought into the harbor. Mr. Justice Putnam, in delivering the opinion of the court, said: "It is perfectly clear that by the returning to New Bedford the parties meant to her destined place of mooring there, and not merely to the waters and territory within the limits of the town and port of New Bedford." "But this ship took the ground while she was proceeding to her place of mooring."

The case of *Meigs v. Mutual Marine Insurance Co.* 2 Cush. 439, was of a policy upon a ship for a whaling voyage, and back to Mattapoissett, and to continue until she had arrived and been moored at anchor twenty-four hours in safety. The question whether the ship had arrived was submitted to the judgment of the court upon the testimony of the pilot who brought her into the harbor, which the court held must therefore be taken as true, and the essential part of which, and the question arising thereon, were thus summed up by Mr. Justice Fletcher in delivering judgment: "One of the facts most expressly and distinctly

stated by him is, that the destination of the ship was to Long Wharf; that she came to anchor, not to unlade, but to lighten, in order to enable her to get to her place of destination; and that she was making her way towards the point to which she was destined, and before reaching it was destroyed. The simple question therefore is, whether the ship, being destined to the wharf as the place of unloading, but being obliged to anchor after coming within the harbor for the purpose of lightening, to enable her to go up to the wharf, there not being sufficient water for her to reach the wharf with the cargo all in, is to be considered as having arrived, within the meaning of the policy, upon reaching the place of anchoring for the purpose of lightening." It is to the facts thus found, and the question of law thus stated, that the judgment against the underwriters in that case is to be applied. It was indeed said in the opinion: "While she is properly pursuing her course to the place of her ultimate destination and of complete and final unlading, and until she reaches that place and has been moored there in safety twenty-four hours, she is insured and protected by the policy." As applied to the case in judgment, this was a sound and accurate statement of the law. But it is not to be inferred from this, in opposition to all the other authorities, that in a different case, not then before the court, of a vessel destined to a particular place short of the wharf, for the purpose of discharging part and perhaps the whole of her cargo, and which did discharge part at that place, and remain there twenty-four hours in safety, the vessel would afterwards continue to be covered by the policy.

The effect of the clause in the policy, by which the risk is to continue until the vessel shall have safely arrived and be moored twenty-four hours in good safety, is settled, in accordance with a judgment of this court delivered by Chief Justice Parsons sixty years ago, to be simply to continue the risk against the perils insured against for twenty-four hours after the arrival and mooring of the vessel. If at the expiration of that time she has suffered no loss from those perils, the policy is at an end. *Bill v. Mason*, 6 Mass. 313. *Lidgatt v. Secretan* Law Rep. 5 C. P. 190. 1 Phil. Ins. § 968.

Applying the principles of law thus established to the facts agreed by the parties, it is clear that the *George Washington* had safely arrived at her port of discharge in Spain, and been there moored twenty-four hours in good safety, before the loss sued for. She proceeded to Valencia to discharge, and anchored at that port in an open roadstead, exposed indeed on one side to the winds and seas, but with good anchorage and holding ground. She was fully entered at the custom-house, and the master lodged her papers with the consul of the United States as required by law, notified the consignees of his readiness to discharge, dismissed part of her crew, retaining only enough to protect the ship, and himself left the ship and returned to the United States before the loss. The ship drew too much water to come into the basin; and the place of her anchorage is found to have been the place at which ships of her draft are usually discharged, by means of lighters furnished by the consignees at the expense of the ship, by stevedores from the shore, and without the assistance of the crew; although such vessels, "discharging at the anchorage, generally, but not uniformly, come into the basin after sufficiently reducing their draft, for greater convenience of lightering and taking in ballast." As soon as lighters were furnished by the consignees, three days after she reached her anchorage, the ship began to discharge, lay at anchor there for more than three weeks, and discharged one third of her cargo.

The fact, if proved, that one of her owners, being then at Valencia, "whither he had gone to look after the general business of the ship, to collect her freight, and to seek future employment for her," intended to take her into the inner basin to complete her discharge, could not be allowed any greater weight as against the controlling fact that she had arrived and been moored twenty-four hours in good safety at the place to which she was originally destined as a place of discharge, at which she did discharge a substantial part of her cargo, and at which similar vessels uniformly discharge in whole or in part, than was allowed by the court of exchequer to corresponding evidence in *Whitwell v. Harrison*, above cited.

Warren v. Franklin Insurance Company.

Our judgment cannot be affected by the decision of the tribunal of commerce of the city of Valencia in a case of general average between the parties interested in another ship injured in the same place at the same time, (a copy of which was handed to us at the argument,) because we have been furnished with no evidence of the terms of the contracts between those parties, the foreign law by which the case was governed, or the nature or grade of the tribunal by which the decision was made.

Judgment for the defendants.

GEORGE WARREN & another vs. FRANKLIN INSURANCE COMPANY.

In estimating a loss under an open policy of marine insurance, the rule of damages is based on the market value of the goods at the inception of the risk and not on the invoice price; and evidence of the usage of a particular port is inadmissible to vary this rule.

Judgment on a contract payable in gold must be rendered for gold coin specifically, and the pound sterling is to be estimated at \$4.84.

A policy of insurance provided that in case of loss all sums due to the insurers when the loss became due should be first deducted, and all sums coming due should be paid or satisfactorily secured, before payment of the loss. *Held*, that, in making up judgment in an action on the policy for the amount of a loss, the defendants could deduct the amounts of notes due to them from the insured, although they were not due at the beginning of the action; and the loss being payable in gold and the notes in currency, that the value of the notes in gold at the time they fell due should be ascertained, and such value deducted from the amount of the loss.

CONTRACT. Writ dated October 14, 1867. The declaration alleged that the defendants executed to the plaintiffs two policies of insurance, one for \$850 on 84 tons of cannel coal, and the other for \$5000 on 147 casks of soda ash, on board the barque Alida, at and from Liverpool to Boston, the losses payable in gold; that the vessel with her cargo was totally lost by perils insured against; that the coal was, and was agreed to be, of the value of \$850 in gold, and the soda ash was, and was agreed to be, of the value of \$5000 in gold; that the defendants had due notice and proof of the loss, and were bound by the terms of the policy to pay the plaintiffs the amount thereof in sixty days thereafter; that the sixty days terminated on June 4, 1867; that the defendants owed the plaintiffs said \$850 in

gold and \$5000 in gold; that these sums were at said date equivalent to \$1,245.25 currency and \$7,325 currency, respectively; and that the defendants also owed them interest from said date. The answer admitted the making of the policy, left it to the plaintiffs to prove the loss, denied all the other allegations in the declaration, and further alleged that, if the plaintiffs should prove that the defendants owed them any sum, the defendants were entitled to deduct from said sum the amount due on two premium notes payable in currency, both falling due on January 9, 1868, and given by the plaintiffs to the defendants for other policies. The defendants also filed a declaration in set-off on the same notes.

At the trial, before *Morton, J.*, it appeared that the coal was purchased by the plaintiffs November 8, 1866, and shipped by them November 17, 1866; that part of the soda ash was purchased on January 2, 1866, and shipped on November 16, 1866, and part was purchased on August 18, 1866, and shipped on November 19, 1866; that the ash rose considerably in market value at Liverpool, between the times of purchase and shipment; and that the cost price of the ash was inserted in the invoice. Both policies were open, and provided that "the premium and loss, if any, shall be payable in gold," and that "in case of loss, such loss shall be paid in sixty days after proof and adjustment, the amount of the premium note, if unpaid, without discount, and all sums due to the company from the insured when such loss becomes due being first deducted, and all sums coming due being first paid or secured to the president and directors, they discounting interest for anticipating payment."

There was no question as to the fact of the loss or the liability of the defendants, but only as to the manner in which the amount of the loss should be estimated. There was no dispute that the plaintiffs had the right to include the costs and charges of shipping the property, and the insurance premium, in the claim for loss; but the plaintiffs contended that the true measure of the loss was the market value of the property in Liverpool at the time of the shipment, with interest to the date of the loss, while the defendants contended that the invoice price was the true measure of loss.

The defendants offered to prove that by the usage in Boston in cases of an open policy, as between insurer and insured, the invoice value, and not the market value at the time and place of shipment, was treated as the basis of insurable value; but the judge excluded the evidence. Questions were raised whether payment and execution should be for gold dollars, or for the value of gold dollars estimated in currency; and whether anything for current rate of exchange should be added.

The plaintiffs denied that the defendants were entitled to set off the premium notes described in the answer and declaration in set-off, on the ground that they were not due when this action was begun.

The judge directed a general verdict for the plaintiffs, and reserved the case for the determination of the full court, — “if the exclusion of the evidence offered was erroneous the verdict to be set aside, and the case to stand for trial; otherwise the case to be sent to an assessor; in either case, under such directions as the full court shall give, as to the manner of making up and rendering judgment and issuing execution.”

J. D. Ball, for the plaintiffs.

C. A. Welch, for the defendants.

CHAPMAN, C. J. The rule of damages, which may be regarded as established in the United States, is the market value of the goods with certain costs and charges at the beginning of the risk. 2 Phil. Ins. §§ 1222, 1229. *Coffin v. Newburyport Insurance Co.* 9 Mass. 436. *Le Roy v. United States Insurance Co.* 7 Johns. 343. *Carson v. Marine Insurance Co.* 2 Wash. C. C. 468. *Cox v. Insurance Co.* 3 Rich. 331. In 1 Arnould on Ins. § 131, cited by the defendants' counsel, it is said that the rule in England is the invoice price, but it is admitted that the American rule is the true rule in theory. But in the third English edition by MacLachlan, p. 291, it is stated as the English rule that “the worth of the thing insured to its owner at the outset of the risk, with the expenses of the insurance, is, in all open policies, its estimated value for the purposes of insurance.” In many cases, the invoice price would be the market value, but in many other cases it would not.

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This being the rule of law as to damages, the custom of a particular port could not vary it. *Dickinson v. Gay*, 7 Allen, 29.

The contract being payable in gold, the judgment must be rendered for gold coin specifically. *Bronson v. Rodes*, 7 Wallace, 229. *Butler v. Horwitz*, lb. 258. *Independent Insurance Co. v. Thomas*, ante, 192. The pound sterling is to be estimated in our coin at \$4.84. *Commonwealth v. Haupt*, 10 Allen, 38.

It is admitted that the notes annexed to the defendants' answer, and declaration in set-off, cannot be made the subjects of a technical set-off. But each of the policies stipulates that in case of loss "all sums due to the company from the insured when such loss becomes due being first deducted, and all sums coming due being first paid or secured to the satisfaction of the president and directors, they discounting interest for anticipating payment," the loss shall be paid within sixty days after notice, proofs and adjustment of loss. The notes were not due when the action was commenced, but became due a few months afterwards. They are payable in currency, and, after finding their value in gold when they became due, that amount should be deducted from the plaintiffs' claim. If the parties cannot agree upon this amount, it must be ascertained by an assessor. The balance will be due to the plaintiffs with interest.

Judgment accordingly.

NANTUCKET COUNTY.

**FREDERICK W. PADDOCK vs. COMMERCIAL INSURANCE COMPANY
OF NANTUCKET.**

EDWARD FIELD vs. SAME.

At the trial of an action on a policy of insurance on a ship, the case was reserved for the determination of the full court, with an agreement of parties that if upon the evidence the jury would be warranted in finding a verdict for a total loss, judgment should be rendered for the plaintiff; if the plaintiff was entitled to recover for a partial loss, the amount thereof should be ascertained by an assessor; and if the jury would not be warranted in finding a verdict for either a total or a partial loss, the plaintiff should become

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monsuit. The full court held that the plaintiff was not entitled to recover for a total loss; but was entitled to recover for a partial loss, if it could be shown that the ship sustained damage to a certain amount upon a certain voyage; and the case was referred to an assessor to determine that question. *Held*, that at the hearing before the assessor, or before the court on the return of his report, it was not open to the defendant to contend that the partial loss was merged in a subsequent total loss; nor to the plaintiff to claim a general average loss.

Upon the question of the amount of an injury caused to a ship by perils of the sea, evidence of what it would cost to put her in repair at the end of the voyage, without reference to the causes which made such repairs needful, is incompetent.

In an action on a policy of insurance upon a ship, the plaintiff is bound to offer evidence by which injury by perils of the sea may be distinguished from defective condition arising from wear and tear and other ordinary causes.

The findings of an assessor in matters of fact may be revised by the court upon exceptions thereto and his report of the evidence introduced before him; but, especially when they depend upon a conflict of testimony, are not to be set aside unless clearly shown to be erroneous.

The finding of an assessor, in accordance with the opinion of competent experts testifying before him, upon a question of fact referred to him, is not invalidated by his stating in his report that "it is of course impossible to determine this question with anything like certainty."

Under a policy of insurance upon a ship, which provides that the insurers shall not be liable for a partial loss, unless it shall amount to five per cent., successive partial losses by distinct gales or storms upon different passages cannot be added together to make up the requisite five per cent.; and the burden of proving a partial loss amounting to five per cent. from one gale or storm is upon the assured.

When a ship cannot be fully repaired at a port of distress, the needful temporary repairs to enable her to proceed on her voyage, as well as complete repairs made at a subsequent port, are subject to the deduction of one third new for old, in computing the amount of a loss under a policy of insurance.

ACTIONS OF CONTRACT upon two policies of insurance made by the defendants on October 7, 1851, one to the plaintiff Paddock in the sum of \$5000, and the other to the plaintiff Field in the sum of \$3500; and each against the usual perils upon the ship Rambler, valued at \$15,000, and outfits valued at a like sum, on a whaling voyage from Nantucket to the Pacific Ocean and elsewhere and back to Nantucket; and containing this clause: "Provided, that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt grain, fish, fruit, hides, skins or other goods that are esteemed

perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel or freight, unless it amount to five per cent.; exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average." The two cases were tried and argued together throughout.

At the trial before the jury, at July term 1860, the plaintiffs introduced evidence of the following facts: The ship sailed from Nantucket October 23, 1851. In September or October 1854, she put into the Sandwich Islands to transship her oil and refit, and was there refitted and repaired, and left those islands in a seaworthy condition in all respects. About May 30, 1855, she encountered a heavy gale, (which continued for twenty-six hours,) and lost three boats, but proved tight and staunch. About the last of August 1855, while on the Japan cruising grounds, she met another gale, which continued for three or four days, with very bad seas and weather, such as would strain a staunch and seaworthy ship. During this gale she sprang a leak, the place of which could not be found until she got into port. The men were kept at the pumps one hour out of every six till she got into Lahaina in the island of Maui, October 5, 1855. There the master called a survey, and the leak was found in the scarf of the stem, where it laps upon the keel. The stem had started from the strain. The stem was refastened, the leak caulked and nearly stopped, and the ship rendered seaworthy for the voyage, though she still leaked three or four hundred strokes an hour. After receiving these repairs, she put to sea, and eight or ten days out encountered strong trade winds, which increased to a gale, with heavy cross seas. All hands were put to the pumps, and the try-works were thrown overboard to lighten the ship. The gale lasted three or four days; the casks were broken out; and a leak was found in the garboard seam, on the port side abreast the foremast, and was nearly stopped. The scarf of the stem and the keel remained as when the ship left Lahaina, leaking somewhat. The

new leak in the garboard seam increased or diminished according to the sail carried on the foremast. Both pumps were kept going till the leak was found and partially stopped. The crew forced the master to put away for the Navigators' Islands, and the ship arrived at Apia on one of those islands, December 5, 1855. The officers and crew called a survey; the ship was condemned, and was sold by the consul; the master protested against calling a survey, and against the condemnation and sale. The ship then had on board a quantity of oil and bone, partly of her own catchings, and partly taken on freight at the Sandwich Islands, which the master immediately after the sale of the ship took out and put on board another vessel. Just as this transshipment was completed, a heavy gale sprang up, and both vessels were wrecked and broken up. The bone and oil were saved and stored. The consul afterwards instituted what he called an admiralty court, and had the whole cargo seized, confiscated and sold, and the proceeds distributed among his officials and other persons on the island.

The defendants contended that upon the evidence introduced by the plaintiffs they were not entitled to recover as for a total or partial loss; and the case was reported, at the request of the defendants and with the assent of the plaintiffs, by *Merrick, J.*, for the determination of the full court, with the agreement that if upon the evidence the jury would be warranted in finding a verdict for a total loss, judgment should be rendered for the plaintiffs; if the plaintiffs were entitled to recover only for a partial loss, the amount of the same should be ascertained by an assessor; and if the jury would not be warranted in finding upon this evidence a verdict for either a total or a partial loss, the plaintiffs should become nonsuit.

Upon that report, the court at January term 1861 held that the plaintiffs were not entitled to recover for a total loss of either vessel or outfits, nor for any loss of that part of the outfits which had been converted into catchings; but were entitled to recover for a partial loss on the vessel, if it could be shown that she sustained damage to the amount of five per cent. before her arrival at Apia; and referred the case to Henry W

Paine, Esquire, as an assessor, to determine that question. 2 Allen, 93.

At July term 1865 the assessor made his report, which stated the history of the voyage, and the subsequent proceedings relating to the ship and cargo, substantially as above; and the material parts of the residue of which were as follows:

"It was proved that the harbor of Apia was ordinarily a safe one, that vessels of the size of the *Rambler* could there be hove down, and that workmen and materials, except copper, could there be obtained.

"The plaintiffs produced the depositions of three experienced shipmasters, who had been at Apia, and also at Sydney in New South Wales, and had had opportunities to know what facilities there were at each of those places for the repairing of ships, and what would be the expenses attending such repairs; and these deponents were asked, assuming the history of the voyage and the condition of the ship to be as before set out, whether the *Rambler* could have been thoroughly repaired at Apia, whether she could have been there so repaired that she might safely proceed to a port where thorough repairs could be made, what was the best and most accessible port where the vessel could be thoroughly repaired, what would be the cost of temporary repairs at Apia, and what the cost of thorough repairs at the best and most accessible port where these could be obtained. The defendants objected to these questions; but the objections were overruled and the questions were answered.

"There was no evidence showing or tending to show any specific damage sustained by the ship, except that in the scarf of the stem and that in the garboard seam; or what would have been the cost of repairing either.

"It was proved that, to render it prudent and safe for the ship to proceed on her voyage, it would have been necessary to strip the garboard streak, refasten and recaulk it; that this might have been done at Apia after discharging cargo and heaving the ship down; and that the expense, including the cost of procuring the money, would have been \$3125. These repairs would have rendered it safe for the ship to proceed to Sydney, where thor-

ough repairs could have been made; this being the best and most accessible port for the ship under the circumstances.

"It was proved that, in order thoroughly to repair the ship, to make her so staunch, strong and seaworthy that she might safely prosecute her homeward voyage, it would have been necessary to strip off her metal and sheathing, recaulk her, refasten her, and put on new sheathing and a new suit of metal; and that to do this in Sydney would have cost \$10,000.

"These facts are found on the testimony of the three deponents" above mentioned. "Their opinion is based on the assumption that the voyage and condition of the ship were as before stated.

"The parties did not furnish the means of determining what proportion of the damage was caused by the first gale and what by the second.

"The assessor finds the total cost of repairing all damage to have been \$13,125. Deducting one third, new for old, the partial loss is found to have been \$8750. Of this sum, the defendants should pay to the plaintiff Paddock $\frac{2}{3}$ or \$1458.33, and to the plaintiff Field $\frac{1}{3}$ or \$1020.83.

"The assessor has rejected all items of general average usually taken into account in the adjustment of a partial loss; because, 1st. there has been no voluntary sacrifice of a part for the safety of the residue; and 2d. the means of ascertaining the value of the contributory interests have not been furnished.

"The defendants contended that no recovery could be had; because, 1st. no specific sea damage sustained in any one gale had been proved to amount to five per cent.; and 2d. the partial loss, whatever it was, was merged in the subsequent total loss of the ship. The honorable court have the facts necessary for the determination of these questions."

The assessor, at the request of the defendants, and against the objection of the plaintiffs, reported all the evidence introduced, by deposition or orally, before him.

The defendants excepted to the assessor's report in the following particulars:

First. To his ruling that the testimony of the three shipmasters was admissible evidence in the case.

Second. To his finding, based on that testimony, as not warranted by the evidence in the case.

Third. "Because he has not reported what specific damage, if any, was done to the ship by any peril within the policy declared on, before her arrival at Apia, nor whether the same was done in one storm or in several distinct storms, nor the cost of repairing the same, if any."

Fourth. To the finding that the defendants should pay to the plaintiff Paddock \$1458.33, and to the plaintiff Field \$1020.83, "because the evidence in the case does not," and **Fifth,** "because the facts found and reported by the assessor do not, warrant the conclusion that either of those sums, or any part of either of them, is lawfully due under either of the policies declared on, by reason of any sea damage within the said policies, or either of them, sustained by the vessel before her arrival at Apia."

Sixth. "Because it is not found," and **Seventh,** "because there was no evidence to warrant any finding, that such sums, or any part thereof amounting to five per cent., would have been required to repair any sea damage sustained by the said ship, within the said policies, or either of them."

Eighth. "Because, inasmuch as it was not proved, and is not found, that the expenditures actually made at Lahaina to repair sea damage amounted to five per cent., and inasmuch as no expenses were proved to have been actually incurred at Apia, and the vessel was there destroyed and totally lost by a peril not insured against by these defendants, the assessor should have reported that it was not proved that the vessel did sustain any sea damage, for the cost of repairing which the defendants are liable."

Upon that report and the exceptions, the case was reserved, at the request of the parties, by *Gray, J.*, for the determination of the full court, and was argued in November 1865.

B. R. Curtis, for the defendants.

S. Bartlett, for the plaintiffs.

BIGELOW, C. J. 1. The question of a merger of a partial loss in a subsequent total loss is not now open to the defendants.

2. The finding of the assessor is based on incompetent evidence. The real subject matter of inquiry was the amount of injury to the vessel, caused by sea perils, which constituted the alleged partial loss; not what it would cost to put the vessel in repair, either temporary or permanent, after a voyage of several years' duration, and without reference to the causes which made such repairs needful.

3. The plaintiffs, in order to warrant a finding by the assessor in their favor for the amount due for the partial loss, were bound to offer evidence by which he would be able to distinguish between injury to the vessel by sea damage, causing partial loss, and the defects, depreciation, and want of repair attributable solely to wear and tear and other ordinary causes during the prosecution of the voyage.

The amount of injury to the vessel by sea damage should be found by the assessor upon competent evidence, before we consider the questions, whether successive partial losses to a vessel can be put together to make up five per cent., and whether, if it appears that the vessel has sustained damage by sea perils to the amount of ten per cent. or more, the burden is on the plaintiffs or defendants to show that in fact any part of such sea damage was equal to less than five per cent., arising from any one cause. The report must therefore be recommitted to the assessor. If injury was done to the vessel by successive causes or sea perils, the assessor will, if possible, ascertain the extent of each, and the cost of repairing each separately. *Report recommitted.*

At July term 1869 the assessor made his second report, which stated the history of the voyage and the proceedings at Apia, substantially as above; and the residue of which was as follows:

"The cost of the repairs made at Lahaina was not shown, and no repairs were made at Apia. No expert gave an opinion as to what it would have cost to repair, either temporarily or permanently, the injury sustained in the first gale by the starting of the stem from the keel; or in the second gale by the opening of the garboard seam. The assessor is therefore un-

able to ascertain the extent of the damage suffered in either gale, or proximately to determine what would be the cost of repairing it.

"A question was made whether there was any connection between the two injuries; whether the starting of the scarf did or not occasion the opening of the garboard seam. It is of course impossible to determine this question with anything like certainty. Garboard seams have opened while the stem was fast to the keel. It will be readily perceived that the working of the stem would help to open this seam. And upon the opinion of the experts I find that the opening of the garboard seam is, in this case, attributable to the working of the stem.

"The plaintiffs introduced evidence tending to show that the ship could not have had such thorough repairs of the first injury at Apia, as would have rendered her seaworthy for her voyage; but that they might have been so far repaired as to enable her to proceed to Sydney, New South Wales, the best and most accessible port where the same could have been thoroughly repaired. The defendants introduced evidence tending to show that such were the facilities for repairing ships at Apia, that the *Rambler* might have been put in a seaworthy condition. What would have been the cost of repairing said injuries to the ship was entirely a matter of opinion, depending upon what it would be necessary to do to her. The experts called by the defendants were of opinion that it would be necessary to discharge the cargo, heave the ship down, and strip off the sheathing above the place of the leak; if the garboard streak was sound, to caulk it; otherwise, to repair with a new piece so much of the old plank as proved unsound, and no more. The plaintiffs' experts were of opinion that, to thoroughly repair said injury to the ship, which had been so strained, it would be necessary to strip her entirely and recaulk her all over. In this conflict of opinion, I find that the injuries to the ship could not have been thoroughly repaired at Apia, though I cannot adopt the estimate of the cost of needful temporary repairs at Apia made by the plaintiffs' witnesses.

"I find the cost of such repairs of said injuries to be \$2000, including the expense of raising the money; and I find it would have cost \$10,000 to repair the said injuries to the ship thoroughly at Sydney. Two thirds of this sum, added to the cost of the temporary \$2000, make a total of \$8867. Of this sum Paddock should recover one sixth, to wit, \$1477.83, and Field, \$1034.48, with interest.

"I have not made a general average account, as I understand that by the rescript of the court the plaintiffs are restricted to the recovery for partial loss of the vessel."

The defendants excepted, First. "To so much of the finding of the assessor's report as connects the loss occasioned by the starting of the scarf in the gale of August 1855, with that occasioned by the opening of the garboard seam in the gale after leaving Lahaina." Second. "To the finding of the assessor, that such repairs could not be made at Apia as would render the vessel seaworthy for the voyage." Third. "To the finding which allows the whole cost of temporary repairs made at Apia, and adds the same to two thirds of the cost of repairs made at Sydney." Fourth. "To the finding that the plaintiff Paddock is entitled to recover \$1477.83 and interest, and the plaintiff Field \$1034.48 and interest; and the defendants submit that they are not entitled to recover any sum whatever."

The assessor, at the request of the defendants, and against the objection of the plaintiffs, reported so much of the evidence as related to the findings thus excepted to. And the questions raised by these exceptions were reserved by *Ames, J.*, for the decision of the full court, before which the case was now argued by the same counsel.

GRAY, J. Several of the exceptions taken by the defendants to the assessor's report relate to mere questions of fact.

1. The learned counsel for the plaintiffs contends that it is not competent for the assessor to report the evidence, nor for the court to examine it, for the purpose of revising his findings upon these questions. But this position cannot be maintained. Whenever in any civil action, facts are found otherwise than by the judge, the findings are subject to the revision of the court,

upon the evidence being properly brought before it. Even the verdict of a jury may be set aside as against evidence and the weight of evidence. When a case at law or in equity is referred to an auditor, his report is made by statute *prima facie* evidence only at the trial or hearing, and even his findings upon questions preliminary to the admission of testimony may be revised by the court upon a motion to recommit his report. Gen. Sts. c. 121, § 46. *Morgan v. Morse*, 13 Gray, 150. *Crafts v. Crafts*, Ib. 360. *Kendall v. May*, 10 Allen, 59. Whenever, in the absence of special provisions of statute or of the rule of reference, a case at common law, or in equity or admiralty, is referred to a subordinate officer, for the purpose of finding facts and reporting them to the court, whether he is styled assessor, auditor, master in chancery, or commissioner, his findings may be reviewed by the court; and the appropriate way of bringing them before the court for this purpose is by specific exceptions to his findings, and by his report of the evidence upon the points on which exceptions are taken; but his findings have the weight of a verdict, and, especially when they depend upon a conflict of testimony, are not to be set aside unless they clearly appear to be erroneous. *Donnell v. Columbian Insurance Co.* 2 Sumner, 366. *Taber v. Jenny*, 1 Sprague, 315. *Heebner v. Eagle Insurance Co.* 10 Gray, 131, 143. *Fisk v. Gray*, 100 Mass. 191. *Dean v. Emerson*, 102 Mass. 480.

2. On the question whether the starting of the scarf of the stem did or did not occasion the opening of the garboard seam, the statement of the assessor, "that it is of course impossible to determine this question with anything like certainty," is not inconsistent with the affirmative thereof being established by a fair preponderance of the evidence. And his finding accordingly is not shown, upon a careful revision of the testimony, to be so clearly erroneous that it should be set aside.

3. The assessor's finding that such repairs could not have been made at Apia as to make the vessel seaworthy for the voyage is founded upon the weighing of conflicting testimony and must also stand.

4. In recommitting the report to the assessor, his attention was called to the distinction between injuries caused by perils of the sea, and defective condition of the vessel arising from wear and tear and other ordinary causes. He must be presumed to have kept in mind this distinction. And upon a fair construction of his report, the injuries which he finds to have been proved must be taken to be injuries by perils of the sea only.

Having thus disposed of the exceptions to the assessor's report, so far as they relate to questions of fact, we proceed to the consideration of the exceptions in matters of law.

5. The first of these presents the question whether the partial losses of the vessel, the one before putting into Lahaina, and the other after leaving that port, can be added together to make up five per cent. on the valuation, within the meaning of the clause in each policy, which declares that the insurers "shall not be liable for any partial loss" on other goods than those previously specified, or on the ship or freight, "unless it amount to five per cent., exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss."

It is universally admitted that this clause was inserted in policies of marine insurance to prevent dispute and litigation about losses of trifling amount, arising from the perishable nature of goods, or which might reasonably be borne by the assured as coming within the common wear and tear of the ship. The words of the clause exclude every distinct loss not exceeding five per cent.; for they declare that the insurers shall not be liable "for any partial loss," unless it amounts to the requisite percentage; and adding two such losses together does not change the nature or the amount of either.

The earliest decision upon this point is that in which this court in 1828 adjudged, in the case of a vessel insured by a policy of this form, "that distinct and successive losses are not to be added together in order to make up the five per cent.; but that the damage from disasters happening at one time, or in one continued gale or storm, is to be considered by itself." *Brooks*

v. *Oriental Insurance Co.* 7 Pick. 259, 267. Whether the same rule would apply to cargo was then left, and is still, an open question in this court.

In 1832, it was held by the English court of exchequer, that under the words "free from average," "on all other goods and on ship, under £3 per cent., except general," a partial loss of the ship, by stranding after entering a river, might be added to a previous loss of a boat at sea, in order to charge the underwriters; although each of the losses, taken by itself, was less than three per cent., and there could be no difficulty in estimating the amount of each separately. *Blackett v. Royal Exchange Assurance Co.* 2 Tyrwh. 266, and 2 Cr. & Jerv. 244. That case illustrates how far the construction contended for by the plaintiffs, if adopted, may be carried. It was decided before the English courts had become accustomed to refer to American decisions upon questions of maritime law. The only reason given is, that the words were ambiguous, and introduced an exception for the benefit of the underwriters, and should therefore, "in the absence of usage and authority," be construed most strongly against them. And the words in that policy, "free from average," though substantially equivalent to the words in these, "not liable for any partial loss," did not perhaps so clearly suggest a distributive effect.

In 1836, Mr. Justice Story, while expressing his regret at the narrow ground upon which the English decision was placed, declared that, if he had been called upon to give a construction, "wholly independent of authority or usage," to the clause in its American form, in a policy of insurance upon a ship, the strong inclination of his mind would have been towards holding it to apply, even in that case, to an aggregate of losses during the whole voyage. But the matter in judgment before him concerned only the cargo; for the partial loss of the ship was not proved, upon either construction, to exceed five per cent. And after stating the rule affirmed in *Brooks v. Oriental Insurance Co.*, he said that, although upon questions of commercial law the courts of the United States were not generally considered to be absolutely bound by the decisions of the state courts, yet,

in deference to the opinion of this court, and from his own anxiety to follow the current of decisions upon commercial questions, ("as to which," he observed, "Lord Mansfield's remark is well founded, that it is less important how they are settled than that they should be settled,") he "should implicitly have adopted this doctrine on the present occasion, if it had been applicable to it." *Donnell v. Columbian Insurance Co.* 2 Sumner, 378.

Those reasons apply with increased force to an attempt, first made after the lapse of nearly forty years, to induce this court to overrule its own decision upon a question of this kind. The parties to these policies, and all others making contracts of insurance in this form, (which they might have varied at their pleasure,) may reasonably be supposed, in this Commonwealth at least, to have acted on the rule of law as thus established, and great injustice might be done by now adopting a different construction of the same words. *Blanchard v. Equitable Safety Insurance Co.* 12 Allen, 386.

6. The defendants, by the terms of their policies, not being liable for a partial loss unless it amounted to five per cent., or the ship was stranded, the plaintiff has the burden of proving a loss from a cause and to an amount for which the defendants are liable. Such was the rule applied by this court to a clause similar in form to that now in question, and providing that the insurers of a steamboat should not be liable for any breaking of the machinery, unless occasioned by stranding. *Heebner v. Eagle Insurance Co.* 10 Gray, 131. So, in the present cases, if the plaintiffs seek to recover for a partial loss, either upon the ground that it was occasioned by stranding, or that it amounted to five per cent., they must prove the fact necessary to charge the underwriters. The affirmative of the proposition rests with the plaintiffs; the means of proof, to say the least, are as much within their knowledge and reach as within those of the defendants; and the difficulty of proving the amount of loss from any one cause is no greater than that of furnishing evidence which would enable the assessor to distinguish between injury to the vessel by perils of the sea, and defective condition attributable to wear and tear and other ordinary causes, which, when these

cases were last before the court, the plaintiffs were held bound to produce.

The plaintiffs have failed to sustain the burden, thus resting upon them, of proving the amount of the partial loss by each peril; and it would be useless to again recommit the report, inasmuch as the assessor, after having been directed, upon the former recommitment, if injury was done to the vessel by successive causes or sea perils, to ascertain, if possible, the extent of each, and the cost of repairing each separately, now reports that he is unable to ascertain the extent of the damage suffered in either gale, or proximately to determine what would be the cost of repairing it. The loss which he finds to have been occasioned by the two gales amounts, after making the deduction to be presently mentioned, to more than ten per cent. on the valuation of the vessel. The amount of the loss caused by one of the gales must therefore have been more than five per cent. Whether the amount of the loss caused by the other did or did not reach five per cent. is left in doubt. As the plaintiffs cannot recover for a loss not proved to amount to five per cent., and as one of the losses is not proved to equal that amount, each of the plaintiffs must remit so much of the sum reported by the assessor as the insurers are not shown to be liable for, or, in other words, must deduct a trifle less than five per cent., or, what may for practical purposes be taken as the same thing, just five per cent., on his share of the valuation, from the amount with which the insurers are to be charged, and, upon making such remission, may take judgment for the residue.

7. The assessor having found that the ship could not have been thoroughly repaired at Apia, the amount of needful temporary repairs at that port is to be added to the estimated cost of complete repairs afterwards at Sydney. But the amount of such temporary repairs (including the necessary expenses of raising money therefor) as well as the amount of the final repairs, is subject to a deduction of one third new for old. *Brooks v. Oriental Insurance Co.* 7 Pick. 259. *Orrok v. Commonwealth Insurance Co.* 21 Pick. 456. *Lincoln v. Hope Insurance Co.* 8 Gray, 22, 26. The assessor having allowed such deduction from

Paddock & Field v. Commercial Insurance Company.

the amount of the repairs at Sydney only, his report must be amended by making a like deduction from the amount of the temporary repairs found by him.

8. The plaintiffs' claim to recover for a general average loss was rightly disallowed by the assessor. A general average loss is distinct in its nature from a partial loss; it requires proof of a voluntary sacrifice for the benefit of the cargo and freight as well as of the ship, and is not computed in making up a constructive total loss, nor subject to the deduction of one third new for old. *Greely v. Tremont Insurance Co.* 9 Cush. 415. At the original trial of the present cases, the only claims made by the plaintiffs, or reserved for the determination of the full court, were for a total loss and for a partial loss. The court decided that the plaintiffs were not entitled to recover for a total loss, and that the question of a partial loss must be referred to an assessor. 2 Allen, 93. And that question only was so referred. Under these circumstances, it was held, when these cases were last before the court, that it was too late for the defendants to contend that a partial loss could not be recovered because it had been merged in a total loss. The rule of practice, by the application of which the defendants were prevented from raising a question concerning the ground of action, after the reference to the assessor, which they had not previously suggested, is quite as applicable to the plaintiffs' claim, first made at this late stage, not included in the original reservation, nor referred to the assessor, for a general average loss.

The result is, that from the amount of loss found by the assessor on the whole ship, \$8666.67, there is to be deducted in the first place one third of temporary repairs at Apia, \$666.67; and from the balance of \$8000 is to be deducted five per cent. on the valuation, or \$750, leaving the amount of the partial loss on the vessel \$7250; of which the proportion due to the plaintiff Paddock is one sixth or \$1208.33, and that due to the plaintiff Field \$845.83, and interest.

Judgments for the plaintiffs accordingly.

CRIMINAL CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
AT THE
MARCH SESSION 1870, IN BOSTON.

PRESENT:

HON. REUBEN A. CHAPMAN,	CHIEF JUSTICE.
HON. HORACE GRAY, JR.,	} JUSTICES.
HON. JOHN WELLS,	
HON. SETH AMES,	
HON. MARCUS MORTON,	

HENRY G. CLARK, petitioner.
ATTORNEY GENERAL, petitioner.

Under the Gen. Sta. c. 115, § 17, and St. of 1860, c. 191, this court cannot allow expenses and fees of experts not appointed by the court, employed, in a capital case, by the counsel for the prisoner, without the authority or approval of the attorney general; but may allow a reasonable compensation, approved by the attorney general, to experts so employed with his assent, to make investigations, give opinions, or testify on the trial.

THE FIRST CASE was a petition filed by Henry G. Clark, a surgeon, for the allowance of a bill in which he charged the sum of \$150 against the county of Suffolk, for "consultations and attendance in court" three days at October term 1867, as a witness for the prisoner, on the trial of an indictment against Edward C. McGuire for murder; to which bill was appended a certificate of the prisoner's counsel that the services charged for

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were rendered by the petitioner at their request, and the charge was reasonable and proper. The petition was reserved for the consideration of the full court, and argued in November 1868.

H. W. Puine, for the petitioner. The petitioner is entitled to payment, as a witness necessary to the prisoner's defence, summoned under the Gen. Sts. c. 171, § 24. The statute makes no discrimination between the discretion of the prosecuting officers and that of the counsel for the prisoner, in summoning witnesses in capital cases, or in determining the necessity of the purpose for which they are summoned. It trusts the integrity and good judgment of both; and dismissal from the bar is the appropriate penalty for an abuse of this confidence.

G. P. Sanger, district attorney. This bill is unapproved by the attorney general, because the expert was employed by the prisoner's counsel without consultation with the prosecuting officers or permission of the court. And further, the petitioner was called to testify at what angle a ball must have been fired to produce a certain wound, and his testimony was ruled inadmissible.

CHAPMAN, C. J. Dr. Clark was summoned as a witness for the prisoner in the case of *Commonwealth v. McGuire*, (who was indicted for murder,) and attended three days. His attendance was procured as an expert, and he testified as such. He asks an order of the court, allowing him fifty dollars per day, that being the usual charge of experts for attendance in criminal cases, as it is alleged.

We do not doubt that the prosecuting officers of the government have a large discretionary power in respect to the investigation of criminal cases, and that for the purpose of eliciting the truth they may call in the aid of experts, and may furnish such aid to a prisoner. But the power of the court, independently of the attorney general, in respect to it, is regulated by statute.

It is provided by Gen. Sts. c. 171, § 24, that a person indicted for a crime punishable with death, or imprisonment for life in the state prison, shall have "process to summon such witnesses as are necessary to his defence, at the expense of the Commonwealth." But it does not provide that he shall be permitted

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to employ experts to do any other service than as witnesses. Chapter 157 establishes the amount of fees to be allowed to witnesses, and does not authorize the court to exceed that allowance. Costs are first taxed by the clerk, and questions respecting the taxation come before the court by appeal; but the court has no power to allow, in any form, the amount claimed by the applicant for his services as an expert. *Petition dismissed.*

THE SECOND CASE was a petition filed by the attorney general January 10, 1870, and reserved by *Coll, J.*, for the consideration of the full court, representing that in December 1869, at the trial in the county of Plymouth of an indictment against Samuel M. Andrews for murder, Edward Jarvis, a physician, attended for several days, by request of the counsel for the prisoner, to testify as an expert, and did testify in that capacity in his behalf; and that, before said trial, by request of the counsel for the prisoner, John E. Tyler, a physician, visited the prisoner in jail, and also advised with said counsel, in relation to his mental condition, but was not summoned or requested by them to attend and testify at the trial, and did not so attend or testify; that now said counsel were requesting the attorney general to allow them to tax, as a part of the costs to be paid out of the public treasury, certain sums in excess of ordinary witness fees, as compensation to Jarvis and Tyler respectively, for their said services; that neither Jarvis nor Tyler were employed as aforesaid with the previous consent or knowledge of the attorney general, yet he was willing to allow a reasonable compensation to them if he had authority to do so; and that, being doubtful whether he was authorized by any statute of the Commonwealth to allow any sum as compensation to Jarvis except the ordinary statute fees for travel and attendance as a witness, or to allow any compensation whatever to Tyler, he requested instructions as to his authority.

C. Allen, Attorney General. It is no part of the ordinary practice or duty of the Commonwealth to defray the expenses of the defence of persons charged with crime. The government furnishes compulsory process for obtaining witnesses, and allows

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counsel, but usually pays neither. Const. of U. S., 6th Amendment. Under our statutes, a person charged with a capital crime is entitled to a copy of the indictment, a list of the jurors, and "process to summon such witnesses as are necessary to his defence, at the expense of the Commonwealth." Gen. Sts. c. 171, §§ 22, 24. The court may also assign him counsel. c. 112, § 9. The Gen. Sts. c. 157, § 8, establish the fees to be paid to witnesses: "for attending as a witness in a civil or criminal cause," \$1.25 per day, besides fees for travel. They contain no provision allowing extra fees to witnesses in any case; but a necessary practice has long prevailed of allowing extra expenses incurred by the prosecuting officers in the prosecution of crimes, as "expenses incident to the courts" within the Gen. Sts. c. 115, § 17. These officers represent the Commonwealth; and when it is necessary to incur preliminary expenses of any sort, as, for instance, to make plans, to spend time in looking up witnesses, to send outside the Commonwealth for witnesses, to make chemical analyses to detect poison or blood-stains, the bills must be allowed in some form. But the question of allowing such bills incurred by persons under indictment rests on entirely different considerations; and there is nothing in the statutes to show that the legislature ever intended to assume them.

Medical experts, who know no facts, and are only called to give opinions, are in no proper sense witnesses. It is doubtful whether they are bound to obey subpoenas, whether the court would compel their attendance, or whether an action would lie against them for refusing to testify. See *In re Roelker*, 1 Sprague, 276; *Webb v. Page*, 1 C. & K. 23; 1 Greenl. Ev. § 310, note. There is no more reason why they should be paid, than the counsel assigned to defend prisoners under indictments for murder. If the legislature intend to have such fees paid, it is for the statutes to say so; and not for prosecuting officers or courts to assume the authority. In civil cases, no special or extra fees are taxable. *Parks v. Brewer*, 14 Pick. 192.

The St. of 1860, c. 191, provides that specific fees therein enumerated shall be taxed as the costs of criminal prosecutions

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and none other "except such as the court shall deem reasonable for services not herein specifically provided for." Accordingly, extra expenses would seem in all cases to require the sanction of the court, before being paid. This statute was not intended to enlarge the authority to allow expenses, but to provide that the supervision and determination of what customary expenses are reasonable should rest with the court, and not with the prosecuting officers alone.

G. A. Somerby, for *Jarvis*. A person indicted for a capital offence is entitled, as of right, to "process to summon such witnesses as are necessary to his defence, at the expense of the Commonwealth." Gen. Sts. c. 171, § 24. These terms include any witness, whether summoned to give an opinion or state a fact. The only limitation is, to witnesses "necessary to his defence;" and this must be the test.

The prisoner *Andrews* was defended, among other grounds, on that of insanity; but was found guilty of manslaughter. Considering the subtle nature of insanity, his counsel could not have justified themselves in not presenting that ground of defence; and the necessity of their doing so is not to be judged of by the actual course of the trial, but by the reasonable appearance of things before the trial. They were the only persons to determine in advance what witnesses were "necessary to his defence;" and if in good faith they believed that the insanity of the prisoner was a fair question to be presented and tried, it follows that the opinion of an expert on that question was "necessary," in the sense of the statute, to the defence.

It is immaterial whether the expert is paid as a witness, or by the same authority by which necessary expenses of preparation and trial, outside of fees of witnesses as such, are paid under the Gen. Sts. c. 115, § 17, as "expenses incident to the courts." The expenses of preparation in the defence of capital cases are as much "expenses incident to the courts" as the expenses of preparation in the prosecution. The theory of the law is, that the government, in a capital case, provides counsel and means for the necessary defence of the prisoner.

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Whether in a civil case an expert could be compelled to give an opinion at all, or if summoned and coming as a witness could receive more than usual witness fees, are questions of which the solution would shed no light upon the present question.

CHAPMAN, C. J. In the case of an indictment for murder, the prisoner's counsel employed a medical expert to visit the prisoner before the trial, in order that he might form an opinion whether the prisoner was insane, but did not procure his attendance at the trial. They employed another expert, who visited the prisoner and also attended the trial and testified. They request the attorney general to allow them to tax, as a part of the costs to be paid out of the public treasury, certain sums in excess of ordinary witness fees, as a compensation to each of these experts. The attorney general requests the instructions of the court as to his authority in the premises; and represents that, though neither of these experts was employed with his previous consent or knowledge, yet he is willing to allow each of them a reasonable compensation, if he has authority to do so.

It is contended in behalf of the one who attended the trial, that he has a right to the allowance, under Gen. Sts. c. 171 § 24, which provides that the prisoner is entitled to process to summon such witnesses as are necessary to his defence, at the expense of the Commonwealth. But, by c. 157, § 8, the fees of the witnesses are fixed, and no authority is given to allow them anything further.

It is also contended that the allowance may be made under c. 115, § 17, which authorizes courts to receive, examine and allow accounts for services and expenses incident thereto in the several counties. But this provision is not limited to capital cases, nor to this court, and it does not authorize courts in all criminal cases to allow charges for experts employed by defendants, any more than it authorizes them to allow charges for the fees of the defendants' witnesses or counsel. Under this statute, and other similar statutes of an earlier date, it has been the practice of prosecuting officers to incur extra expenses in the

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prosecution of crimes. Some of these are preliminary to the trial, and others are incurred at the trial. Some are incurred in searching for evidence, or in making scientific examinations and experiments. Among them is the compensation of experts. These expenses are often necessary; and it has been the practice of courts to allow them. The statute is not limited to capital cases.

There is yet another statute that has some bearing on the subject. By St. 1860, c. 191, which defines the costs of criminal prosecutions, it is provided that certain specific fees shall be taxed, including the fees of witnesses, "and none other except such as the court shall deem reasonable for services not herein specifically provided for." The implied authority of the court which this exception contains is very indefinite, and we cannot see that it confers any rights on defendants to charge their expenses to the government.

Even in capital cases, in which the court is authorized by Gen. Sts. c. 112, § 9, to assign counsel to the prisoner, it has not been held that they had authority to allow counsel fees. When a prisoner has not obtained counsel, it is usual for the court to request some member of the bar to aid him; and we believe that no prisoner has been compelled to go to trial in a capital case without being ably and faithfully defended. The members of the bar have been ready, so far as they reasonably could do so, to give their best services gratuitously, in aid of any prisoner who was unable to pay counsel.

Whenever the prosecuting officer thinks the interests of justice require it, we do not doubt that he is authorized, by the statutes above mentioned, to employ experts to make proper investigations for ascertaining the truth of a case, and that it is proper for him in some capital cases to enable the prisoner's counsel to make similar investigations, and to procure the attendance of experts at the trial, if the prisoner is not able to do so; and the court is authorized to allow a reasonable compensation to such experts for their services, both for attending the trial and for their prior investigations. This is not on the ground that the statute has given to a prisoner the right to such

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aid at the expense of the public treasury; but on the ground that it is for the interest of the Commonwealth, in the case then before the court, that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner in a case where he is exposed to so great a penalty. The experts selected by the attorney general ought to testify with impartiality, and without any bias against the prisoner, and it is to be presumed that he will select able and impartial experts only. So it is the duty of all experts called in any case, to testify with impartiality; but it is notorious that experts are called by parties in many cases who are governed in their investigations and their testimony by a partisan desire to aid the party that employs them, and not by an impartial desire to present fairly the truth of the case. In consequence of this, the testimony of experts has often been brought into discredit. We do not think the prosecuting officer or the court would be authorized to allow the charges of all such persons as the prisoner would have a right to employ as experts at his own expense, without regard to their character or to the need of employing them in the case. But the assent of the prosecuting officer should be obtained beforehand to the employment of such experts as may be selected and agreed upon, or, in case of his refusal to assent, application should be made to the court to appoint the experts. This would be the more proper course of proceeding, if the prisoner desires to have the experts called by him paid out of the public treasury.

In the present case, the attorney general expresses his willingness to consent to a reasonable allowance to each of the experts named, if he has authority to do so, and the court will, with his assent, allow the bills to a reasonable amount.

Ordered accordingly.

COMMONWEALTH vs. JAMES CUNNINGHAM.

At the trial of a criminal case where the only question is as to the identity of the prisoner with the guilty party, the jury may be justified in returning a verdict of guilty, although no witness will swear positively to the identity.

At a criminal trial, the counsel for the Commonwealth stated in his closing argument to the jury, that the defendant had been previously convicted of the same offence. No evidence had been offered to support the statement; and the judge instructed the jury that it was not competent for their consideration. *Held*, that the defendant had no ground of exception.

INDICTMENT for larceny of a horse and wagon. At the trial in the superior court, before *Pitman*, J., the only question was one of identity, whether the prisoner was the person who stole the horse and wagon. The witnesses called by the Commonwealth testified that they saw a man driving off the stolen wagon on the day the theft took place; that they did not notice that the man had an "imperial"; and that a few days afterwards they separately and without any suggestion picked out the prisoner from among others in the station-house, as the man they thought they saw on the wagon; but that they were not positive, as the prisoner had then an "imperial" and different clothes; and that they would not swear that the prisoner was the man they saw on the wagon; but that he resembled him. At the close of the case for the Commonwealth the defendant requested the judge to direct the jury to return a verdict of acquittal, but the judge declined so to do.

"The district attorney, in his closing argument to the jury, stated to them, aside from any evidence given in the case, that the defendant had been previously convicted of the same offence or crime in said court before and by another jury; that as it had appeared before them that the defendant had once before been tried he must have been convicted, or the government would have had no power to try him again; and if that were so, he was put upon his best efforts for testimony upon this trial, and yet had failed to produce what an innocent man might. And although the district attorney expressly confined his use of the suggestion as to the defendant's prior conviction to the argu

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ment aforesaid, and although the judge afterwards in his charge to the jury instructed them that the statement that the prisoner had been convicted before of the same crime was not competent for their consideration upon the question of his guilt, and, as far as the judge could do so, tried to prevent any wrong, yet the defendant contended that he was prejudiced by reason of said statement, and that a fair and impartial trial of the defendant was thereby prevented in a great measure, but the judge overruled his motion for a new trial on such grounds."

The defendant asked the judge to instruct the jury "that as no witness sworn in the case had given evidence that the defendant was the man who committed the crime set forth in the indictment, or the man who was seen in the possession of the stolen property, the jury would not be justified to find the defendant guilty." The judge declined so to instruct the jury, but instructed them as follows: "That they must be satisfied beyond a reasonable doubt of the identity of the defendant with the person seen to drive off the wagon; that there was no rule of law defining the manner in which this identity was to be proved, or describing the terms in which witnesses must testify to it to produce conviction in the minds of the jury; that the whole question was one of fact for them to pass upon; that if, from the testimony of the witnesses, taken in connection with their means of knowledge, their acts at the station-house, and their present appearance and manner upon the stand, together with any other evidence in the case, the jury were satisfied of the fact of identity beyond a reasonable doubt, then they might convict; that there were cases where the concurrence of separate and independent impressions as to identity might be as convincing as the positive opinion of a single witness; but that on the other hand, if the evidence fell short of producing a belief in their minds beyond a reasonable doubt, no mere probability would justify a verdict of guilty." The jury returned a verdict of guilty, and the defendant alleged exceptions.

E. A. Alger, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

AMES, J. The only question that appears to have been in controversy was whether the defendant was sufficiently identified as the person who committed the crime charged in the indictment. The general circumstances of the transaction were not in dispute. Upon this question of identity, the evidence offered was all of it competent, and proper for the consideration of the jury. It is impossible to say that it had no tendency to convict the defendant. Its sufficiency was to be estimated and weighed exclusively by them. It is not necessary that any one witness should distinctly swear that the defendant was the man, if the result of all the testimony, on comparison of all its details and particulars, should identify him as the offender. The principle which allows evidence to go to the jury necessarily involves a right, on their part, to believe it, and if its effect upon their minds should be to prove the defendant's guilt beyond reasonable doubt, their verdict will be rendered accordingly.

The course of argument on the part of the prosecuting officer, as exhibited by the bill of exceptions, appears to have been in some respects objectionable. Under such circumstances, it became the duty of the presiding judge to caution the jury to confine their attention to the legitimate evidence, and to try the case strictly upon its merits. The bill of exceptions shows that this duty was not overlooked, and we have no reason to doubt that it was adequately performed. We are bound to presume that the jury appreciated and obeyed his instructions. *Commonwealth v. Byce*, 8 Gray, 461. *Smith v. Whitman*, 6 Allen, 562.

Exceptions overruled.

COMMONWEALTH vs. ALBERT DAVIS.

The felonious taking of goods from the owners' shop by a clerk and packer in their employ who had keys by means of which, at the time in question, he entered the shop after it was closed, but who was not a salesman, although the owners had occasionally allowed him to take and sell goods for them, is larceny and not embezzlement.

INDICTMENT for receiving stolen goods, the property of Joseph W. C. Seavey, Charles Foster and John A. Bowman.

At the trial in the superior court, before *Pitman, J.*, it appeared that the defendant received the goods from Jeremiah Brown, a clerk in the employ of the firm of Seavey, Foster & Bowman. A member of the firm testified that "on October 7, 1869, after their shop was closed, the witness, remaining in the shop, saw Brown enter by means of keys which he had, and take two boxes of silk twist" (which there was evidence were among the goods alleged in the indictment to have been received by the defendant) "from the shelf and go off with them; that Brown was not a salesman but a clerk and packer; that he occasionally, however, sold when the regular salesmen were absent or busy; that the firm had sometimes allowed him to take goods and sell them to parties in East Boston, where he lived, accounting to them for the proceeds; but that he had not made any such sales, or taken any goods for such purpose to their knowledge since April 1869." It appeared that all the goods charged in the indictment were taken since July 1869. There was no evidence that Brown had any other custody or possession of said goods other than as appeared or might be inferred from the above evidence.

The defendant contended that Brown's conduct was an act of embezzlement, not of larceny; but the judge instructed the jury that, "upon the undisputed evidence in the case, Brown did not sustain such a relation to the property in question as would make his felonious appropriation of it an act of embezzlement, but that his taking of the same, if the jury found the other elements necessary to constitute the offence, would be larceny, and the property would be rightly described as stolen property."

The defendant was convicted, and alleged exceptions.

F. A. Perry, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

MORTON, J. The instructions of the court that "upon the undisputed evidence in the case *Brown* did not sustain such a relation to the property in question as would make his felonious appropriation of it an act of embezzlement, but that his taking of the same, if the jury found the other elements necessary to constitute the offence, would be larceny," were correct. *Brown* was a mere servant of the owners of the property alleged to be stolen by him. We cannot see in the case any testimony which tends to show that he had even the bare custody of the goods, much less the legal possession. They were in the possession and custody of the owners, and the felonious taking and appropriation of them by *Brown* was clearly larceny and not embezzlement. Upon the facts in this case an indictment against him for embezzlement could not be sustained. *Commonwealth v. Berry*, 99 Mass. 428. *Exceptions overruled.*

COMMONWEALTH vs. ADELBERT HOOPER & another.

In an indictment against A. under the Gen. Sta. c. 181, § 54, for designedly obtaining goods from B. by false pretences, an averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid and with intent to cheat and defraud the said B. of the same goods," is a sufficient averment that the goods were designedly obtained.

In an indictment against A. for obtaining goods from B. by false pretences, an averment that B. "was induced, by reason of the false pretences so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A." certain property "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by the false pretences he did pay and deliver; and is not defective for not repeating the words "then and there" before the words "to pay and deliver," or before the words "did pay and deliver."

INDICTMENT against Adelbert Hooper and John Simonton, for cheating by false pretences. The indictment alleged that Hooper and Simonton on December 16, 1869, "being persons

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of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into their hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this Commonwealth, and with intent to cheat and defraud one Robert G. Derbyshire, and with a view to effect a sale to said Derbyshire of the alleged interest of said Simonton in the business and fixtures hereinafter mentioned as sold to said Derbyshire, did then and there unlawfully, knowingly and designedly, falsely pretend and represent to said Derbyshire that "certain alleged facts as to said business and interest were true.

"And the said Derbyshire then and there believing the said false pretences and representations so made as aforesaid by said Hooper and said Simonton, and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said Simonton said Simonton's pretended right of ownership in, and the right to receive the prospective profits in, an undivided half of said "business, "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," a certain sum, "of the property, goods, merchandise, chattels and effects of said Derbyshire."

"And the said Simonton did then and there sell and deliver to said Derbyshire said right, and said Hooper and said Simonton did then and there receive and obtain the said goods, merchandise, chattels, effects and property of the said Derbyshire, from said Derbyshire, by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said Derbyshire of the same goods and merchandise, chattels, effects and property; whereas, in truth and in fact," said alleged facts as to said business and interest were not true, "all of which said Hooper and said Simonton then and there well knew."

"And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Hooper and said Simonton, by means of the false pretences aforesaid, on the said sixteenth day of December, in the year of our Lord eighteen hundred and sixty-nine, at Boston aforesaid, unlawfully, knowingly and designedly did receive and

obtain from said Derbyshire the said goods, merchandise, chattels and effects so alleged to have been obtained of the property, goods, merchandise, chattels and effects of the said Derbyshire, with intent to defraud him of the same."

At the trial in the superior court, before *Putnam, J.*, the defendants moved to quash the indictment: 1. Because it did not charge that Derbyshire was induced, by any false pretence, "to pay or deliver" anything, or that he "did pay or deliver" anything, by reason of any false pretence; nor was there "any allegation of time or venue, when or where he was induced to pay anything, nor when or where he paid or delivered, nor to whom." 2. Because it did not charge that the defendants unlawfully, knowingly, designedly or fraudulently obtained the goods of Derbyshire. The judge overruled the motion, and the defendants were convicted, and alleged exceptions.

A. W. Boardman, for the defendants. The Gen. Sts. c. 161, § 54, provide that "whoever designedly, by a false pretence, or by a privy or false token, and with intent to defraud, obtains from another person any property," shall be punished, &c. The indictment is bad for failing to aver that the goods were designedly obtained. *Gatewood v. State*, 4 Ohio, 386. 1 Chit. Crim. Law. 241.

C. Allen, Attorney General, for the Commonwealth.

Wells, J. The position of the defendants' counsel is correct that a good indictment must show, not only a false pretence and an intent to defraud, but also that the goods obtained thereby were designedly received by the defendants. The principal objection made to this indictment is that the allegation that the defendants "did then and there receive and obtain the said goods" is not thus qualified. It is not necessary that the qualifying term should be grammatically connected with the allegation of receipt. It is sufficient if there be, in any form, a distinct charge that the goods so received were knowingly and intentionally received in pursuance of the purpose to defraud.

This indictment alleges that the defendants did receive and obtain the goods by means of false pretences, "and with intent to cheat and defraud the said Derbyshire of the same" goods

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and property. The intent, thus alleged, relates back to the previous allegation of a receipt of the goods; and as it is not set forth as an intent merely to defraud, but as an intent to defraud Derbyshire of the same goods, it necessarily involves the qualification of design in the receipt thereof. We think it is thus sufficiently made to appear, by the allegations of the indictment, that the goods were received by the defendants designedly.

The other objection to the indictment does not appear to us to have any foundation for its support.

Exceptions overruled.

COMMONWEALTH vs. EDWARD J. SULLIVAN.

Distinct larcenies may be presented in different counts of one indictment; and whether the Commonwealth shall elect between them is within the discretion of the judge presiding at the trial.

The stealing by one taking of several articles belonging to different persons may be indicted either as one crime or as several crimes.

Under the Gen. Sta. c. 172, § 12, an indictment for larceny may allege the property in the stolen goods to have been in a consignee to whom they were in course of transportation by a carrier when they were stolen, whether the carrier was designated by him or not.

INDICTMENT for larceny. One count charged the stealing of goods, the property of James M. Longstreet; and another count, the stealing of goods, the property of Henry O. Ford.

At the trial in the superior court, before *Pitman, J.*, Longstreet testified that he ordered from the manufacturers goods described in the first count, to be consigned to him for sale and to be sent to him through the American Union Express Company; and Ford testified that he ordered from other manufacturers goods described in the second count, to be sent to him. The defendant objected to the admission of this evidence; but the judge admitted it.

It appeared that the defendant took all the goods from the express wagon at the same time by one act and one taking; but that the goods were in different places in the wagon, belonged to different owners, and were differently marked. The defendant

asked the judge to rule that the Commonwealth must elect and were entitled to a verdict on one count only; but the judge refused so to rule.

The defendant contended that there was no sufficient proof of ownership to warrant a conviction on either of the counts; but the judge instructed the jury that "the counts were sustained, if the jury believed the evidence of Longstreet and Ford, as far as the averment of ownership was concerned; and that if the jury were satisfied that the defendant feloniously took and carried away the articles alleged to have been stolen, they should render a verdict of guilty on both counts." The jury returned such a verdict, and the defendant alleged exceptions.

C. H. Hudson, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

GRAY, J. 1. Distinct larcenies may be presented in different counts of one indictment; and whether the district attorney shall be ordered to elect between them is within the discretion of the presiding judge and not a subject of exception. *Commonwealth v. Hills*, 10 Cush. 530. *Commonwealth v. Cain*, 102 Mass. 487.

2. The stealing at the same time and by one taking of several articles belonging to different persons is larceny of the whole and of each article; and may be indicted either in one aspect or the other — as one entire crime, or as several distinct offences. If indictments or counts for one taking of several articles are unreasonably multiplied, the court, in superintending the course of trial and in passing sentence, will see that justice is done and oppression prevented. 1 Hale P. C. 531. 2 Stark. Crim. Pl. (2d ed.) 451 note. *Regina v. Brettell*, Car. & M. 609. *Regina v. Giddins*, Ib. 634. *Commonwealth v. Andrews*, 2 Mass. 409, 413. *Commonwealth v. Butterick*, 100 Mass. 1. *State v. Thurston*, 2 M'Mullan, 382.

3. By the Gen. Sta. c. 172, § 13, it is sufficient to prove either the actual or constructive possession, or the general or special property, in stolen goods, to have been in the person alleged in the indictment to have been the owner thereof. A delivery to a common carrier is a delivery to the consignee, in the ab-

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sence of any agreement to the contrary, whether the carrier is or is not designated by the consignee. *Merchant v. Chapman*, 4 Allen, 362. *Kline v. Baker*, 99 Mass. 253. The testimony of Longstreet and Ford that certain goods were sent through a carrier to them respectively was therefore sufficient evidence that the goods while in the hands of the carrier were in the constructive possession of the respective consignees; and was rightly submitted to the jury in support of the counts severally charging larceny of their property. *Exceptions overruled*

RULES
OF THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS,
1870.

COMMONWEALTH OF MASSACHUSETTS.

At the supreme judicial court, begun and holden at Boston in and for said Commonwealth on the first Wednesday of January, being the fifth day of said month, in the year of our Lord one thousand eight hundred and seventy.

PRESENT:

HON. REUBEN A. CHAPMAN,	CHIEF JUSTICE.
HON. HORACE GRAY, JR.,	} JUSTICES.
HON. JOHN WELLS,	
HON. JAMES D. COLT,	
HON. SETH AMES,	
HON. MARCUS MORTON,	

Ordered, That all the rules of this court be repealed from and after the first day of September next; and the following rules are established for regulating the modes of trial and the conduct of business in this court from and after that day:

Old rules
repealed

RULES FOR THE REGULATION OF PRACTICE AT COMMON LAW.

I. No civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of the court, or unless the court shall allow the same for sufficient cause.

II. Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the clerk's docket; and in default thereof a nonsuit may be entered.

III. If either party shall change his attorney pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party; and until such notice of the change of an attorney all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law the notice is required to be given to the party personally: provided, however, that nothing in these rules shall be construed to prevent either party in a suit from appearing for himself in the manner provided by law; and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

IV. No amendment in matter of substance shall be allowed after the entry of an action, unless by consent, in any case where the adverse party appears, except upon payment of a term fee; and upon striking out unnecessary counts or statements, or filing amendments after demurrer, the same terms shall be imposed; and no amendment shall be allowed, unless by consent, after an action is placed on the trial list, except upon payment of a double term fee; but this rule shall not prevent the imposition, in any case, of such further terms as the circumstances of the case and justice to the parties may require. When either party shall amend, the other party, if by reason thereof his case shall require it, shall be entitled also to amend without terms.

V. Answers and pleas in abatement, and motions to dismiss, shall be filed within the time allowed by law for entering an appearance, unless otherwise specially ordered by the court for good cause shown.

Pleas in abatement, and motions to dismiss.

VI. The answer, and, in real and mixed actions, the plea, shall be filed within thirty days from the return day, unless the court shall by special order restrict or extend the time; and if the answer or plea be not so filed, a default may at any time be entered by order of the court on motion of the plaintiff.

Answers.

VII. When actions shall be brought against parties severally liable upon written contracts, and some of the defendants shall be defaulted and others appear, the clerk may enter up judgment and issue execution against the parties defaulted, as if they had been the sole defendants; and the case shall go forward against the parties appearing, as in other contested cases.

Actions against several on one contract.

VIII. In all cases in which money shall be brought into court under the common rule, the plaintiff shall be entitled to receive the same, together with his costs up to that time, to be legally taxed; and if the plaintiff shall in reasonable time tax his costs, the amount thereof shall be paid into court, in addition to the money brought in, and shall be for the use of the plaintiff, and paid out to him on request; whereupon the amount so brought in on account of the plaintiff's demand shall be considered as stricken out of the plaintiff's demand, to the same effect as if paid. If the plaintiff shall consent to accept the amount thus paid, with costs, in satisfaction, all further proceedings in the case shall cease. If the plaintiff shall signify his election not to receive the same in satisfaction, but to proceed in his suit, and shall recover any sum beyond the amount thus paid in, he shall be entitled to a judgment therefor, with costs to be taxed from the time the money is so brought in; if the plaintiff shall not prove more to be due to him than the sum thus paid in, the defendant shall be entitled to a verdict, and judgment thereon, with costs to be taxed from the time the money is paid into court.

Payment of money into court.

IX. In all cases in which money shall be paid into court, the money shall be considered in the custody of the clerk, whose duty it shall be to receive it, and to pay it to the party entitled thereto, on request. And if such party shall not be ready to receive the same of the clerk as soon as paid, it shall be the duty of the clerk to deposit it in some bank, and not to draw it, except for the purpose of paying it over to the party entitled thereto; and in such case the money shall be deemed to be at the risk of the person entitled thereto, from the time of the deposit to the time when the same shall be drawn for. And in all such cases the clerk shall be entitled to a fee of one dollar, together with a commission of one per cent. on sums not exceeding five hundred dollars, and one half of one per cent. on any amount beyond that sum, as a compensation for receiving and paying out the money, to be paid by the party paying the money into court.

X. The court will not hear any motion grounded on facts, unless the facts are verified by oath or affirmation, or are apparent upon the record and the papers on file in the case, or are agreed and stated in writing, signed by the parties or their attorneys. And the same rule will be applied to all facts relied on in opposing any motion.

XI. No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted; the particular testimony which he is expected to give, with the grounds of such expectation; and the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. The party objecting to the continuance shall not be permitted to contradict the statement of what the absent witness is expected to testify, but may disprove any of the other facts stated in such affidavit. And no action shall be continued on such motion, if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as

evidence on the trial, in like manner as if the witness were present and had so testified; and such agreement shall be made in writing, at the foot of the affidavit, and signed by the party, or his counsel or attorney. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper, or other evidence, that might be used on the trial: provided, however, that this rule shall not prevent the court in any case from granting a continuance, in its discretion, for good cause shown.

XII. When an action shall be continued on the motion of either party at the term when it might otherwise have been tried, the party making the motion shall pay to the adverse party all his costs incurred at that term in procuring the attendance of witnesses, unless the continuance is ordered on account of some unfair advantage taken by the adverse party, or of some other fault or misconduct on his part; or unless the party making the motion shall have given notice thereof, with a statement of the grounds of such motion, to the adverse party or his attorney, in such season before the sitting of the court, as might have prevented the attendance of the witnesses; or it shall appear that the ground of the motion was not seasonably known to the party making it; and the costs thus paid shall not be included in the bill of costs of the party receiving them, if he shall finally prevail in the suit.

Costs of continuance.

XIII. The preceding rule shall not prevent the court from imposing any other and additional terms on the party moving for a continuance, when the justice of the case shall require it; neither shall it be construed to prevent the party, to whom such previous notice may have been given, from procuring the attendance of his witnesses, if he shall think fit to oppose the motion for a continuance. And in such case, if the motion is granted, the costs for such witnesses shall be allowed in the bill of costs for the said party, if he shall finally prevail in the suit.

Same subject.

XIV. Whenever auditors shall be appointed in any action, the rule shall be taken out and proceeded upon within such time, during the term or in vacation, as that the

Auditors

report shall be made at the next succeeding term of the court. And if no report shall be made at the commencement of that term, the rule may be discharged, and the action stand for trial.

XV. No writ of protection shall issue, except by the order of the court, or a justice thereof; such order to be made upon the application of the person for whom the writ of protection is to be issued, or some person in his behalf; and no order shall be made for granting such writ of protection until it shall be made to appear to the court or justice applied to, by affidavit or other satisfactory evidence, that the application is made in good faith, and for the purpose of enabling such person to attend this court as a party or as a witness in some case pending, such case to be specified; if a party plaintiff, that such suit has not been commenced by him collusively; or, if a defendant, that such suit has not been commenced against him by his request or procurement, collusively, and to enable him to obtain a writ of protection; or, if as a witness, that he has not been required to attend as a witness, by his own request or procurement, or collusively, to enable him to obtain the writ of protection prayed for.

XVI. All depositions shall be opened by the clerk, when presented for that purpose, either in term time or vacation; and he shall certify the day on which any deposition is opened, and may deliver the same to the party for whose use it is taken. The party for whose use it is taken shall not afterwards use the deposition, unless the same is filed in fourteen days from the time it is so opened; and, when the deposition is filed, the day of filing shall be noted by the clerk. The deposition shall afterwards be in his custody, subject to the order of the court, as other documents in the case; and when a deposition has been filed, if not read on the trial by the party taking it, it may be used by the other party, if he sees fit, he paying the costs of taking the same: provided, however, that if, by accident or unforeseen cause, the party shall be prevented from filing his deposition within fourteen days, the court may allow it to be filed afterwards, on motion, and sufficient cause shown, and provided, further, that in all cases the court may order a de-

Depositions.

position in the possession of any party to be opened and filed on: the application of any party against whom the same is taken, at such time as the court shall direct; and if such deposition shall not be opened and filed in pursuance of the order of the court, it shall not be used on the trial.

XVII. The court will grant commissions to take the depositions of witnesses without the Commonwealth; and either party may, on application to the clerk, obtain a commission, which shall be directed to any commissioner appointed by the governor of the Commonwealth to take depositions in any other of the United States; or upon the order of the court in term time, or by the clerk in vacation, after notice to the adverse party, or by agreement filed in the clerk's office, the commission may be directed to any justice of the peace, notary public, or other officer, legally empowered to take depositions or affidavits in the state or country where the deposition is to be taken. In each case the depositions shall be taken upon interrogatories, to be filed by the party applying for the commission, and upon such cross-interrogatories as shall be filed by the adverse party; the whole of which interrogatories shall be annexed to the commission. The party applying for the commission shall in each case file his interrogatories in the clerk's office, and give notice thereof to the adverse party, or his attorney, seven days at least before taking out the commission, and one day more for every ten miles that such party or his attorney shall live from the clerk's office. And when a deposition shall be taken and certified by any person as a justice of the peace or other officer as aforesaid, by force of such commission, if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting; and, if a like objection shall be made to a deposition taken without such commission, it shall be incumbent on the party producing the deposition to prove that it was taken and certified by a person duly authorized.

Depositions with out the Commonwealth.

XVIII. In all cases where depositions shall be taken on interrogatories, neither party shall be permitted to attend at the taking of such deposition, either himself, or by an

Mode of taking depositions

attorney or agent; nor be permitted to communicate by interrogatories or suggestions with the deponent, whilst giving his deposition. It shall be the duty of the commissioner to take each deposition in a place separate and apart from all other persons, and to permit no person to be present during such examination, except the deponent and himself, and such disinterested person, if any, as he may think fit to appoint as a clerk to assist him in reducing the deposition to writing. And it shall be the duty of the commissioner to put the several interrogatories and cross-interrogatories to the deponent in their order, and to take the answer of the deponent to each, fully and clearly, before proceeding to the next; and not to read to the deponent, nor permit the deponent to read a succeeding interrogatory, until the answer to the preceding has been fully taken down. And it shall be the duty of the clerk, on issuing a commission to take a deposition on interrogatories, to insert the substance of this order therein; or to annex this order, or the substance thereof, to the commission, by way of notice and instruction to the commissioner.

XIX. Depositions may be taken within the Commonwealth, for the causes and in the manner by law prescribed, in term time; provided they be taken in the town in which the court is holden, and at an hour when the court is not actually in session; but the court may, upon good cause shown, specially order a deposition to be taken at any other time or place.

XX. Every *venire facias* shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term; and the jurors shall be required to attend at that time, unless the court shall otherwise direct.

XXI. All civil actions shall be heard and tried in the order in which they stand on the docket, unless the court shall, upon good cause shown, otherwise order: provided, however, that any action may, with the consent of all the parties concerned, and with the leave of the court, be substituted for another action standing earlier on the docket; but in such

case the action which stood earliest shall take the place of the one substituted for it, and shall be tried when the latter would have come on in course if no such change had taken place.

XXII. At each term of the court for the trial of cases by the jury, a trial list shall be prepared on the first day of the sitting of the court; and no case shall be placed thereon afterwards, except by order of the court. Trial list.

XXIII. No action shall be postponed by consent, except by way of substitution; and no action shall be postponed or continued to await the return of a commission, if it shall appear that there has been any negligence to apply for and transmit the same, whether such negligence happen in term time or in vacation. Postponements.

XXIV. Objections to evidence shall be decided without argument at the trial, unless the presiding judge shall call upon the parties to state the grounds upon which the evidence is offered or objected to. Objections to evidence.

XXV. The general form of verdicts shall be as follows: if for the plaintiff, "*The jury find for the plaintiff, and assess damages in the sum of —;*" if for the defendant, "*The jury find for the defendant;*" unless the court shall in particular cases otherwise order. Form of verdicts.

XXVI. No motion for a new trial shall be sustained in any civil action after verdict, either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence or the weight of evidence, unless, within three days after the verdict is returned, the counsel of the party complaining of the proceedings or of the verdict shall file a motion for a new trial, specifying the grounds of his complaint, and cause a copy of the motion to be delivered to the adverse counsel on the day the same shall be filed. And if it shall be alleged as a ground of the motion, that the verdict is against the evidence or the weight of it, the counsel of the party shall, within ten days after filing his motion, make out and deliver to the clerk a legible copy of his minutes of the oral evidence, and specify the depositions or New trials.

documents on which he intends to rely in support of his motion; otherwise the motion shall be stricken off, and judgment may be rendered on the verdict, on the motion of the counsel for the party in whose favor the verdict shall be returned; provided, that should the trial of any case be had so near the close of any term, that the foregoing rule cannot be complied with, the motion for a new trial shall be made before the court adjourns, and the specification of the reasons shall be filed within three days afterwards; and such time, not exceeding ten days, shall be allowed for a compliance with the residue of the rule as the presiding judge shall order.

XXVII. Whenever costs shall be awarded to two adverse parties in the same suit, the court may order one sum to be set off against the other, and enter judgment for the balance; and, when such set-off cannot be conveniently effected, each party may have an execution for the costs due him.

XXVIII. Whenever a party shall seek to establish before this court the truth of any allegations in a bill of exceptions, which a judge shall have refused to allow and sign, he shall, within twenty days after notice of such refusal, file his petition, verified by affidavit, setting forth in full said allegations and all facts material thereto, in the court in which the exceptions would by law have been entered, if duly signed and allowed; and shall, before filing his petition, give notice thereof to the adverse party, by delivering a copy thereof to him or his attorney of record. And no party shall be allowed to establish the truth of any such allegations in this court, if he shall have failed to comply with the requisitions herein prescribed.

XXIX. Before taking out a writ of error, the plaintiff shall file the assignment of errors in the clerk's office, and a copy of the same shall be inserted in the *scire facias*; and the defendant shall be held to plead thereto within ten days after the return day of the *scire facias*, unless the court shall by special order restrict or enlarge the time.

XXX. All copies for the court shall be written in a fair, legible hand, or printed, on paper of the usual quarto size with a convenient margin.

Rules of Practice at Common Law.

XXXI. At or before the commencement of the argument of each case upon the law docket, each party shall deliver to the other, and furnish to each of the judges and to the reporter, a printed or written statement, on paper of the usual quarto size, and signed by counsel, of the points on which he intends to rely, and the authorities intended to be cited in support of them, arranged under the respective points. And in cases where it may be necessary for the court to go into examination of evidence, each party shall briefly specify, in his printed or written statement of points, the leading facts which he deems established, with a reference to the pages of the papers where the evidence of such facts may be found.

Briefs of law arguments.

XXXII. All arguments of counsel, either before the full court before a single justice, or before the jury, shall be limited to two hours on each side, unless before the commencement of the argument, for good cause shown, the court shall allow further time; and, when more than one counsel is to be heard on the same side, the time may be divided between them as they may elect.

Limitation of arguments.

XXXIII. The clerk shall be answerable for all records and papers filed in the court or in his office; and they shall not be taken from his custody without his consent, unless in cases authorized by statute or by special order of court; but the parties may at all times have copies.

Custody of records.

XXXIV. In order to enable the clerks to complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case; and if the same shall not be so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded, unless, upon a petition to the court and after notice to the adverse party, the court shall order it to be recorded; and no execution shall issue until the papers are filed as aforesaid. When a judgment shall be recorded upon such petition, the clerk shall enter the same, with

Making up of records.

gether with the order of the court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment, when so recorded, shall be, and be considered, in all respects, as a judgment of the term in which it was originally awarded; and the party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

XXXV. Whereas it is made the duty of the judges of the several courts to inspect the conduct of their respective clerks, in regard to the making and keeping of their records, it is ordered, that the respective clerks of this court shall, on the first day of every term, exhibit to the court the then latest book of records in their respective offices, and such others as the court shall require; to the end, that, in case of any deficiency therein, the court may take the measures prescribed by the statute in such case, and such other measures as the case shall appear to them to require.

*Inspection
of records.*

RULE FOR THE REGULATION OF PRACTICE IN DIVORCE.

THE notice provided for by the two hundred and twenty-second chapter of the statutes of eighteen hundred and sixty-seven shall be substantially in the form following:

Decree nisi
on default
of the li-
bellor

COMMONWEALTH OF MASSACHUSETTS.

_____, ss.

Supreme Judicial Court,

Term, 18 .

DIVORCE.

In the above entitled libel for divorce, it is now ordered, that a decree of divorce from the bond of matrimony be entered in favor of the said _____ for the cause of the _____ of the said _____, to be made absolute on motion after the expiration of six months from the first publication of this decree, upon compliance with the terms thereof, unless sufficient cause to the contrary shall appear.

And the libellant is required to publish, as soon as may be, an attested copy of this order in the _____, a newspaper printed in _____ in said county of _____, once a week, for six successive weeks; that all persons interested may, within said six months, show cause, if any they have, why said decree should not be made absolute.

By the Court,

G. C. W., Clerk.

And at any time before the expiration of the time limited in said order, the libellee may file in the office of the clerk of this court for the county in which the libel is pending a motion to take off the default; or any other person may file in said office a statement of the objections to an absolute decree; said motion or statement to set forth the facts on which it is founded, verified by affidavit.

RULES FOR THE REGULATION OF PRACTICE IN CHANCERY.

I. WHEN the bill is not inserted in an original writ, as provided by statute, the original process to require the appearance of defendants shall be a subpoena, in form following:

COMMONWEALTH OF MASSACHUSETTS.

_____, ss. To A. B., of

(addition)

GREETING:

[L. s.] We command you that you appear before our supreme judicial court, next to be holden at _____, within and for the county of _____, on the _____ day of _____ next, then and there to answer to a bill of complaint exhibited against you in our said court by C. D. of _____ (addition), and to do and receive what our said court shall then and there consider in that behalf. Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness, L. S., Esquire, the _____ day of _____, in the year _____ of our Lord _____ G. C. W., Clerk.

The writ shall bear the test of the chief justice, or of the first justice who is not a party to the suit; it shall be under the seal of the court, and be signed by the clerk; and shall be served by the same officers and in the same manner as other original writs of summons are by law to be served.

II. The plaintiff shall file his bill before or at the time of taking out the subpoena; and no injunction or other proceeding shall be ordered until the bill is filed, unless for good cause shown.

III. There shall be rule days on the first Monday of each month, in all the counties except Dukes County, for the return of process and the entry of all proceedings and orders which may be taken at the rules.

IV. All process shall be made returnable at the next succeeding term, or at any intermediate rule day, at the election of the party who takes it out; and, when made returnable at a rule day, the subpoena shall be altered accordingly. If a party shall not be found, a copy thereof may be left

at his usual place of abode; and the truth of the case being returned by the officer, if it shall be made to appear to the court that the party has actual notice of the suit, no other service shall be required; otherwise, such notice shall be given as the court shall order.

V. Whenever it shall appear that a defendant resides out of the Commonwealth, the clerk, on application of the plaintiff, at any time after the filing of the bill, shall enter an order requiring such defendant to appear and answer the plaintiff's bill, if in any part of the United States east of the Mississippi River, or the states of Louisiana, Missouri, Iowa or Minnesota, within one month; if within any other of the United States, or New Brunswick, Nova Scotia, or Canada, within two months; if elsewhere in the United States, or in Great Britain, Ireland or France, within three months; and if in other foreign parts, within six months, from the rule day next succeeding the date of such order. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill. A copy of the order shall be served on such defendant personally, or published three times in different weeks, within thirty days after the date of the order, in some newspaper published in the county where the suit is pending; and proof of such service shall be made by affidavit, or in such other manner as the court may order.

Notice to
absent de-
fendants.

VI. Bills, answers, pleas and demurrers may be printed or written. If printed, they shall be on paper of the usual quarto size; and the reasonable expense of printing the same may, at the discretion of the court, be taxed in the bill of costs.

Printing of
pleadings.

VII. All prolixity and repetition in the pleadings shall be avoided. The bill shall contain a clear and explicit statement of the plaintiff's case. The plaintiff, when his case requires it, may propose specific interrogatories; and may allege, by way of charge, any particular fact, for the purpose of putting it in issue. The common charge of fraud and combination shall be omitted, except when it is intended to charge fraud and combination specifically.

Form of
bills.

VIII. The defendant shall be required to answer fully, directly and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated. When a bill shall be filed other than for a discovery only, the plaintiff may waive the necessity of the answer being made on the oath of the defendant; and in such case the answer may be made without oath, and shall have no other or greater force as evidence than the bill; and no exception for insufficiency shall be taken to such answer.

IX. The day of appearance shall be the return day of the writ or subpoena, when personal service shall be made on the defendant, or he shall have had personal notice of the suit; or the return day of any order issued under the fourth or fifth rule, when no personal service shall be made. And, if the defendant shall not appear and file his answer, plea or demurrer, within one month after the day of appearance, the plaintiff may enter an order to take his bill for confessed; and the matter thereof may be decreed accordingly, unless good cause shall appear to the contrary.

X. The defendant may, at any time before the bill is taken for confessed, or afterwards, by leave of the court, demur, plead or answer to the bill; and he may demur to part, plead to part, and answer as to the residue; but, in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer supporting the plea, and explicitly denying the fraud or combination, and the facts on which the charge is founded.

XI. The plaintiff may set down the plea or demurrer to be argued, or take issue on the plea, within fifteen days from the time when the same is filed; and, if he shall fail to do so, a decree, dismissing the bill, with costs, may be entered upon motion, unless good cause appear to the contrary.

XII. If a plea or demurrer be overruled, no other plea or demurrer shall be received, but the defendant shall proceed to answer the plaintiff's bill; and if he shall fail to do so within one month, the plaintiff may enter an order that the same, or so much thereof as is covered by the plea or demurrer,

be taken for confessed; and the matter thereof may be decreed accordingly, unless good cause appear to the contrary.

XIII. Upon a plea or demurrer being overruled or adjudged good, the party prevailing upon the question shall recover full costs from the time of the filing of such plea or demurrer, unless the court shall otherwise specially order.

Costs on
plea or de-
murrer

XIV. The defendant, instead of filing a formal plea or demurrer, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same or demurred to the bill.

Plea or
demurrer
by answer

XV. The defendant to a cross bill shall in no case be compelled to answer thereto, before the defendant to the original bill shall have answered such original bill.

Answer to
cross bill

XVI. The form of the general replication shall be that the plaintiff joins issue on the answer. No special replication shall be filed, but by leave of the court.

Replica-
tions.

XVII. The plaintiff shall reply, or file exceptions, or set down the case for hearing on the bill and answer, within one month after the answer is required to be filed; or if the answer be filed before it is required, then within one month after written notice of such filing; and if he fail so to do, a decree may be entered for the dismissal of the bill, with costs.

Setting
down for
hearing.

XVIII. If the plaintiff shall except to an answer as insufficient, he shall file his exceptions, and forthwith give notice thereof to the defendant or his solicitor; and if within fifteen days the defendant shall put in a sufficient answer, the same shall be received without costs; but, if the defendant insist on the sufficiency of his answer, he shall, within fifteen days, file a statement to that effect, and give notice thereof to the plaintiff, and thereupon the exceptions shall be referred to a master; and either party, dissatisfied with the master's decision, may, within seven days after the filing of his report, set down the exceptions to be argued. If the exceptions shall be overruled, or the answer adjudged insufficient, the prevailing party shall recover costs of the reference to the master,

Exceptions
to answers

and also of the hearing before the court. If the answer shall be adjudged insufficient, a new answer shall be filed within fifteen days. .

XIX. Upon a second answer being adjudged insufficient, costs shall be doubled by the court; and the defendant may be examined upon interrogatories, and committed until he shall answer them.

XX. The plaintiff may, of course, and without payment of costs, amend his bill at any time before answer, plea or demurrer filed; but if the defendant's appearance shall have been entered, the plaintiff shall, at his own expense, furnish the defendant with a certified copy of the amendment filed. No amendment, however, shall be allowed, as of course, to a bill which has been sworn to by the party.

XXI. If the defendant shall demur to the bill for want of parties, or other defect which does not go to the equity of the whole bill, the plaintiff may amend at any time before the demurrer is set down for argument, or within fourteen days after the demurrer is filed, and notice thereof given to him, upon the payment of a term fee.

XXII. Upon the coming in of the answer, if the plaintiff shall find it necessary to amend his bill, in order to meet the case made by the answer, he may do so, by furnishing to the defendant a certified copy of the amendment; and the plaintiff may also, at the same time, except to the defendant's answer to the bill, as originally filed. And in such case, if the defendant shall submit to answer further, or shall be ordered to answer further, he shall answer the amendments of the bill, and shall furnish a sufficient answer to the bill as originally filed, at the same time.

XXIII. The court may in its discretion allow the parties to amend their pleadings, and order or permit pleadings to be filed, or any proceeding to be had, at other times than are provided in these rules; and may in all cases impose just and reasonable terms upon the parties.

XXIV. All notices in a case, required to be given to a party may be given to his solicitor of record; and if transmitted through the post-office, postpaid, shall be deemed

Same subject.

Amending bill as of course.

Amending bill after demurrer.

Amending bill after answer.

Proceedings by special leave.

Notices in a cause.

to have been received by the person to whom they are addressed, in due course of mail, unless the contrary shall appear by affidavit or otherwise.

XXV. When the death of any party shall be suggested in writing, and entered on the docket, the clerk, upon application, may issue process to bring into court the representative of such deceased party.

Summoning in representatives of deceased parties.

XXVI. When the circumstances of the case are such as to require a bill of revivor, or supplemental bill, or bill in the nature of either or both, or the joinder of additional or different parties, the requisite allegations may be made by way of amendment to the original bill; and, after service on any new parties as in the case of an original bill, and service of copies of the amendments on all the defendants affected thereby, shall entitle the plaintiff to proceed as on an original bill.

Amendment instead of bill of revivor or supplemental bill.

XXVII. In bills by executors or trustees to obtain the instructions of the court, and in bills of interpleader, or in the nature of interpleader, no solicitor or counsel for the plaintiff shall appear or be heard or act for or in behalf of any or either of the defendants.

Bills for instructions or of interpleader.

XXVIII. At the expiration of one month from the day when issue is joined, unless the time be enlarged for cause shown, the case shall be considered as ready for hearing.

Time for hearing.

XXIX. All facts well alleged in a bill, other than for discovery only, which are not denied or put in issue by the answer, shall be deemed to be admitted; but nothing in this rule shall prevent the plaintiff from excepting to the answer for insufficiency, when the defendant's oath is not waived.

Facts alleged and not denied, admitted.

XXX. Testimony taken by depositions shall be taken in the manner required by statute and by the rules of the court in actions at law.

Depositions.

XXXI. When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference

Hearings before a master.

shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons, requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte*; and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same, at the election of the adverse party.

XXXII. When exceptions shall be taken to the report of a master, they shall be filed with the clerk, and notice thereof shall forthwith be given to the adverse party; and the exceptions shall then be set down for argument. In every case, the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

XXXIII. All hearings in equity shall be had in the county in which the case is pending, if the court is in session therein; unless otherwise ordered for special cause.

XXXIV. When any party shall desire a hearing in equity before a single justice, except at a term held in the county where the case is pending, he may apply to a justice to appoint a time and place for the hearing; and, when such time and place shall have been appointed, he shall give notice thereof to the adverse party, or his solicitor, as provided in the twenty-fourth rule. But this rule shall not prevent a party from obtaining a preliminary injunction, or a dissolution of an injunction, or other order, upon a shorter notice, or without notice, if the court shall think the same reasonable. And cases may be heard by consent of parties, and the permission of the court, without such notice.

XXXV. At any hearing before a single justice upon any interlocutory question or for a final decree, the evidence shall not be reported to the full court, unless one of the parties, before any evidence is offered, shall request that the same be so reported, or the justice shall, for special reasons, so direct; and the justice will appoint a suitable disinterested

Exceptions to master's report.

Place of hearings.

Hearings before a single justice.

Evidence at hearings before a single justice.

interested person to take the evidence. The expense of taking the evidence shall be paid by the party requesting the taking of the same, to be allowed in the taxation of costs, if costs are decreed to him. The allowance to the person appointed to take the evidence shall be fixed by the court, and shall not exceed ten dollars a day.

XXXVI. Whenever it shall be necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury, and be tried upon the like evidence as in a suit at law, together with such part of the answers, depositions, and other proceedings in the cause, as the court shall direct.

XXXVII. When exceptions shall be allowed or overruled under the eighteenth rule, the costs shall be taxed as follows: for every ten miles' travel of a party to attend at a hearing before one of the justices, or before a master, there shall be taxed thirty-three cents; but no more than eighty miles' travel shall be taxed for in any case, unless the party shall make an affidavit, stating that he actually travelled more than eighty miles, for the purpose of attending at such hearing; for each day's attendance on a hearing before a justice or before a master, three dollars. In all other cases of hearing before a justice or before a master, costs shall be allowed or disallowed according to the discretion of the court; but, when allowed, shall be taxed as above directed, in addition to the other taxable costs.

XXXVIII. The solicitor of the party in whose favor a decree or order is passed shall draw the same; and without reciting previous proceedings, decrees shall begin, in substance, as follows:

"This case came on to be heard [or to be further heard, as the fact may be] at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed," &c.

But if it is intended that the final decree shall serve as a record of the case, proper recitals of previous proceedings may be inserted therein.

XXXIX. The foregoing rules shall apply to hearings upon probate appeals, as far as the same are applicable thereto; and the last six of the common law rules shall apply to proceedings in equity and probate.

XL. The clerk shall keep a separate docket for equity cases and probate appeals, upon which all the proceedings in such cases shall be entered.

By the Court,

GEO. C. WILDE, Clerk.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF BERKSHIRE, SEPTEMBER TERM 1870,
AT PITTSFIELD.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.		
HON. HORACE GRAY, JR.,	}	JUSTICES.
HON. JOHN WELLS,		
HON. JAMES D. COLT,		
HON. MARCUS MORTON,		

WILLIAM F. BACON vs. THEODORE POMEROY & others.

In order to procure credit for a manufacturing corporation, its stockholders signed and gave to a bank a writing, in which, after reciting that the stock had "all been recently purchased, and is now owned, by the subscribers, who desire and intend to continue the corporate organization, but not for the purpose of exempting themselves from their individual liability for the debts of the company," they declared that, "as to creditors of the corporation, we do and shall hold ourselves liable, jointly and severally, as copartners, and such liability shall continue as to each one so long as he shall continue a stockholder in said concern, but shall not apply to liability contracted after transfer of his stock." The bank then made two loans to the corporation, which it failed to repay, whereupon one of the signers repaid them, and sued for contribution the executors of the will of another signer, no transfer of whose stock had ever been made, and who died after the time of the first and before the time of the second loan. The will directed the executors to pay the testator's just debts, and empowered them to continue his estate in trade so long as they should deem for its interest in prosecuting and completing business undertakings which at the time of his death he was engaged in as copartner or on his sole account, and apply any part thereof "for the performance of any engagement, and the payment of any debts, notes and obligations, which have been made or incurred by me or by any copartnership of which I am a member." The plaintiff made his payment to the bank more than two

Bacon v. Pomeroy.

years after the executors gave bond, and brought the suit against the executors within a year after making the payment. *Held*, (1.) that the testator ceased by death to be a stockholder within the meaning of the writing, and was not chargeable thereon for the loan made afterwards; (2.) that, as to the loan made before the death, even assuming that the plaintiff's payment of it created a right of action which first accrued upon such payment, the special statute of limitations of actions against executors and administrators, Gen. Sta. c. 97, § 5, was a bar to the suit, from which he was not excepted under §§ 3-11, if he had omitted to present the claim to the judge of probate under § 8; and (3.) that the mere delay of the executors to dispose of and transfer the testator's shares would not warrant an inference of any election by them, in their discretion under the will, to continue the estate in trade or make any part thereof liable for debts or obligations contracted by any copartnership either before or after the death.

BILL IN EQUITY filed May 2, 1870, by William F. Bacon against Theodore Pomeroy, Robert Pomeroy, Henry Colt, and the executors of the will of William Pollock.

The bill alleged that said Pomeroy, Colt, Pollock in his lifetime, and the plaintiff, were owners of nine hundred and five shares in the capital stock of the Pittsfield Woollen Company, (a manufacturing corporation organized and established at Pittsfield under the general laws of this Commonwealth, and in accordance with the provisions of the St. of 1851, c. 133, and the acts in addition thereto, relating to corporations,) Pollock owning three hundred and twenty, the plaintiff one hundred and sixty, and the others the residue, specifying the number owned by each; that since May 3, 1862, none of said owners of said nine hundred and five shares had ever ceased to be a stockholder in said corporation or had transferred any of his said stock, and no certificate of any transfer thereof had been filed in the office of the town clerk of Pittsfield signed by the clerk of the Pittsfield Woollen Company; that on said May 3 said stockholders, to facilitate the business operations and aid the credit of the Pittsfield Woollen Company, and especially to give it a credit at bank, signed and delivered to the cashier of the Pittsfield Bank, for that bank, (a corporation created by the laws of this Commonwealth, and on June 10, 1865, reorganized as the Pittsfield National Bank under the laws of the United States,) the following writing:

“Whereas, the stock of the Pittsfield Woollen Company, a corporation organized under the general law of this state, has all been recently purchased, and is now owned, by the sub-

scribers, who desire and intend to continue the corporate organization, but not for the purpose of exempting themselves from their individual liability for the debts of the company, now we hereby declare to all whom it may concern, that as to creditors of the corporation we do and shall hold ourselves liable, jointly and severally, as copartners, and such liability shall continue as to each one so long as he shall continue a stockholder in said concern, but shall not apply to liability contracted after transfer of his stock and a certificate thereof shall have been filed in the office of the town clerk of Pittsfield, signed by the clerk of said corporation. Dated at Pittsfield, the 3d day of May, 1862."

The bill then alleged that the bank had ever since held this writing, as the contract of the joint and several liability of the signers, as copartners, upon any and all liabilities of the Pittsfield Woollen Company to the bank; that such liability continued, as to each of the signers, so long as he continued to be a stockholder in the Pittsfield Woollen Company without having transferred his stock and a certificate thereof having been filed in the office of the town clerk of Pittsfield, signed by the clerk of the company; and that this writing still was in full force and effect, never having been rescinded or in any way modified or abrogated; that upon the credit of the Pittsfield Woollen Company and of the said signers, the bank, among other loans to and transactions with the company, afterwards, in Pollock's lifetime, made a loan to the company upon its negotiable promissory note, dated January 9, 1865, and payable in three months to the order of the bank, which had since been renewed, from time to time, till October 15, 1869, on which date the amount due thereon was \$30,000 and it was again renewed by a note of the company payable in three months, and also made another loan to the company and took therefor its promissory note dated December 24, 1869, for \$10,662.71, payable in three months, and continued to hold both said last named notes till their maturity; that upon the maturity of these notes the company neglected to pay them, and, notwithstanding demand by the bank, had never made any payment on either of them. Copies of the notes were set forth in the bill.

The bill further alleged that Pollock died December 9, 1866, testate, and on February 5, 1867, his will was duly proved and letters testamentary were issued to the executors named therein. This will, a copy of which was made part of the bill, appointed the executors trustees for certain purposes named therein, and contained the following provisions :

“ I direct my executors to pay my just debts and funeral expenses, without unnecessary delay ; and for that purpose to sell and convey any of my property, real and personal, (except my mansion-house estate hereinafter named,) which they may deem necessary. I authorize them to compound debts due me, and to compromise or submit to arbitration any claims made by or against them as my executors. And I give to them all the power over my property and estate, (except the said mansion-house estate,) for the purpose of winding up my business, that I should have if living. And if at the time of my death I am engaged in business undertakings, whether as copartner or on my sole account, which it would be inexpedient in their opinion to close at the time and in the manner usually adopted in the settlement of the estate of deceased persons, I empower them to continue my estate in trade for such period as they deem for the interest of my estate, for the purpose of prosecuting and completing such undertakings to the best advantage ; to use the credit of my estate, (with the above exception,) and to make any part thereof liable by mortgage, pledge or otherwise, for the performance of any engagements, and the payment of any debts, notes and obligations, which have been made or incurred by me, or by any copartnership of which I am a member, or which they may deem it necessary to make or incur, for the above purpose.”

“ I empower my trustees to sell or exchange any real or personal property at any time held by them upon the trusts herein declared, (excepting said mansion-house estate,) to make deeds and transfers thereof, and to invest the proceeds of such sale or exchange as they may deem expedient.”

“ Upon all sales by my executors or trustees, their receipt shall exempt the purchaser from liability as to the application of the purchase money.”

The bill further alleged that the executors on February 5 1867, filed bonds with sureties approved by the judge of probate, and on February 4, 1868, filed in the probate office an affidavit that they gave notice of their appointment and acceptance thereof, within three months from February 5, 1867, by posting and publishing notices thereof as required by law, the form and manner of which were set forth in the bill.

The bill then alleged, that, upon the neglect of the Pittsfield Woollen Company to pay said two notes and interest thereon, or any part thereof, payment thereof was demanded by the bank of the plaintiff and of the defendants, and the defendants neglected and refused to pay the same, and, the bank persisting in demanding payment of the notes and interest, the plaintiff on April 27, 1870, paid the amount thereof and thereby became subrogated to all the rights of the bank, and entitled to demand and receive a contribution from the defendants towards the amount so paid by him and interest thereon, in accordance with the principles of equity and good conscience in such matters, and that each of the defendants (the executors being deemed together as one only) should pay and contribute the same in the proportion the number of shares held by each bore to the whole number of shares held by all the signers of the writing aforesaid; but that they had refused to do so, and pretended that the plaintiff was not entitled to demand and receive any contribution for such payments. And the bill prayed that they might be ordered to pay to the plaintiff the sums so due from them respectively or such other sums as might be found due to him.

The executors of the will of William Pollock demurred to the bill, for the following causes :

First. That the Pittsfield Woollen Company should have been made a party to the bill.

Second. That the plaintiff's remedy, if any, was at law, and not in equity.

Third. That any right or cause of action of the bank, or of the plaintiff, against these defendants, in their said capacity, growing out of the writing aforesaid or the payments made by the plaintiff, was barred by the statute of limitations.

Fourth. That upon the death of Pollock he ceased to be a stockholder in the Pittsfield Woollen Company, and his estate was liable, if at all, under the contract contained in the writing, for such demands only as then existed and not for any which afterwards accrued.

Fifth. That the plaintiff had not by his bill made a case which entitled him to the relief prayed for.

Upon this demurrer the case was heard by *Collt, J.*, and by consent of the parties reserved for the consideration of the full court.

M. Wilcox, for the executors.

B. R. Curtis & T. P. Pingree, for the plaintiff.

GRAY, J. The agreement signed by the plaintiff and Pollock and their associates, upon which this bill is founded, recites that they have purchased and own all the stock in a manufacturing corporation established under the laws of the Commonwealth, that they desire and intend to continue the corporate organization, and have no purpose of exempting themselves from their individual liability for the debts of the company; and declares that they shall hold themselves liable jointly and severally as copartners to its creditors, and that such liability shall continue as to each so long as he shall continue a stockholder.

At the date of this agreement, the St. of 1862, c. 218, subjecting the estate of a deceased person in the hands of his executor or administrator, to some extent, to his liability as stockholder for the debts of a manufacturing corporation, had not taken effect; but the liability of the stockholders in such a corporation for its debts was regulated by the Gen. Sts. cc. 60, 61. It has been said that such statutes "in fact only continue the principle of copartnership in operation." *Parker, C. J.*, in *Marcy v. Clark*, 17 Mass. 330, 334. But a partner is not ordinarily liable for debts contracted by his copartners after his death, unless there is an express stipulation to that effect in the partnership articles. *Marlett v. Jackman*, 3 Allen, 287. *Tyrrell v. Washburn*, 6 Allen, 466. And the statute liability of a stockholder for the debts of a manufacturing corporation is limited to debts contracted while he is a stockholder, and, as has been

repeatedly held, in the absence of express provision for its continuance, terminates with his death. *Child v. Coffin*, 17 Mass. 64. *Ripley v. Sampson*, 10 Pick. 371. *Dane v. Dane Manufacturing Co.* 14 Gray, 488.

In the light of these rules of law, the affirmative part of the agreement in question cannot, upon any fair construction, be held to make either of the subscribers liable for debts contracted after he has ceased by death to be a stockholder in the company. And no such extension of liability can be inferred from the negative clause, providing that he shall not be liable for debts contracted after a transfer of his stock shall have been made and recorded as therein prescribed. Taking the whole agreement together, this clause evidently contemplates only transfers made by himself in his lifetime.

This agreement, therefore, does not of itself charge the estate of Pollock with debts contracted by the company after his death. The question whether his executors can be held in this suit by reason of debts contracted in his lifetime requires further consideration.

By the special statute of limitations of actions against executors and administrators, no executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of any creditor of the deceased, unless it is commenced within two years from the time of his giving bond, except in the cases afterwards specified, namely, of new assets afterwards received, failure of an action by defect in form or service, rights of action accruing after the end of the two years and before the estate is settled, or where justice and equity require it and the creditor is not chargeable with culpable neglect. Gen. Sts. c. 97, §§ 5-11. St. 1861, c. 174, § 2. *Wells v. Child*, 12 Allen, 333. *Sykes v. Meacham*, 103 Mass. 285. Even a representation of the estate as insolvent, and the appointment of commissioners to receive and examine the claims of creditors, do not suspend the operation of the statute against claims not presented to the commissioners within the period of limitation, except in cases of contingent claims or of farther assets. *Aiken v. Morse*, ante, 277.

The ground upon which the plaintiff relies to take his claim arising from his payment of the debt contracted by the Pittsfield Woollen Company in the lifetime of Pollock, out of the special statute of limitations is, that his right of action thereon did not accrue within two years after the giving of the administration bond, within the meaning of the Gen. Sts. c. 97, §§ 8-11.

The Gen. Sts. c. 97, § 8, provide that "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond," may present his claim to the probate court at any time before the estate is fully administered, and obtain an order that the executor or administrator retain in his hands a sum sufficient to satisfy the same, or that, instead thereof, a bond for payment of the demand may be taken, if offered by any other persons interested in the estate. By § 9, the decision of the probate court shall not be conclusive in favor of the claimant, and his claim shall not be paid, "unless it is found to be due in an action commenced by the claimant within one year after the same becomes payable." By § 10, "the action shall be brought against the executor or administrator, if he has been required to retain assets therefor; otherwise, upon the bond given by the persons interested in the estate." And § 11 prescribes the form of the pleadings in an action on such bond.

The executors of Pollock deny that the payment by the plaintiff of the sums due from him under their agreement created a right of action which first accrued at the time of such payment, within the meaning of these statutes. The question thus raised would require consideration, if the case turned upon it. See Gen. Sts. c. 99, §§ 5-7; c. 101, §§ 31, 32; *Cummings v. Thompson*, 7 Met. 132, 134; *French v. Hayward*, 16 Gray, 512; *Wood v. Leland*, 22 Pick. 503, and 1 Met. 387; *Hayward v. Hapgood*, 4 Gray, 437; *Fairfield v. Fairfield*, 15 Gray, 596. But it is not necessary, in order to dispose of this bill, to determine whether the plaintiff's right of action accrued after the end of two years from the giving of the administration bond. If it did not, it was clearly barred by the special statute of limitations. If it did, it is not brought within the exception to that statute

on which the plaintiff relies, because no application has been made to the judge of probate, as required by the Gen. Sts. c. 97, § 8; and, if such an application should be made, a bond might be offered and taken from persons interested in the estate, in which case, by § 10, no suit could be brought against the executor or administrator, but only against the persons giving that bond. *Holden v. Fletcher*, 6 Cush. 235. *Lovell v. Nelson*, 11 Allen, 101.

The plaintiff further relies upon the provisions of Pollock's will, to charge his estate with these claims. But we are of opinion that neither the provisions of the will, nor any acts which have been done by the executors in pursuance thereof, are sufficient to have that effect.

The preliminary direction to pay all the testator's just debts adds nothing to the duty imposed upon all executors by law; and no executor has power to waive the special statute of limitations, even if he wishes to do so. *Wells v. Child*, 12 Allen, 333. *Lamson v. Schutt*, 4 Allen, 359, 360.

A testator may doubtless subject his estate to liability for debts contracted after his death by a partnership of which he has been a member. But such liability can be created only by clear provisions of the will, or unambiguous acts of the executors or trustees under an authority thereby conferred upon them. *Ex parte Garland*, 10 Ves. 110. *Burwell v. Mandeville*, 2 How. 560. *Stamwood v. Owen*, 14 Gray, 195. It is not pretended that these executors, in the exercise of the discretion vested in them by the testator, have done any affirmative act, manifesting an intention to continue the estate in trade, or to make any part thereof liable for any debts or obligations made or contracted by any copartnership, either before or after his death. Their mere delay in selling the shares in the Pittsfield Woollen Company, in which, for the reasons already stated, he had ceased by his death to be a stockholder within the meaning of the agreement sued on, will not warrant the inference of such an election.

As neither the terms of the agreement signed by Pollock, nor the provisions of his will and the conduct of his executors, sustain this bill to enforce the payment, out of his estate, of the

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plaintiff's claim, whether arising out of debts contracted during his lifetime, or out of rights accrued since his decease, it is unnecessary to decide whether the demurrer for the nonjoinder of the Pittsfield Woollen Company is well taken.

Demurrer sustained.

WILLIAM H. MURRAY vs. BERKSHIRE LIFE INSURANCE COMPANY.

The Sta. of 1865, c. 242, § 3, and 1868, c. 349, § 4, were not intended to create a new class of taxpayers, but to provide the mode in which shares in national banks should be assessed to those already liable to taxation; and therefore mutual life insurance companies are not liable to taxation under those statutes.

CONTRACT by the collector of the town of Pittsfield against a mutual life insurance company, located in that town, to recover the amount of a tax assessed on shares in national banks, owned by the defendants. The case was submitted to the judgment of the superior court, and, on appeal, of this court, upon agreed facts, and is stated in the opinion.

J. M. Barker, (T. P. Pingree with him,) for the plaintiff.

E. Merwin, for the defendants.

MORTON, J. The question presented in this case is, whether the shares in a national banking association, owned by a mutual life insurance company, are taxable to such company in the town where its principal office is established. The plaintiff claims that they are made taxable by St. 1868, c. 349, § 4, which provides that "all shares of stock in the banks aforesaid, owned by residents of this Commonwealth, shall be assessed to the owners thereof, as provided in chapter two hundred and forty-two of the acts of the year eighteen hundred and sixty-five: provided, that no stock insurance corporation, savings bank or institution for savings, incorporated under the laws of this state including the Mercantile Savings Institution in the city of Boston, otherwise taxed under the laws of this state, shall be taxed for its investments in the shares of national banks within this

Commonwealth." The St. of 1865, c. 242, in the first and second sections, requires the assessors of every city or town, in which a national bank is established, to obtain from the officers of such bank, and transmit to the assessors of the other cities and towns, a correct list of the names and residences of all shareholders in such banking association, and the number of shares held by each, and a statement of the amount of the capital stock of such association, the par value and the fair market value of each share, the amount and value of real estate owned by such association, and where the same is located. The third section provides that "the assessors of each city and town in which any shareholder in such association resides shall include all shares in such associations held by persons resident and liable to taxation in said city or town, in the valuation of the personal property of such person, for the assessment of all taxes imposed and levied in said town by authority of law, to be assessed at the same rate and subject to the same deductions as shares of state banks and other moneyed corporations in the hands of the citizens of such city or town." Prior to the enactment of these statutes, corporations have, under our laws, never been liable to be taxed for any personal property owned by them, except machinery employed in manufactures. *Gen. Sts. c. 11, § 12. Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181. *Worcester Insurance Co. v. Worcester*, 7 Cush. 600. *Worcester County Institution for Savings v. Worcester*, 10 Cush. 128. *Middlesex Railroad Co. v. Charlestown*, 8 Allen, 330. Under our system, as it prevailed for many years, the personal property of most moneyed corporations was made to bear its portion of the public burdens by means of a tax assessed to each stockholder at his place of residence upon the shares held by him. The St. of 1862, c. 224, imposed an excise upon the franchise of fire and marine insurance companies and of savings banks, and not a tax on the property belonging to those corporations. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428. By the St. of 1864, c. 208, as revised by the St. of 1865, c. 283, an excise is imposed upon the franchise of all corporations having a capital stock divided into shares, except banks of issue and

deposit, and the stockholders of such corporations as pay this excise are exempted from taxation upon their shares in the places of their residence. *Commonwealth v. Hamilton Manufacturing Co.* 12 Allen, 298. *Manufacturers' Insurance Co. v. Loud,* 99 Mass. 146.

Neither of the statutes above referred to lays a tax upon the personal property of corporations, and it has been held that mutual life insurance companies are not affected by them. *Commonwealth v. Berkshire Insurance Co.* 98 Mass. 25.

From this review of the statutes and authorities, it is seen that corporations are not liable to taxation for their general personal property in the town in which they are located. Are they made liable to be taxed for the shares in national banks owned by them, by the Sts. of 1865, c. 242, and 1868, c. 349? These two statutes must be construed together, and we are of opinion that their purpose and effect is not to create a new class of taxpayers, but to provide the mode in which shares in national banks shall be assessed to those who, by existing laws, were liable to taxation in the several cities and towns. Such is the natural construction of the language of the statutes. The assessors of the city or town in which any shareholder resides are to "include all shares in such associations held by persons resident and liable to taxation in said city or town in the valuation of the personal property of such person." The owner of national bank shares must not only be a resident of the town, but "liable to taxation" therein, to authorize the assessors to assess him for them. The direction to include such shares "in the valuation of the personal property of such person" strongly implies that the statute is intended to apply to such persons only as are liable to be taxed for the personal property owned by them. The provision that the tax is "to be assessed at the same rate and subject to the same deductions as shares of state banks, and other moneyed corporations, in the hands of the citizens of such city or town," raises a strong implication in favor of this construction.

It is clear that corporations are not liable to taxation in the towns where they are established, for shares in state banks or in

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other moneyed corporations which, if owned by citizens of such town, would be taxable. It is not to be presumed that the legislature intended to discriminate against shares in national banks, and to subject them to taxation in the hands of corporations which are not taxable for shares in any other moneyed corporations.

Upon the whole, we are of opinion that the defendant corporation is not liable to taxation in Pittsfield upon the national bank shares owned by it, and that this action, therefore, cannot be maintained.

Our only difficulty in reaching this conclusion has arisen from the proviso in the fourth section of the statute of 1868, that no stock insurance corporation or savings bank, "otherwise taxed under the laws of this state, shall be taxed for its investments in the shares of national banks within this Commonwealth." The plaintiff's argument, that this provision implies that in the view of the legislature corporations were taxable for national bank shares held by them, because otherwise the proviso is useless, is not without force. It is difficult to see the precise view in which this proviso was deemed to be necessary; but we think that the inference which the plaintiff draws from it is not sufficiently strong to control the considerations which have led to the construction adopted by us. *Judgment for the defendants.*

LURENA PROPER vs. GEORGE H. COBB.

Whether keeping a colt for use, nor buying materials to build a house for herself and husband, is such a carrying on of business by a married woman as to require the filing of a certificate under St. 1862, c. 198, in order to protect the colt and materials from attachment for her husband's debts.

TORT by the wife of David H. Proper against a deputy sheriff to recover the value of a colt and some lumber, alleged to be her separate property, and attached by the defendant on a writ against her husband. At the trial in the superior court, before Brigham, C. J., it appeared that the colt was bought by the

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plaintiff before her marriage, with the intention of raising and keeping it for use; that after marriage she had, with her separate money, bought standing trees, and had them cut down and prepared as building material for the purpose of erecting a house, to be occupied by her and her husband, on land which she intended to purchase; and that neither she nor her husband had ever filed a certificate under St. 1862, c. 198. The defendant contended that, no such certificate having been filed, the property was liable to attachment for the debts of the plaintiff's husband, and requested the judge so to rule, but the judge refused to do so. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. C. Spaulding, for the defendant.

H. J. Dunham, for the plaintiff, was not called upon.

CHAPMAN, C. J. The St. of 1862 c. 198, requires that "any married woman, now doing business or hereafter proposing to do business on her separate account, shall file a certificate in the clerk's office of the city or town," "setting forth the name of her husband, the nature of the business proposed to be done, and the place where it is to be done, giving the street and number if practicable, and whenever the place of business or the nature of the business is changed, a new certificate" must be filed, otherwise the property employed in such business is subject to attachment by the husband's creditors. The terms of the statute are quite general, and are held to include the use of furniture for keeping a boarding-house. *Chapman v. Briggs*, 11 Allen, 546. But they evidently do not include all uses of her property. The use of a horse and carriage by herself, or the purchase of food and stabling for the horse, or the procuring of repairs for the carriage, or the raising and gathering of crops for her own use on her land, or the repair or erection of a dwelling on her land and the purchase of materials for it, or of materials and furniture for the use of herself and family, are not uses of property which come within the contemplation of the statute, and which require the designated certificate for the protection of the property. We think it was rightly held that the protection of the colt and the building materials did not require the filing of the certificate.

Exceptions overruled.

AZUBA SPRING vs. JOSIAH HULETT.

Upon an issue whether a niece owes her uncle for board and lodging furnished to her during time she lived in his family, evidence that she rendered services to him during that time is admissible.

In an action by an uncle against his niece, for board and lodging furnished to her and her infant ward, and for articles furnished to her while in his family, he requested the judge to rule that the law would imply a promise to pay for what was furnished; but the judge refused, and instructed the jury that her stay in the family and the receipt of the articles would, between strangers, considered of themselves, imply such a promise, but would not have that force in view of the relation of the parties and the circumstances attending her stay and the receipt of the articles, which should be considered by the jury in determining the understanding between the parties. *Held*, that the plaintiff had no ground of exception.

CONTRACT on a promissory note and for work and labor. The defendant filed a declaration in set-off containing a count on an account annexed for board and lodging furnished to the plaintiff and Edward Spring, her infant ward, and for wool, a "goods box," and eighteen dollars in cash furnished by the defendant to the plaintiff. The answer to the declaration in set-off was a general denial.

At the trial in the superior court, before *Brigham*, C. J., it appeared that the plaintiff with her ward was at the house of the defendant, who was her uncle, at the time alleged in the declaration in set-off. The plaintiff offered evidence that she and her ward rendered services for the defendant while in his family, which she expected would pay for whatever she had of him while there. The defendant objected that the evidence was not admissible under the answer to the declaration in set-off, but the judge admitted it.

The defendant requested the judge to instruct the jury that "if the plaintiff and her ward were in the defendant's family during the time alleged in the declaration in set-off, or had the articles charged in said declaration, the law would imply a promise to pay therefor." But the judge declined so to instruct the jury, and instructed them that "the plaintiff's stay in the defendant's family, and the receipt of the articles charged, would, between strangers, considered in and of themselves, imply such a promise, but would not have that force in view of

the relations and kinship of the parties, and the circumstances attending the plaintiff's stay and the receipt of the articles, which circumstances should be considered by the jury in determining the understanding between the parties at the time."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. J. Fargo, for the defendant.

M. Wilcox, for the plaintiff.

WELLS, J. 1. Evidence that the plaintiff and her ward rendered services to the defendant, while living at his house, was admissible upon the question of the value, or the reasonable amount of compensation to be allowed for their board, if any; and also upon the question whether there was any understanding or implication of a promise that payment should be made for it. *Boardman v. Silver*, 100 Mass. 330.

2. The law implies a promise to pay for the reasonable value of benefits received, only when there is no evidence that they were conferred upon other grounds than that of contract. When the relations between the parties are such as to warrant the inference that the benefit was bestowed gratuitously, by way of hospitality, or by reason of any obligation, either legal or moral, it becomes a question of fact, to be submitted to the jury, to determine whether it was in reality gratuitous, or upon the basis of contract. So also when there is evidence of corresponding benefits or services rendered by the other party, in connection or at the same time with those for which the suit is brought; such evidence requires that the inference to be drawn shall be determined by the jury, as one of mere fact. In all such cases it would be improper to instruct the jury that the law implies a promise to pay for benefits so received.

The instruction asked for, in this case, was rightly refused; and the case was submitted to the jury, with such explanation of the denial as would allow them to infer a promise by the plaintiff to pay for the board and other articles charged, if they thought that to be the reasonable interpretation of the facts proved. We do not think the jury could have misunderstood the instructions to mean that such an inference would not be warranted by the evidence in the case. *Exceptions overruled.*

AMOS BREWER vs. HOUSATONIC RAILROAD COMPANY.

It is within the discretion of the judge presiding at a trial, to allow the plaintiff, who has rested his case on an auditor's report, to introduce evidence in support of the report, after the defendant has put in his evidence.

In an action for goods sold and delivered, the defendant has good ground of exception to instructions which authorize the jury to return a verdict for the plaintiff even if they find that the goods were not all of the kind contracted for and that the defendant did not accept them.

CONTRACT for wood sold and delivered. The case was referred to an auditor, who reported in favor of the plaintiff. At the trial in the superior court, before *Brigham*, C. J., the plaintiff introduced the auditor's report in evidence, and rested his case. The defendants contended that if the plaintiff proposed to offer other evidence in support of his case, he should do so before the defendants put in their evidence, but the judge ruled otherwise.

There was conflicting evidence as to the terms of the contract of sale, as to the kind of wood delivered, and as to whether the defendants accepted the wood.

"The defendants requested the judge to instruct the jury that if the parties contracted for the delivery of wood, all of a particular quality, and the plaintiff delivered a quantity embracing a portion of several cords intermixed with the entire mass of a different quality, the defendants would not be obliged to accept any of the wood; and if the defendants did not accept the wood as delivered, the plaintiff could not recover. But the judge instructed the jury that if the parties contracted for wood of a particular quality, and the plaintiff delivered a quantity of wood which was not of the quality contracted for, intermixed with that which was called for by the contract, the plaintiff might recover for the latter, notwithstanding its intermixture with wood of inferior quality. Instructions were given to the jury as to acts or conduct of the defendants which would authorize the inference of an acceptance of the wood; to which no exception was taken."

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

I. Sumner & J. Dewey, Jr., (H. J. Dunham with them,) for the defendants.

H. C. Joyner, for the plaintiff.

COLT, J. It was within the discretion of the court, and according to the usual practice in this Commonwealth, to permit the plaintiff to introduce evidence in support of the issue to be maintained by him, after the defendants had produced evidence to meet the case made by the auditor's report. *Morgan v. Morse*, 13 Gray, 150. The auditor's report, it is true, is only *prima facie* evidence, and does not change the burden of proof, but the plaintiff may in the first instance rest his case upon it, and, if it is attempted to control or impeach it by other evidence offered by the defendants, may be permitted to put in evidence in reply, in support of his own case.

The judge was in substance requested to instruct the jury, that, if the parties contracted for the delivery of wood to be all of a particular quality, and the plaintiff delivered wood intermixed with that of inferior quality, the defendants would not be obliged to accept it; and if it was not accepted, the plaintiff could not recover. There was evidence in the case which made this instruction proper; but the jury were told, instead, that if the parties contracted for wood of a particular quality, and the plaintiff delivered a quantity of wood which was not of the quality contracted for, intermixed with that which was called for by the contract, the plaintiff might recover for the latter. The exceptions show, indeed, that, in addition to this, instructions were given as to what would authorize the inference of an acceptance of the wood, which were not objected to. And it may be possible, or even probable, as the plaintiff argues, that the jury must have found, upon the pleadings and evidence in this case, that there was an acceptance of the wood for which they charge the defendants in their verdict. But this cannot be left to conjecture. And the difficulty is, that, as the instructions stand, with the accompanying request of the plaintiff, the jury were permitted to find for the plaintiff, without either finding as

acceptance by the defendants, or that wood of the quality required by the contract was delivered at the place agreed on. *Nichols v. Morse*, 100 Mass. 523. Upon the last ground stated, the
Exceptions are sustained.

ANDREW J. PIKE vs. IVORY WITT & another.

The two defendants with a workman went to a tenement in the occupation of the plaintiff, but in which there was no one at the time, and the door of which was fastened with a padlock; demanded the key from the plaintiff's servant; and, on his refusal, ordered their workman to enter the premises through a hole in the floor. The workman did so; and by his assistance, and with the aid of an axe which they brought with them, they removed the padlock, and entered and kept possession of the premises. They used no violence in word or act to the plaintiff's servant. *Held*, that there was not such a forcible entry as would support an action on the Gen. Sts. c. 137.

In an action on the Gen. Sts. c. 137, to recover possession of a tenement which the plaintiff claimed under a written lease, and which he alleged that the defendants held against his right, the answer was a general denial. *Held*, that evidence offered by the defendants of an oral submission to arbitrators of the question of the plaintiff's right to possession, and of an oral award against him, was not admissible.

ACTION on the Gen. Sts. c. 137, against Ivory Witt and George W. Alford, to recover possession of a room in a steam saw mill at Adams, alleged to be held by the defendants unlawfully and against the right of the plaintiff. The answer was a general denial.

At the trial in the superior court, before *Brigham*, C. J., it appeared that the plaintiff, claiming under a written lease from Daniel Carrier, occupied the room from October 1868, and the defendants owned the mill and occupied the remaining part of it; that on March 17, 1869, "the defendants, with a person employed by them as a workman, went to the premises, the doors of which were fastened by an iron clasp and padlock, and demanded of Charles Gilson, a workman in the plaintiff's service, who was at the premises, the key of the padlock, the plaintiff not being present; that Gilson, having there the key in his possession, refused to deliver it to the defendants, who thereupon after directing the workman who accompanied them to enter the

premises through the floor of the same, by means of a hole in the floor, used for throwing out slabs, and after the workman entered the premises as directed, by means of an axe which they brought with them for that purpose, assisted by their workman within the premises, removed the clasp from the doors, and entered the premises, and held them, excluding the plaintiff therefrom, and refusing to permit him to enter, use or occupy the same, although he demanded entrance thereto and claimed the right to use and occupy the same; that the defendants continued so to refuse entrance to, and use and occupancy of the premises, to the plaintiff until the date of the action and thereafterwards; that Gilson did not resist or offer to resist the entry of the defendants into the premises, otherwise than by refusing to deliver to them the key of the padlock; and that the defendants used or offered no language or acts of violence to Gilson, at the time of demanding the key and effecting the entrance into the premises."

The defendants offered evidence to prove that, before their entry, they and the plaintiff made an oral agreement to submit the question, whether they or the plaintiff were entitled to possession of the premises, to three designated arbitrators, and to abide by their award; that in pursuance of said agreement they and the plaintiff stated the question to the arbitrators; and that the arbitrators awarded that the plaintiff had no right to the use and occupation of the premises. But the judge excluded the evidence.

The defendants requested the judge to rule that the evidence in the case did not, as matter of law, prove a forcible entry or forcible detainer, by the defendants, of the premises, and to direct a verdict for the defendants; but the judge refused.

The case was submitted to the jury upon the following instructions as to what constituted a forcible entry and a forcible detainer, to which the defendants took no exception: "To constitute a forcible entry which would support this action, the plaintiff must prove, by a preponderance of evidence, that the defendants entered the premises described in the declaration by actual force accompanied by an exhibition of means of applying such force, or any other acts, demonstrations or declarations

indicating to the plaintiff's workman, in attendance there at the time, their purpose to forcibly enter the premises in spite of any resistance which it was his duty or disposition to make to such forcible entry, and calculated to overpower such disposition. Such acts, demonstrations or declarations must have been in the nature of menaces, by a show of persons appearing to take part in the purpose of entry, or a show of weapons or mechanical means sufficient to alarm said workman, and deter him from maintaining the plaintiff's occupation, because of apprehensions of bodily harm or force by the applications of the defendants to his own person. A forcible entry by merely mechanical force applied against the consent of the plaintiff or his agent there present would not be a forcible entry within the meaning of the law. If the jury find that there was a forcible entry or a forcible detainer, as thus defined, they will find for the plaintiff."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. L. Dawes, (*F. P. Brown* with him,) for the defendants.

S. W. Bowerman, for the plaintiff.

CHAPMAN, C. J. No fault is found, on either side, with the instructions given to the jury as to what constitutes a forcible entry, but they are conceded to be correct. The only question raised is, whether the evidence, as reported, is sufficient in law to authorize the jury to find the defendants guilty.

The premises consist of one room in a steam saw mill, which was in the occupation of the plaintiff, no person being in it, but it was left locked by a padlock, the plaintiff's workman being near the mill and in possession of the key. The defendants owned the mill, and occupied the remaining part of it. It is admitted that the defendants entered the room, but it is denied that they entered forcibly. We need to consider the acts and language of the defendants separately and in connection with each other, and apply to them the instructions given to the jury.

It appears that the two defendants went to the mill, taking with them a workman. This of itself does not constitute the "multitude" or "unusual number" spoken of in the books,

which of itself tends to excite terror. They took with them an axe. But as this is a mechanical tool, rather than a weapon to be used in combat, the mere fact that one of three men carries an axe to a saw mill cannot be supposed to excite terror. There must be something in addition to the number of the men and the possession of the axe, to constitute the force mentioned by the learned judge, and this must consist of menace or act. The bill of exceptions states that there was no violence of language or act towards the plaintiff's workman who was at the mill. The defendants demanded of him the key; he refused to deliver it; and they said no more to him. Thus far, there was no force. They then directed their workman to enter the room through the floor by means of a hole used for throwing out slabs; and he entered accordingly. But it is not forcible to enter by drawing a latch or through an open door or window. *Bac. Ab. Forcible Entry & Detainer, B.* It cannot then be forcible to enter through a hole in the floor. Thus it appears that they directed their servant to enter without force, and he did so. His entry was their entry, and it was completed without force. The removal of a clasp or bolt afterwards, for the purpose of making ingress and egress easy, does not constitute such force as the instructions require to be proved. It amounted merely to mechanical force, applied against the consent of the plaintiff's agent, but not tending to alarm him or to excite apprehensions of bodily harm, and there is no evidence that he felt any alarm or apprehension. And the case finds that the axe was brought for the purpose of being used in removing the clasp. A majority of the court are of opinion that there is nothing in all these facts tending to prove the force required by the instructions to be proved.

The submission and award offered in evidence by the defendants were oral. They related to the right of the plaintiff under a lease for years of real estate, and could not be valid on that ground. Nor had such a defence been alleged in the answer. The evidence was rightly excluded.

But on the ground that there was no evidence upon which the jury could legally find that there was a forcible entry, the

Exceptions are sustained.

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ABATEMENT.

See PLEADING, 1.

ACCIDENT.

See MISTAKE AND ACCIDENT.

ACTION.

1. One who places his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise and as near as possible to the sidewalk, is not restrained by the mere fact of thus violating the ordinance from maintaining an action against one who injures the horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so. *Steele v. Burkhardt*, 59.
2. A landowner in a city, who drains his premises by a private drain leading from them under the adjoining street, has no right of action against the city for merely opening a passage from the street down into the drain to conduct off surface water. But if the city constructs and maintains the passage in such a manner as in effect to adopt it, in connection with the drain, as a common sewer, and by negligence in its construction or repair obstructs his drainage, it is liable to him in an action at common law for the obstruction. *Emery v. Lowell*, 18.
3. A declaration that the defendant, knowing J. S. to be a retailer of fluids to be burned in lamps for illuminating purposes, and naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that, in ignorance of its dangerous properties, he retailed a pint of it to the plaintiff to be burned in his lamp for illumination; and that, while the plaintiff, in like ignorance, was so burning it, it exploded and injured him and his property; sets forth a good cause of action at common law. *Wellington v. Downer Kerosene Oil Co.* 64.
4. The right of action given by the St. of 1867, c. 286, to "any person suffering damage from the explosion or ignition" of fluid unlawfully sold under the statute, extends to injuries to property, and includes all persons to whom any purchaser from such seller may give or resell it. *Ib.*
5. A declaration which, with sufficient allegations of the defendant's knowledge and the plaintiff's care, alleges that the defendant sold to J. S. naphtha

under the name of oil, contrary to the St. of 1867, c. 286; that J. S. resold it to the plaintiff, to be burned in a lamp for illuminating purposes; and that, while the plaintiff was so burning it, it exploded and injured him and his property; sets forth a good cause of action under the statute. *Id.*

See ASSIGNMENT; ASSUMPSIT; CARRIER, 5 CONTRACT, 2; EVIDENCE, 3; INSURANCE, 1; JUDGMENT, 3-6; MORTGAGE, 8; PROMISSORY NOTE; RAILROAD, 1-3; REPLEVIN; SALE, 6; SAVINGS BANK; SEDUCTION; SHIPPING, 1; TOWN, TRUSTEE PROCESS; WAREHOUSEMAN; WRIT OF ENTRY.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See EXCEPTIONS, 2; SALE, 3; VARIANCE.

ANSWER.

See PLEADING, III.

APPORTIONMENT.

See DEVISE AND LEGACY, 2.

AQUEDUCT.

See WATERWORKS.

ARBITRAMENT AND AWARD.

A. sued B. for pulling down a wall built by A. in a lane. Pending the suit, they agreed, under seal, that whereas there were differences between them "as to the ownership and use" of the lane, and B. claimed "an interest in the fee" of the lane and also a right of way therein, and the suit was pending about the wall, and both were desirous of settling "all questions between them touching their respective rights in and to the use of" the lane, they would submit "all said questions, including said suit," to an arbitrator, and abide by his award. At the hearing before the arbitrator, B. offered evidence to prove title in himself to the fee of the lane; A. denied this claim of title; and the matter was made subject of argument. The arbitrator awarded that A. had a right of way in the lane, and B. had no right of way therein or to pull down the wall; and as referee under a rule of court in the pending suit, he assessed damages against B. for pulling down the wall. *Held*, in a suit in equity brought by B. to avoid both awards, (the question of jurisdiction being waived,) that both should be declared void, for the

omission of the arbitrator to pass on the question of title in the fee of the lane. *Parker v. Clark*, 431.

See PLEADING, 2.

ARREST.

1. The magistrate's certificate required by the Gen. Sta. c. 124, § 5, to be annexed to an execution in order to arrest the judgment debtor thereon, need not in terms authorize an arrest in the daytime. *Manuel v. Bates*, 354.
2. A magistrate's certificate under the Gen. Sta. c. 124, §§ 5, 8, subjoined to the affidavit of the judgment creditor, and annexed to the execution, in these terms: "I certify that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor, if his arrest is authorized by law, to be made after sunset," authorizes an arrest of the debtor before sunset. *Id.*

See EXCEPTIONS, 3.

ASSAULT AND BATTERY.

See RAILROAD, 3.

ASSESSMENT.

See BRIDGE; HARVARD COLLEGE; LANDLORD AND TENANT; TAX; WAY, 1-11.

ASSESSOR.

1. The findings of an assessor in matters of fact may be revised by the court upon exceptions thereto and his report of the evidence introduced before him; but, especially when they depend upon a conflict of testimony, are not to be set aside unless clearly shown to be erroneous. *Paddock v. Commercial Insurance Co.* 521.
2. The finding of an assessor, in accordance with the opinion of competent experts testifying before him, upon a question of fact referred to him, is not invalidated by his stating in his report that "it is of course impossible to determine this question with anything like certainty." *Id.*

ASSIGNMENT.

A claim for damages for a personal injury is not assignable before judgment thereon. *Linton v. Hurley*, 353.

ASSUMPSIT.

One who has agreed with another to assume and pay a claim against him, but has neglected for two years to do so, may be sued by him on the agreement without a demand from him for the payment. *Andrews v. Frye*, 234

See WAREHOUSEMAN.

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ATTACHMENT.

See BOND; CARRIER, 1; OFFICER.

ATTORNEY GENERAL.

See COSTS, 1; EQUITY, 1.

AUDITOR.

See CASE STATED; EXCEPTIONS, 6.

BAILMENT.

See BANKRUPT; BROKER; CARRIER; LARCENY, 3; OFFICER; PLEDGE
PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 2; RAILROAD, 3; SALE,
1, 4; SHIPPING, 3; TRUSTEE PROCESS, 1; WAREHOUSEMAN.

BANK.

See SAVINGS BANK; TAX.

BANKRUPT.

In the provision of the bankrupt act of 1867, c. 176, § 33, excepting from the effect of a bankrupt's discharge debts created by him while acting in any fiduciary character, the phrase "fiduciary character" does not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it and apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, to pay over to the debtor a balance of the proceeds of the sale remaining after such satisfaction; but, *it seems*, implies a fiduciary relation existing previously to or independently of the particular transaction from which the excepted debt arises. *Cronan v. Cotting*, 245.

See JUDGMENT, 7; MORTGAGE, 4.

BAR.

See JUDGMENT, 3-6; TRUSTEE PROCESS, 3.

BETTERMENT.

See HARVARD COLLEGE; LANDLORD AND TENANT; WAY, 1-11.

BILL OF EXCHANGE.

See CARRIER, 5; PROMISSORY NOTE.

BILL OF LADING.

See CARRIER, 2-4.

BILL OF SALE.

See SALE, 5.

BOARD AND LODGING.

See EVIDENCE, 13, 14.

BOND.

1. The substitution, by a clerical error, in the condition of a bond to dissolve an attachment, of the name of the plaintiff, instead of the defendant, as the person in event of whose payment of the judgment the obligation shall be void, does not invalidate the bond, if the true intention of the parties can be ascertained by applying the terms of the whole instrument to its subject matter; and in suing such a bond it is not a material variance if it is declared upon as it was intended to be written. *Leonard v. Speidel*, 356.
2. In an action against A., B. and C., the rendering of judgment against A. and B. only, and for C., does not exempt sureties from liability on a joint and several bond given by them with A., B. and C. as principals, to dissolve the plaintiff's attachment of "goods and estate of said A., B. and C.," the condition of which is that "A., B. and C. shall pay to the plaintiff in said action the amount, if any, which he shall recover therein." *Ib.*
3. In a suit on a bond given in the usual form to dissolve an attachment, judgment will be rendered for the full penal sum, upon proof of a breach of the condition, although this sum is larger than the amount recovered by the plaintiff against the principal obligor. *Ib.*

See CONSTABLE; PLEADING, 1; POOR DEBTOR; REPLEVIN.

BOSTON, CITY OF.

See CONSTABLE; WATERWORKS; WAY, 1-11.

BOUNDARY.

See WRIT OF ENTRY, 1.

BREACH OF PROMISE OF MARRIAGE.

See CONTRACT, 5; EVIDENCE, 10.

BRIDGE.

1. A statute empowering commissioners to assess on one county part of the expense of repairing a portion of a bridge which lies in another county is constitutional. *Carter v. Cambridge & Brookline Bridge Proprietors*, 236.
2. Commissioners empowered by statute to make and report to this court such orders as they may deem expedient for rebuilding a bridge, and to order that the expense thereof shall be paid and borne by certain counties or towns, any or all of them, as they may deem just, may order a town to rebuild the bridge, and two of the counties to pay to the town, in respect to its expenses in the rebuilding, certain gross sums, to be due and payable immediately on the acceptance of their report, without requiring the town to give security for the proper employment of said sums. *Ib.*

See WAY, 12, 13.

BROKER.

A broker who buys stock on an order from another broker, knowing or having reason to know that this broker is acting as agent only, and the purchase is in fact made for an unnamed principal, has no right, in consequence of the omission to name the principal, to presume that he has authorized the agent to pledge the stock for his own debt; and cannot hold the stock by virtue of such a pledge unauthorized or unratified by the principal. *Fisher v. Brown*, 259.

See CONTRACT, 1; PRINCIPAL AND AGENT, 2.

BURDEN OF PROOF.

See INSURANCE, 5.

BY-LAW.

See ACTION, 1; WATERWORKS.

CARRIER.

1. It is no defence to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. *Edwards v. White Line Transit Co.* 159.
2. The successive roads of three railroad corporations, together with the line of a steamboat company whose boats plied from the end of the third road, constituted a route between two cities. The first corporation had a written contract with the second for mutual transportation of goods over and beyond their roads, having in view transportation between the two cities, and providing that the first corporation might "bill freight through," and for any loss of goods beyond its own road the second corporation would indemnify it; and the general course in transporting goods from the first city to the second was for the first corporation to receive and receipt for them, as "to be forwarded" to the second city; to dispatch them over its own road and the second road, with a way-bill in which they were marked for through transportation, which way-bill the third road took, with the goods, from the second road, and in its turn delivered, with the goods, to the steamboat company; and to collect the entire freight, not only for the transportation over its own road and the second road, in pursuance of the written contract, but also over the road of the third corporation and the line of the steamboat company. After deducting from the freight thus collected a portion fixed in its written contract with the second road as due for its own transportation of the goods, it paid the balance to that road, which, after deducting a portion fixed by oral agreement between itself and the third road, paid the residue to the third road, which divided it with the steamboat line in pursuance of an oral agreement between itself and that line. But between the first corporation and the third corporation and steamboat line, and between the second corpo-

- ration and the steamboat line, there was no agreement except what may be inferred from this course of business. *Held*, that these facts warranted the inference that the first corporation was liable as a common carrier over the whole route, to a person from whom, in this course of business, it received goods for transportation from the first city to the second city. *Hill Manufacturing Co. v. Boston & Lowell Railroad Co.* 122.
3. An agent in St. Louis for several railroad corporations whose roads together formed a line from that city to Boston was instructed by one of them (whose road lay in New York) not to receive any cotton in its behalf for transportation without writing into the bill of lading an exemption of the carriers from the risk of fire. A factor in St. Louis of a mill corporation in Massachusetts, who was aware of these instructions, and had frequently argued to the railroad agent that the carriers would be liable for a loss by fire notwithstanding such a writing; and who had repeatedly delivered to said agent parcels of cotton for transportation over the line to his principals in Boston, and in each instance, after the delivery, had received from him and forwarded to them a bill of lading of the parcel as the only bill of lading thereof, knowing that the clause "Owner's risk of fire" was written into it, and which stipulated for the exemption of the line from that risk as a part of the consideration of the contract; delivered another parcel of cotton to the agent in St. Louis on June 30, for transportation to Boston, and afterwards, and while the cotton was still in St. Louis, received from him a like bill of lading, dated July 1, as the only bill of lading of it, and, knowing its contents, forwarded it to his principals. Before this transaction, their treasurer, in conversation with the railroad agent, had said that he did not like the exemption clause above quoted, and the agent had replied that it made no difference, and that the carriers were liable notwithstanding what they wrote in that way; but this conversation was not intended or understood by either party at the time, as varying the legal effect of any previous or subsequent contracts for transportation. On the line between St. Louis and Boston the cotton was destroyed by fire, upon the railroad in New York, without negligence of that railroad corporation. *Held*, that the railroad corporation was not liable for the loss. *Pemberton Co. v. New York Central Railroad Co.* 144.
4. If common carriers by water, whose duty of transportation is fulfilled upon landing goods on a wharf in a city, cause them to be carried from the wharf to the place of business of the consignee in the city, they have no lien on them for such additional transportation, (whether or not it is performed by their own servants,) in the absence of any authority for it from either consignor or consignee; and the facts that they received the goods from the consignor marked with the place of business of the consignee, and gave no bill of lading or written receipt for them, do not import such an authority. *Richardson v. Rich*, 156.
5. An express company, having received from the drawer, for collection, with instructions to return it at once if not paid, a draft for a sum overdue from

the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay more than the principal sum. Thereupon the company, without collecting anything on the draft, agreed with him that they would hold it till he could inquire of the drawer as to the additional amount, and he wrote, the next day, making such inquiry, and adding, "The parties will hold the draft until I hear from you." Upon receiving a reply, in due course of mail, from the drawer, that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft, which the express company continued to hold but neglected again to present. The third day was Sunday; and on the fourth day he became insolvent. Held, that the express company were liable for the drawer's loss on the draft by the drawee's insolvency. *Whitney v. Merchants' Union Express Co.* 152.

See LARCENY, 3; PRINCIPAL AND AGENT, 2; RAILROAD, 3-8; SHIPPING, 3; TRUSTEE PROCESS, 1.

CASE STATED.

The submission of a case to the judgment of the court on an auditor's report as a statement of agreed facts does not import that the court is to presume in favor of conclusions of the report upon facts not sufficiently stated to enable a revision of such conclusions in matters of law, and if they are essential to a judgment the statement will be discharged. *Meserve v. Andrews*, 360.

CASES OVERRULED, DOUBTED, OR DENIED.

ATTORNEY GENERAL v. GREAT NORTH-ERN RAILWAY Co. 1 Drewry & Smale, 154	} See <i>Attorney General v. Tudor Ice Co.</i> 243.
<i>In re</i> COLLEGE STREET, 8 R. L. 474	} See <i>Harvard College v. Aldermen of Boston</i> , 484.
GRAFTON BANK v. FLANDERS, 4 N. H. 289	} See <i>Barlett v. Tucker</i> , 342.
<i>In re</i> KIMBALL, 2 Benedict, 554 See <i>Cronan v. Cotting</i> , 247.
PULLEN v. BELL, 40 Maine, 314 See <i>Poor v. Oakman</i> , 318.
<i>In re</i> SEYMOUR, 1 Benedict, 348 See <i>Cronan v. Cotting</i> , 247.
STATE v. NEWARK, 3 Dutcher, 185	} See <i>Harvard College v. Aldermen of Boston</i> , 485.
WALSON v. MOORE, 1 C. & K. 626 See <i>Stone v. Sanborn</i> , 324.

CERTIORARI

See WAX, 1, 4, 6, 8, 10.

COLLATERAL SECURITY.

See BANKRUPT; BROKER; MORTGAGE; PLEDGE; PROMISSORY NOTE, 2.

COMMISSIONERS.

See BRIDGE; FISHERY.

COMMON CARRIER.

See CARRIER.

CONDITION.

See BOND, 2; CONTRACT, 1, 3, 6; POOR DEBTOR, 2; SALE, 1; VENDOR AND PURCHASER, 4; WRIT OF ENTRY, 2.

CONSIDERATION.

See CONTRACT, 1.

CONSIGNOR AND CONSIGNEE.

See CARRIER, 4; LARCENY, 3; PRINCIPAL AND AGENT, 1.

CONSTABLE.

A judgment against a constable for nominal damages and for costs, in an action of replevin of goods attached by him, is a judgment for a misfeasance, within the meaning of the St. of 1814, c. 165, § 1, providing for suits on the bonds of constables of Boston. *Tracy v. Warren*, 376.

See EXCEPTIONS, 3.

CONSTABLE OF THE COMMONWEALTH.

See EXCEPTIONS, 3.

CONSTITUTIONAL LAW.

See BRIDGE, 1; CORPORATION, 1; FISHERY; JUDGMENT, 1, 2; WAY, 7.

CONTINGENT INTEREST.

See DEVISE AND LEGACY, 1.

CONTRACT.

I. Consideration.

1. In an action for services in selling an estate for the defendant, it appeared that the defendant told the plaintiff that he would give him a certain sum if he would obtain a purchaser; that the plaintiff, who was not a broker, neither did nor said anything at the time to show that he accepted the offer, but within a few days told J. S. that the defendant wanted to sell, and took him to see, but did not find the defendant; and that afterwards J. S. bought the estate, but the defendant did not know till after the sale that the plaintiff had done anything to aid it. *Held*, that there was evidence for the jury of a continuing offer, of an acceptance, and of a performance by the plaintiff of the contract thus formed. *Bornstein v. Lans*, 214.

See CONTRACT, 4; SPECIFIC PERFORMANCE, 2, 3; VARIANCE; VENDOR AND PURCHASER, 4.

II. Parties.

2. A contract by two persons with a boat-builder to pay for a boat to be built for them a certain sum, "each his one half," is several, not joint; but under the Gen. Sta. c. 129, § 4, they may both be sued thereon in one action, and separate judgments rendered. *Costigan v. Lunt*, 217.

See BOND, 2; EVIDENCE, 13, 14; PLEADING, 1; PLEDGE, 1; PROMISSORY NOTE, 1; SAVINGS BANK; VENDOR AND PURCHASER, 1, 2.

III. Validity.

See ASSIGNMENT; BOND, 1; CARRIER, 3; SAVINGS BANK; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 1, 2.

IV. Construction.

2. An agreement to convey land "in fee simple, by good and sufficient deed of conveyance with full covenants of seisin, warranty and freedom from incumbrances," is not satisfied by a conveyance of the land, sufficient otherwise, but subject to conditions prescribing the size, height, materials and position of any building to be erected or maintained on the land, and limiting the occupation of such building, for a term of years, to the purposes of a dwelling-house and certain mercantile purposes. *McGlynn v. Maynz*, 263.

4. A. and B. agreed in writing, concerning a tract of land belonging to A., which was occupied by squatters, as follows: that if the claims of the squatters could be extinguished by compromise for a reasonable sum, A. should extinguish them within sixty days after B. should pay him \$5000, but if it should be impracticable to settle with the squatters on reasonable terms, A. should eject them by legal process, and in such case B. should pay him such sums as might be needed for the purpose, not exceeding in all \$2000, and further, if A. should find that he could effect a settlement with them, and should wish for said \$5000, or any part thereof, for that purpose, B. should pay him said \$5000, or such part thereof as he might desire, within thirty days after notice from him; that A. should convey the tract to B. when B. should finish paying him \$50,000, including the \$5000; but that B. should not incur any personal liability for payment of the \$50,000, or any part thereof "except the aforesaid \$5000, or the aforesaid \$2000, as the case may be." A. thereupon proceeded to compromise with some of the squatters; and paid C., one of them, \$300 for a release of his claim in the tract, and as part of the bargain agreed to purchase from him for \$1000 a lot of land outside of the tract. Then, having effected no final settlement with the squatters, he made a supplemental written agreement with B., modifying the terms of sale of the tract in certain particulars not relating in any material clause to the squatters, and concluding thus: "This modification of the agreement is made with the understanding that B. is to pay A. \$1500 on said contract within sixty days hereof, according to the terms of his promissory note of even date herewith, and also the further sum of \$1000, if A. shall require, within sixty days from this date, for the purpose of settling

with said squatters, provided A. shall give him thirty days' notice of his requiring the same. If such payment or payments shall not be so made, this modification is to be void." *Held*, 1. that B. did not agree to pay A. \$5000 absolutely, but only such part thereof as A. should desire and need to effect a settlement with the squatters; 2. that the \$1500, paid by B. on his promissory note of even date with the modification of the original agreement, was not paid as the consideration of said modification, but to be applied by A. towards the \$5000 or such part of the \$5000 as was needed to settle with the squatters; 3. that A. could not charge against the \$5000 the sum which he promised to pay C. for land outside of the tract; and 4. that any part of the \$5000 which B. paid A. in consequence of A.'s representations that he needed it to settle with the squatters, but which in fact was not needed or used for that purpose, could not, without B.'s consent, be retained by A. and applied as a part payment of the contract price of the tract. *Pease v. Brown*, 291.

See ASSUMPSIT; BANKRUPT; BOND, 1; CARRIER, 1, 3, 4; CONTRACT, 6; PARTNERSHIP, 2; PRINCIPAL AND AGENT, 1; SALE, 1-5; SAVINGS BANK; SHIPPING, 1; SPECIFIC PERFORMANCE, 3; VARIANCE; VENDOR AND PURCHASER, 2-4.

V. Breach.

5. On the trial of an action for breach of a contract which both parties agree was terminated at a certain time, and differ only as to whether the termination was by mutual consent, the refusal of instructions to the jury, which were framed on the assumption that the contract subsisted some months later, affords no ground of exception. *Stone v. Sanborn*, 319.
3. W. and D. made a written contract, in which D. agreed to build, under a patent of W., six machines, without expense to W. "except he is to furnish patterns for the same;" and it was agreed that, out of the proceeds of the sale, by either party, of these six or any other machines which D. might build under the patent, W. should have a certain sum, and D. the balance; and W. agreed to "hold D. harmless in all cases of sales of machines by D., and in no other case, against any and all suits against D. for an alleged infringement of W.'s patent on any other patent." Another clause fixed a minimum price per machine, for sales. A further clause provided that D. should build, at the rate of two machines per month until the whole order should be filled, "any number of machines more than six that W. may order, if W. does not order more than twelve at any one time," to be sold in like manner; and it was stipulated "that W. is to furnish one set of patterns, and only one set of patterns, free of expense to D." It was also agreed that either party might terminate the contract on four months' notice to the other; "but that, when notice is given, all orders up to the end of that time which have been given are to be filled," and that, if D. should give the notice, then it should be at the option of W. whether D. should take "all machines ordered or built or being built at the time the contract terminates," paying to W. a certain sum per machine, or D. should "deliver the same to

W. within one month from the termination of the contract," receiving from W. a like sum per machine. Before the six machines were all built, W. gave to D. an order for twelve additional machines; and D. a month later gave W. a notice for termination of the contract in four months, and neglected and refused to build any of the twelve machines, but completed the original six. After this notice, C., the owner of another patent, gave D. notice that he should hold D. liable for infringing his patent in building the six. W., after notifying D. that under the option clause in the contract he required D. to take the twelve machines and pay him the stipulated sum per machine, sued D. for breach of the contract; and in his declaration, after setting forth the contract and his order for twelve additional machines, alleged that D. "wholly neglected and refused to build the said twelve according to the plaintiff's order and the terms of said contract, and did wholly neglect and refuse to do so, up to the termination of said contract and ever since"; and then, under succeeding allegations, sought to recover the sum he had demanded from D. under the option clause. Jury trial was waived, and the judge to whom the case was submitted found that during the year in which the contract was terminated "there was a demand for these machines in the market" at the minimum price fixed in the contract, and gave judgment for the plaintiff for the amount of the difference, upon ten machines, between the sum for which the defendants would have built them under the contract, and the larger sum which the plaintiff would have been obliged to pay to others for building them. *Held*, 1. that the plaintiff's attempt to avail himself of the option, in a state of facts under which it did not exist, was no bar to his remedy for a general breach of the contract; 2. that the declaration sufficiently alleged a general breach of so much of the contract as related to the order for twelve machines; 3. that the stipulation that W. was to furnish a set of patterns was not distinctly made by the form of the contract a condition precedent to the obligation of D. to begin to manufacture the twelve machines; 4. that the mere fact of a notice given by C. of his intention to prosecute D. for an infringement of patent afforded no defence to D. for refusing to fulfil that obligation; and 5. that D. had no good ground for exceptions to the measure of the damages assessed by the judge per machine, or to the number of machines on which he assessed them. *Weed v. Draper*, 28.

See CARRIER, 1; GOODS SOLD AND DELIVERED; JUDGMENT, 1, 2; SHIPPING, 1.

VI. *Rescission.*

See PLEDGE, 2; SALE, 3; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 3, 4.

CORPORATION.

1. The provision of the Rev. Sts. c. 44, § 23, and Gen. Sts. c. 68, § 41, declaring that acts of incorporation shall be subject to amendment, alteration or repeal

at the pleasure of the legislature, reserves to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or other public or private rights. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 446.

2. A bill in equity by stockholders of a corporation, in behalf of themselves and the other stockholders, for fraud and conspiracy whereby the interests of the corporation have been sacrificed, brought against the corporation and persons who were its directors in former years, and others, cannot be maintained, if it does not show either that an effort has been made to set the corporation in motion to redress the wrong, or an application been made to the board of directors in office at the time of bringing the bill, or that such effort or application would be useless; and this requirement is not satisfied by an allegation that a majority of the directors are acting in the interest and under the control of persons charged with the fraud. *Brewer v. Boston Theatre*, 378.
3. A bill in equity brought by stockholders of a corporation, in behalf of themselves and the other stockholders, against the corporation, and against certain directors and other individuals for fraudulently conspiring to lease the corporate property on improperly low terms and share in the profits of the lessees, which alleges that individual defendants own or control a majority of the stock and control the proceedings at the stockholders' meetings, and that a majority of the directors are knowingly and fraudulently colluding with them to continue to them the control of the corporation and its property, sufficiently shows that no redress can be obtained through the corporation or the directors, and that neither the lessees, nor all, nor a majority of, the directors, are necessary parties to the bill. *Id.*

See EQUITY, 1; FISHERY; PARTNERSHIP, 3; RAILROAD, 1-3; TAX; TRUSTEE PROCESS, 2.

COSTS.

1. Under the Gen. Sta. c. 115, § 17, and St. of 1860, c. 191, this court cannot allow expenses and fees of experts not appointed by the court, employed, in a capital case, by the counsel for the prisoner, without the authority or approval of the attorney general; but may allow a reasonable compensation, approved by the attorney general, to experts so employed with his assent, to make investigations, give opinions, or testify on the trial. *Clark & Attorney General, petitioners*, 537.
2. In an action of tort, changed on the plaintiff's motion to a suit in equity upon the terms that he shall pay the defendants' taxable costs, each defendant is entitled to separate costs if they have answered severally; and it is immaterial that the action was brought originally in contract. *George v. Rees*, 366.

2. After a defendant has taken judgment and execution for costs in an action in the superior court, the court has no jurisdiction, on his petition, even with the assent of the plaintiff, to bring forward the action upon the docket to a subsequent term, and permit him to return the execution and obtain a new taxation of his costs and another execution for them as taxed anew; and such a petition is an independent proceeding in which the respondent is the prevailing party, and costs may be allowed to him therein under the Gen. Sta. c. 156, § 16, in the discretion of the court, which is not subject to exceptions. *Barnes v. Smith*, 363.

See VARIANCE.

COUNTY.

See BRIDGE.

COVENANT.

See LANDLORD AND TENANT.

CRUELTY.

See DIVORCE.

DAMAGES.

See ARBITRAMENT AND AWARD; ASSIGNMENT; BOND, 3; CONTRACT, 6; INSURANCE, 7, 8; JUDGMENT, 1, 2, 6; PLEDGE, 2, 3; RAILROAD, 1, 2; REPLEVIN.

DECEIT.

See FRAUD.

DECLARATION.

See PLEADING, II.

DEED.

See CONTRACT, 3; EVIDENCE, 9; VENDOR AND PURCHASER, 2-4; WRIT OF ENTRY, 2.

DEFAULT.

See REVIEW.

DEMAND.

See ASSUMPSIT; PLEDGE, 3.

DEVISE AND LEGACY.

1. A testator by his will gave his estate to his widow during her life or widowhood, and at her decease or marriage "to such of my children as shall then be living, share and share alike; the names of my said children are A., B., C., D. and E., to them and to their heirs and assigns forever" B. survived

the testator, but died before the death or marriage of the widow, and left a child born in the testator's lifetime. *Held*, that this child had no interest in the estate. *Thomson v. Ludington*, 198.

2. A testator, in his will, gave a sum to his daughter absolutely, and another sum to trustees to pay the income to her for life, and on her death pay one quarter of the principal as she should by will appoint, and three quarters among her issue, if any, her surviving, as she should by will appoint; and directed that the bequests to her "or for her benefit, to be held in trust or otherwise, as aforesaid," should be preferred to other legacies. His estate was insufficient to pay both sums. *Held*, that they should abate *pro rata*. *Bancroft v. Bancroft*, 226.

See EXECUTOR AND ADMINISTRATOR, 1; TRUST AND TRUSTEE, 2; TRUSTEE PROCESS, 2.

DISSEISIN.

Disseisin may be proved by evidence of open and exclusive possession, claiming title against all persons whomsoever, without proof of actual notice to the disseisee. *Samuels v. Borrowscale*, 207.

See WRIT OF ENTRY.

DIVORCE.

1. The mere neglect of a husband, with no circumstance of aggravation, to provide maintenance for his wife and children for fifteen years, during which she has supported the children from her own earnings, is not such gross or wanton and cruel neglect as will sustain a libel in her behalf on the Gen. Sta. c. 107, § 9, for a divorce. *Peabody v. Peabody*, 195.
2. To sustain a libel for divorce for the cause of extreme cruelty, there must be evidence of personal violence, intentionally inflicted, of such a character as to endanger the life, limb or health of the libellee or create reasonable apprehension of such danger. *Ford v. Ford*, 198.
3. On a trial by jury of a libel for divorce for the cause of extreme cruelty, specified as consisting in blows inflicted on the libellant by the libellee upon a single occasion, evidence of similar acts of the libellee on other occasions is inadmissible to establish an independent ground of divorce; and it is within the discretion of the judge to exclude it also, if offered to show the disposition of the libellee on the occasion in question, or if attempted to be elicited on cross-examination of the libellee as a witness. *Id.*

See EVIDENCE, 7, 8; EXCEPTIONS, 2.

DRAIN.

See ACTION, 2.

EASEMENT.

See RAILROAD, 1, 2; WAY, 12, 13.

ELECTION.

See EQUITY, 2; JUDGMENT, 4, 5; LARCENY, 1; PARTNERSHIP, 3.

EMBEZZLEMENT.

See LARCENY, 4.

EMINENT DOMAIN.

See RAILROAD, 1, 2.

EQUITY.

1. This court has no jurisdiction in equity of an information by the attorney general against a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely on the ground that they are not authorized by the act of incorporation, and are therefore against public policy. *Attorney General v. Tudor Ice Co.* 239.

2. The recital, in a bill in equity for fraud, of other frauds by some of the defendants, which are the subject matter of another bill in equity filed by the same plaintiff at the same time, does not make the bill multifarious, nor can he be compelled to elect on which bill he will proceed. *Brewer v. Boston Theatre*, 378.

See ARBITRAMENT AND AWARD; CORPORATION, 2, 3; COSTS, 2; EVIDENCE, 3; PARTNERSHIP, 1; RECEIVER; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 1; WATERWORKS.

ESTATES OF DECEASED PERSONS.

See DEVISE AND LEGACY, 2; EXECUTOR AND ADMINISTRATOR; PARTNERSHIP, 3; TRUST AND TRUSTEE, 2; TRUSTEE PROCESS, 2; VENDOR AND PURCHASER, 2.

ESTOPPEL.

See FIXTURE; MORTGAGE, 3, 4; SAVINGS BANK; TRUST AND TRUSTEE, 2.

EVIDENCE.

1. At the trial of a criminal case where the only question is as to the identity of the prisoner with the guilty party, the jury may be justified in returning a verdict of guilty, although no witness will swear positively to the identity. *Commonwealth v. Cunningham*, 545.

2. There is no conclusive presumption that a retailer of fluids to be burned in lamps for illuminating purposes, or a customer to whom he sells naphtha for such a use, is aware of the danger of so burning naphtha. *Wellington v. Downer Kerosene Oil Co.* 64.

3. A., owning goods attached as B.'s property on a writ in C.'s favor against B., sued the officer for their conversion, and recovered judgment, which remaining wholly unsatisfied, he then sued C. for the same conversion. *Held*,

- in the second action, that the facts, that C. paid the counsel fees for defending the officer in the first action, and afterwards made oath to a bill in equity which alleged that he placed the writ against B. in the officer's hands for service in order to prevent the goods from being taken away, and was liable to indemnify the officer against all loss on account of the attachment, were competent, but not conclusive, evidence against C. *Elliott v. Hayden*, 180.
4. In an action for an injury caused at six o'clock on Monday morning by the alleged defective condition of a sidewalk which the defendant town was bound to keep in repair, which condition was occasioned in the course of repairs on an adjoining building which were begun before and finished after the accident, evidence is competent of the condition of the sidewalk at seven o'clock on the previous Saturday evening. *Sheren v. Lowell*, 24.
 5. In an action by a laborer in a mill for an injury which occurred Monday, she testified that she kept at work that day and until some time Tuesday when she took to her bed. The defendants, to contradict her, called the overseer of the mill, who testified that she worked there as usual from Monday until some time Thursday; and on cross-examination testified that she came to him Thursday and said she could not attend to her work and asked leave to go away, and he let her go. *Held*, that it was competent for the plaintiff to testify in rebuttal, that this conversation occurred Tuesday, and that she did not see him or talk with him afterwards. *Ib.*
 6. The refusal of a party to a suit, when testifying as a witness, to answer a material question, on the ground that it might criminate himself, is competent evidence against him. *Andrews v. Frye*, 234.
 7. On the trial of a libel for divorce, a daughter of the parties was a witness for the libellant, and the libellee introduced evidence of remarks which she had made about him, for the purpose of showing that she testified under bias. *Held*, that evidence, offered by the libellant, to prove that the libellee had struck the witness before she made the remarks, was inadmissible. *Ford v. Ford*, 198.
 8. On the trial of a libel for divorce, in which the libellee has introduced evidence tending to show that the acts relied on to sustain the libel were induced by the libellant for the purpose of getting cause for a divorce, it is inadmissible for the libellant to prove, in refutation of this theory and as evidence of her intention, an unanswered letter subsequently written by her to the libellee, recounting her accusations against him and proposing terms for a separation. *Ib.*
 9. On the trial of a writ of entry, if the demandant, as part of his chain of title, puts in evidence an office copy of a deed of the premises, purporting to have been made from the tenant to a third person, the tenant may disprove his execution of such a deed by any evidence that would be competent had the demandants' proof been by the original instead of the copy. *Samuels v. Borrowsdale*, 207.
 10. On the trial of an action for breach of an oral contract, a letter of the defendant to the plaintiff, offered by the latter to show admissions of the defend-

ant that the contract was made and broken by him, is admissible in evidence, although it is one of a series of letters between the parties, all of which were in the plaintiff's possession, and some, including his own letter to which the one in question was a reply, he has voluntarily destroyed or refuses to produce; and the refusal of the judge to instruct the jury that, in the absence of those letters, and in view of their voluntary destruction by the plaintiff, they have a right to draw the most unfavorable inferences against the plaintiff as to their contents, affords the defendant no ground of exception, if the judge instructs them that the plaintiff's failure to produce all the letters and destruction of some of them are circumstances to be considered in determining the weight and effect to be given to the letter produced. *Stone v. Sanborn*, 319.

11. The record kept by a town clerk, under the Sta. of 1863, cc. 65, 229, of the soldiers who composed his town's quota of the troops furnished by the Commonwealth to the United States during the civil war, is competent, though not conclusive, evidence of facts which it is required to contain. *Wayland v. Ware*, 46.
12. Upon the question of the amount of an injury caused to a ship by perils of the sea, evidence of what it would cost to put her in repair at the end of the voyage, without reference to the causes which made such repairs needful, is incompetent. *Paddock v. Commercial Insurance Co.* 521.
13. Upon an issue whether a niece owes her uncle for board and lodging furnished to her during time she lived in his family, evidence that she rendered services to him during that time is admissible. *Spring v. Hulett*, 591.
14. In an action by an uncle against his niece, for board and lodging furnished to her and her infant ward, and for articles furnished to her while in his family, he requested the judge to rule that the law would imply a promise to pay for what was furnished; but the judge refused, and instructed the jury that her stay in the family and the receipt of the articles would, between strangers, considered of themselves, imply such a promise, but would not have that force in view of the relation of the parties and the circumstances attending her stay and the receipt of the articles, which should be considered by the jury in determining the understanding between the parties. *Held*, that the plaintiff had no ground of exception. *Ib.*
15. On an issue between A. and B. whether money paid to a collector of internal revenue by B., who owed A. for the price of some liquors, was received by the collector in payment of a tax due from A. to the United States in respect to the liquors, the collector testified, as a witness for B., that he received it in payment of the tax, but had not yet paid it over to the United States because he had been summoned as trustee of A. in a suit against A. by the United States; and further testified that the suit was brought by his procurement. *Held*, that it was competent for A. to show that not the collector, but B. himself, was summoned as trustee in the suit. *Harrington v. Weselowski*, 184.

See CONTRACT, 1; DISMISSAL; DIVORCE, 3; EXCEPTIONS, 5, 6 FRAUDS

LENT REPRESENTATIONS, 3; INSURANCE, 4, 5, 7; INTOXICATING LIQUORS;
NEGLIGENCE, 1, 3, 5; PILOT; PLEADING, 2; SALE, 6; SAVINGS BANK;
SOLDIER, 3-6; VARIANCE.

EXCEPTIONS.

1. At a criminal trial, the counsel for the Commonwealth stated in his closing argument to the jury, that the defendant had been previously convicted of the same offence. No evidence had been offered to support the statement; and the judge instructed the jury that it was not competent for their consideration. *Held*, that the defendant had no ground of exception. *Commonwealth v. Cunningham*, 545.
2. A refusal to allow an amendment of the libel on a trial for divorce is not subject to exception. *Ford v. Ford*, 198.
3. In a bastardy process, a motion to dismiss the complaint, on the ground that the record shows that the defendant was arrested by a deputy of the constable of the Commonwealth upon a warrant directed to the sheriff or to the constable of a city, and does not show the special circumstances which would justify an arrest by a deputy of the constable of the Commonwealth, may be "for defect of form of process" only, and therefore no exception lies to its disallowance by the superior court, unless the record shows some other ground for it. *Bassett v. Howorth*, 224.
4. In an action on the Gen. Sta. c. 44, § 22, for an injury received through a defect in a highway which the defendant town was bound to keep in repair, the objection that the defect had not existed twenty-four hours at the time of the accident cannot be taken for the first time at the argument in this court of a bill of exceptions which does not show that any such question was raised at the trial. *Pinkham v. Topsfield*, 78.
5. The exclusion of remarks made by a witness, offered for the purpose of showing that he has testified under bias, without stating the nature of the remarks, is not ground of exception. *Ford v. Ford*, 198.
6. It is within the discretion of the judge presiding at a trial to allow the plaintiff, who has rested his case on an auditor's report, to introduce evidence in support of the report, after the defendant has put in his evidence. *Brewer v. Housatonic Railroad Co.* 593.

See ASSESSOR; CONTRACT, 5; COSTS, 3; DIVORCE, 3; INTERROGATORIES;
JUDGMENT, 7; LARCENY, 1; VARIANCE.

EXECUTION.

See ARREST; COSTS, 3; TRUSTEE PROCESS, 2.

EXECUTOR AND ADMINISTRATOR.

1. A testator, in his will, named an executrix and an executor, and gave them all his estate in trust to accumulate for his children for ten years, paying meanwhile the expenses of their support out of the income and investing the balance thereof. In a separate clause he provided that "if it shall be

found necessary or expedient to dispose of any of my real property for the benefit of the estate, in the judgment of my executrix and executor, I hereby give them full power to do so and invest the sums so received for the benefit of my children." *Held*, that this power was given to the executrix and executor as an incident of their office, and upon the resignation of one of them the other might exercise it singly. *Gould v. Mather*, 283.

2. The institution of proceedings in insolvency against the estate of a deceased person does not suspend, in favor of the creditors, the special statute of limitations of actions against the administrator, Gen. Sts. c. 97, § 5, nor prolong his lien on the real estate of the intestate for the payment of debts. *Aiken v. Morse*, 277.
3. Two commissioners, appointed to take proof of claims against the estate of a deceased person, which had been represented insolvent by the administrator, allowed some claims but never made return. Several years after the death of one of them, the administrator procured the appointment of another commissioner, and filed a bill in equity to redeem land mortgaged by the intestate and in which the mortgagees had acquired the title of the widow and heirs. The commissioners then again took proof of claims, and finally returned a schedule of the debts of the intestate. *Held*, in the suit in equity, that, as against the mortgagees holding the title of the widow and heirs, in the absence of any allegation or evidence on the subject, there was no presumption that the administrator did not give legal notice of his appointment; nor, in a like absence of allegation and evidence, any presumption that claims, allowed by the second board of commissioners additional to those allowed by the first board, were ever presented to the first board. *Ib.*

See PARTNERSHIP, 3; TRUSTEE PROCESS, 2; VENDOR AND PURCHASER, 2.

EXPERTS.

See ASSESSOR, 2; COSTS, 1; MORTGAGE, 2.

FALSE PRETENCES.

1. In an indictment against A. under the Gen. Sts. c. 161, § 54, for designedly obtaining goods from B. by false pretences, an averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid and with intent to cheat and defraud the said B. of the same goods," is a sufficient averment that the goods were designedly obtained. *Commonwealth v. Hooper*, 549.
2. In an indictment against A. for obtaining goods from B. by false pretences, an averment that B. "was induced, by reason of the false pretences so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A." certain property, "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by the false pretences he did pay and deliver, and is not defective for not repeating the words "then and there" before the words "to pay and deliver," or before the words "did pay and deliver." *Ib.*

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS.

FEES.

See COSTS, 1.

FIDUCIARY DEBT.

See BANKRUPT.

FIRE.

See RAILROAD, 8; SHIPPING, 8

FIRE DEPARTMENT.

See TOWN.

FISHERY.

After a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, and whose charter does not expressly exempt it from maintaining the dam without a fishway and is subject under the Rev. Sts. c. 44, § 23, and Gen. Sts. c. 68, § 41, to amendment, alteration or repeal at the pleasure of the legislature, has paid such damages, and constructed the dam without a fishway, so as to destroy the fishing rights above, and to impair fishing rights below, for the injury to which last no compensation has ever been made or provided, that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed for the purpose. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 446.

FIXTURE.

A., owning land, gave B. a bond for a deed of it. A religious society was afterwards formed, of which B. was treasurer. A. sold the land to the firm of C. & D., and B. surrendered his bond and took from them another bond to convey the land to him upon his paying a certain price for it on or before a specified day. After this day had passed without such payment, the society, through a committee of which D. was chairman, built a meeting-house on the land, upon stone foundations set deep in the ground, procured insurance on it, and put furniture in it. C. was clerk of the society, and solicited subscriptions towards the cost of the building, recommended purchases of the pews as a good investment, and spoke of the building as belonging to the society; it was the general expectation of the members of the society that C. & D. would convey the land to it for the price named in B.'s bond; and on the pastor's asking for a conveyance in order to make the society secure, D. replied that it was in no danger, for it could remove the building

when it should choose. After this, C. refused to convey the land to the society till its debts were paid. A creditor sued the society, and attached the meeting-house and furniture on his writ; recovered judgment; and assigned the judgment to C. & D., who directed the officer to sell the attached property on the execution, and were present at the sale. After the officer had received some bids, C. announced that he claimed the building as part of the realty, and should resist its removal by any buyer, and the officer declared that he did not warrant title to any of the property; but the sale proceeded, and the whole property was bid off for an entire price, which the officer received, and out of it paid to C. & D. the amount of their execution, and delivered the key of the meeting-house to the buyer as a symbolical delivery of the property. The buyer gave the key to the sexton, with directions to take care of the property; and C. then expelled the sexton from the building, and took possession of it, whereupon the buyer sued C. for a conversion. *Held*, that the meeting-house was not built on the land as personal property, but was fixed to the realty; and that C. & D. were not estopped to deny the buyer's title to it. *Poor v. Oakman*, 309.

FORCIBLE ENTRY AND DETAINER.

The two defendants with a workman went to a tenement in the occupation of the plaintiff, but in which there was no one at the time, and the door of which was fastened with a padlock; demanded the key from the plaintiff's servant; and, on his refusal, ordered their workman to enter the premises through a hole in the floor. The workman did so; and by his assistance, and with the aid of an axe which they brought with them, they removed the padlock, and entered and kept possession of the premises. They used no violence in word or act to the plaintiff's servant. *Held*, that there was not such a forcible entry as would support an action on the Gen. Sta. c. 137. *Pike v. Will*, 595.

FRAUD.

SEE CORPORATION, 2, 3; EQUITY, 2; FALSE PRETENCES; FRAUDULENT REPRESENTATIONS; PARTNERSHIP, 1; SPECIFIC PERFORMANCE, 3.

FRAUDS, STATUTE OF.

See FIXTURE.

FRAUDULENT REPRESENTATIONS.

1. B., having agreed with A. to buy a tract of mining land, belonging to A. but occupied by squatters, and to pay A. so much, not exceeding a certain amount, as should be needful to settle the squatters' claims, and having paid sums to A. on account of this amount, and incurred other expenses relating to the land, sued A. in tort for deceit, and alleged that A. obtained the agreement from him by false statements of the value and minerals of the tract; that said sums were paid under and in consequence of the agreement thus obtained, and because A. assured him that they were needed and to be used

to settle the squatters' claims, when in fact they were neither so needed nor used, but misappropriated by A. to his own use; and that in consequence of said misrepresentations the other expenses were incurred; and he joined a count in contract, alleged to be for the same cause of action, which set forth the agreement and his payment of said sums to A. under it, alleged that he paid them in consequence of the false representations and statements set forth in the first count, and sought to recover them as money had and received by the defendant to the plaintiff's use. At the trial, B. gave notice that he did not seek to recover anything from A. by reason of any alleged statements of A. touching the value or minerals of the land. *Held*, that, after striking out all such allegations, either count still set forth a good cause of action. *Pease v. Brown*, 291.

2. On the trial of an action on counts in tort for deceit, and contract for money had and received, to recover sums paid under an agreement of the plaintiff to pay them to the defendant to be applied by him to a certain purpose if he should need and desire them for it, facts agreed showed that the whole amount of them was not needed or used by the defendant for that purpose, and the plaintiff testified that he paid them because the defendant represented to him that they were needed for it. In relation to one of the sums, the defendant requested a ruling that it could not be recovered if the jury should find that the parties believed that it was paid with the impression, created by the phraseology of the contract or otherwise, that it was not to be applied to that purpose; and on the whole case, he requested a ruling that there was no evidence to sustain the action. The judge refused the second request; declined to rule in the terms of the first request; and submitted the case to the jury with instructions which required them to find, in order to return a verdict for the plaintiff, that the payments made by him were made for the purpose named, and that he was induced to make them by false representations of the defendant that they were needed for it. *Held*, that the defendant had no ground of exception. *Id.*
3. On the issue between A. and B., whether B. was induced to pay A. money by false representations of A. that it was needed for a certain purpose, if A. contends that B., when he made the payment, did not understand that the money was to be used for that purpose but for another purpose, it is competent for B. to testify that he paid the money supposing that it was to be applied to the first purpose. *Id.*

GIFT.

See SAVINGS BANK.

GOODS SOLD AND DELIVERED.

In an action for goods sold and delivered, the defendant has good ground of exception to instructions which authorize the jury to return a verdict for the plaintiff even if they find that the goods were not all of the kind contracted for and that the defendant did not accept them. *Brewer v. House-
tonic Railroad Co.* 593.

See EVIDENCE, 14.

INDEX.

GRANT.

See CORPORATION, 1.

GUARDIAN AND WARD.

See NEGLIGENCE, 2, 4, 5.

HARVARD COLLEGE.

An assessment by the aldermen of Boston upon land of Harvard College, under the Sta. of 1866, c. 174, and 1868, c. 276, of a part of the expense of altering a street, proportional to the benefit received by the assessed land from the alteration, is a "civil imposition," within the meaning of that term in the clause of the college charter of 1850, exempting from all civil impositions, taxes and rates, lands of the college not exceeding a certain annual value; and if at the time when the land was acquired by the college, before the adoption of the Constitution of the Commonwealth, it was within the limit of the exemption, and continued within it until and at the time when the Constitution was adopted, the college is entitled to continue to hold it exempted, notwithstanding that its annual value now greatly exceeds the limit, and that the college holds other lands, also exceeding the limit, in value, aside from lands exempted under the general tax acts. *Harvard College v. Aldermen of Boston*, 470.

HUSBAND AND WIFE.

Neither keeping a colt for use, nor buying materials to build a house for herself and husband, is such a carrying on of business by a married woman as to require the filing of a certificate under St. 1862, c. 198, in order to protect the colt and materials from attachment for her husband's debts. *Proper v. Cobb*, 589.

See DIVORCE; JUDGMENT, 6; TRUST AND TRUSTEE, 1; VENDOR AND PURCHASER, 1.

ILLUMINATING FLUIDS.

See ACTION, 3-5; EVIDENCE, 2; SALE, 6.

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See FALSE PRETENCES; LARCENY, 1-3; SALE, 6.

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See EQUITY, 1

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See EXECUTOR AND ADMINISTRATOR, 2, 3.

INSURANCE.

I. *Life Insurance.*

See TAX.

II. *Marine Insurance.*

1. An abandonment of insured property to the insurers relates back from the time of their acceptance of it to the time of the loss, and enables them to sue in their own name for the property or its proceeds. *Sun Insurance Co. v. Hall*, 507.
2. A policy of insurance on a vessel to a port of discharge and until she be moored twenty-four hours in safety does not cover a loss occurring after she has lain three weeks at a place to which she was destined as a place of discharge, where she has discharged a substantial part of her cargo, and at which similar vessels uniformly discharged in whole or in part; although one of her owners, being present at the port, intended to take her into an inner basin in the same port to complete her discharge. *Bramhall v. Sun Insurance Co.* 510.
3. At the trial of an action on a policy of insurance on a ship, the case was reserved for the determination of the full court, with an agreement of parties that if upon the evidence the jury would be warranted in finding a verdict for a total loss, judgment should be rendered for the plaintiff; if the plaintiff was entitled to recover for a partial loss, the amount thereof should be ascertained by an assessor; and if the jury would not be warranted in finding a verdict for either a total or a partial loss, the plaintiff should become nonsuit. The full court held that the plaintiff was not entitled to recover for a total loss; but was entitled to recover for a partial loss, if it could be shown that the ship sustained damage to a certain amount upon a certain voyage; and the case was referred to an assessor to determine that question. *Helic*, that at the hearing before the assessor, or before the court on the return of his report, it was not open to the defendant to contend that the partial loss was merged in a subsequent total loss; nor to the plaintiff to claim a general average loss. *Paddock v. Commercial Insurance Co.* 521.
- 4 In an action on a policy of insurance upon a ship, the plaintiff is bound to offer evidence by which injury by perils of the sea may be distinguished from defective condition arising from wear and tear and other ordinary causes. *Id.*
5. Under a policy of insurance upon a ship, which provides that the insurers shall not be liable for a partial loss, unless it shall amount to five per cent., successive partial losses by distinct gales or storms upon different passages cannot be added together to make up the requisite five per cent.; and the burden of proving a partial loss amounting to five per cent. from one gale or storm is upon the assured. *Id.*
6. When a ship cannot be fully repaired at a port of distress, the needful temporary repairs to enable her to proceed on her voyage, as well as complete

repairs made at a subsequent port, are subject to the deduction of one third new for old, in computing the amount of a loss under a policy of insurance. *Ib.*

7. In estimating a loss under an open policy of marine insurance on goods, the rule of damages is based on their market value at the inception of the risk and not on the invoice price; and evidence of the usage of a particular port is inadmissible to vary this rule. *Warren v. Franklin Insurance Co.* 518.
8. A policy of insurance provided that in case of loss all sums due to the insureds when the loss became due should be first deducted, and all sums coming due should be paid or satisfactorily secured, before payment of the loss. *Held*, that, in making up judgment in an action on the policy for the amount of a loss, the defendants could deduct the amounts of notes due to them from the insured, although they were not due at the beginning of the action; and the loss being payable in gold and the notes in currency, that the value of the notes in gold at the time they fell due should be ascertained and such value deducted from the amount of the loss. *Ib.*

See EVIDENCE, 12; TRUSTEE PROCESS, 3.

INTEREST.

See PARTNERSHIP, 1; REPLEVIN.

INTERROGATORIES.

In an action for an injury alleged to have been caused by a defect in a highway which the defendant town was bound to keep in repair, the answer was only a general denial of the plaintiff's allegations. The town, before the trial, filed interrogatories to the plaintiff, as to the nature, location and description of the defect; the manner, circumstances and nature of the injury; what the plaintiff did immediately after being injured; whether she had since done work, and if so, what and where; and the names and residences of any physicians she had consulted. These interrogatories the plaintiff neglected to answer; and the judge refused a request of the town to require her to answer them. On the trial, the plaintiff testified as a witness, and a verdict was returned in her favor. *Held*, that exceptions to the refusal to require answers to the interrogatories could not be sustained, which did not expressly show that the town was injured by the refusal to answer them. *Sheren v. Lowell*, 24.

INTOXICATING LIQUORS.

On an issue between seller and purchaser of intoxicating liquors, whether the sale was in violation of a statute which forbids the sale of such liquors except by the manufacturer or a person having a license, and except to municipal officers, or for medical, mechanical or manufacturing purposes, or for sacramental uses, or made from fruit grown within the state, the refusal of the seller to testify whether he had a license, on the ground that his answer might criminate himself, and evidence that the liquors were part of his stock

in trade as a druggist, and that the subject of the sale was the entire stock, will warrant a jury in finding that the sale was illegal. *Andrews v. Frye*, 234.

JUDGMENT.

1. A specific judgment payable in gold coin is to be rendered for damages assessed for the breach of a contract for the payment of a sum in gold. *Independent Insurance Co. v. Thomas*, 192.
2. Judgment on a contract payable in gold must be rendered for gold coin specifically, and the pound sterling is to be estimated at \$4.84. *Warren v. Franklin Insurance Co.* 518.
3. Judgment against one joint trespasser without satisfaction does not bar an action against another. *Elliott v. Hayden*, 180.
4. Judgment recovered against one of two joint debtors by the creditor bars a subsequent action by him against the other. *Kingsley v. Davis*, 178.
5. If A., having made a contract with B. and sued him thereon, recovers judgment against him after ascertaining that he acted as agent only and all the facts, it is a bar to a subsequent action by A. against B.'s principal. *Ib.*
6. A judgment recovered on the merits, by a laborer, for the full amount of his claim, in an action against a married woman and her husband for work done on her separate estate, which she defended on the ground that he was negligent in doing the work, though without seeking to recoup therefor, is a bar to a subsequent action by her against him for such negligence. *Merriam v. Woodcock*, 326.
7. An order of the superior court that judgment should be entered for the plaintiff in an action as of the last day of the preceding term, in accordance with an order made by it at that term, cannot be revised by this court on the ground that, after the original order, but before the close of said term, the defendant petitioned to be adjudged a bankrupt, and filed a motion for the continuance of the case, if he failed to bring the motion to the notice of the court until after the end of the term. *Dunbar v. Baker*, 211.

See ASSIGNMENT; BOND, 2, 3; CONSTABLE; CONTRACT, 2; COSTS, 3; EVIDENCE, 3; INSURANCE, 8; PILOT; REPLEVIN; REVIEW; WRIT OF ERROR.

JURISDICTION.

See COSTS, 3; EQUITY, 1; PARTNERSHIP, 1; PILOT; RECEIVER; REVIEW; TRUSTEE PROCESS, 1; WRIT OF ERROR.

JURY.

See WAY, 4, 11.

LACHES.

See JUDGMENT, 7.

LANDLORD AND TENANT.

In a lease for twenty years of land on which the lessee covenants to erect permanent buildings, and the contract for which was negotiated after the passage of the St. of 1866, c. 174, his covenant to pay "all taxes and assessments, whether in the nature of taxes now in being or not, which may be payable or assessed in respect of the premises, or any part thereof, during said term," binds him to pay the whole amount of an assessment on the premises, under that statute, for a part of the expense of altering a street on which they abut, proportional to the benefit received by them from the alteration. *Codman v. Johnson*, 491.

See FORCIBLE ENTRY AND DETAINER; RAILROAD, 2; WATERWORKS.

LARCENY.

1. Distinct larcenies may be presented in different counts of one indictment; and whether the Commonwealth shall elect between them is within the discretion of the judge presiding at the trial. *Commonwealth v. Sullivan*, 552.
2. The stealing by one taking of several articles belonging to different persons may be indicted either as one crime or as several crimes. *Ib.*
3. Under the Gen. Sta. c. 172, § 12, an indictment for larceny may allege the property in the stolen goods to have been in a consignee to whom they were in course of transportation by a carrier when they were stolen, whether the carrier was designated by him or not. *Ib.*
4. The felonious taking of goods from the owners' shop by a clerk and packer in their employ, who had keys by means of which, at the time in question, he entered the shop after it was closed, but who was not a salesman, although the owners had occasionally allowed him to take and sell goods for them, is larceny and not embezzlement. *Commonwealth v. Davis*, 548.

LEASE.

See CORPORATION, 3; LANDLORD AND TENANT; PLEADING, 2.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

See FIXTURE.

LIEN.

See CARRIER, 4; EXECUTOR AND ADMINISTRATOR, 2; MORTGAGE, 3, 4.
PLEDGE.

LIFE INSURANCE.

See INSURANCE, I.

LIMITATIONS, STATUTE OF.

See EXECUTOR AND ADMINISTRATOR, 2; PARTNERSHIP, 2.

LIS PENDENS.

See TRUSTEE PROCESS, 3.

MANDAMUS.

See PILOT.

MANUFACTURING CORPORATION.

See FISHERY; PARTNERSHIP, 3.

MARINE INSURANCE.

See INSURANCE, II.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See LARCENY, 4; OFFICER; RAILROAD, 3; SEDUCTION; TOWN.

MERGER.

See JUDGMENT, 3, 4.

MINOR.

See NEGLIGENCE, 2-5.

MISTAKE AND ACCIDENT.

See BOND, 1; REPLEVIN; SPECIFIC PERFORMANCE, 3; TRUST AND TRUSTEE, 2; WAREHOUSEMAN.

MONEY.

See INSURANCE, 3; JUDGMENT, 1, 2.

MONEY HAD AND RECEIVED.

See FRAUDULENT REPRESENTATIONS, 1, 2.

MORTGAGE.

I. Of Real Estate.

1. A mortgagee in possession will be allowed, as compensation for managing the property, five per cent. on the rents collected, but not on the amount expended in repairs and improvements also, unless his services are worth actually more than the five per cent. on the rents. *Gerrish v. Black*, 400.
2. On a bill in equity to redeem lands from a mortgage, it appeared that the

defendant, who had entered to foreclose, lived in another state, and appointed an agent to manage the property; and there was no evidence of negligence in the appointment of the agent, or of fraud on the part of the mortgagee. *Held*, that, without other evidence of negligence than the testimony of the mortgagor's witnesses, as experts, that a higher rent could have been obtained, the mortgagee should not be charged with a greater amount than he received as rent. *Ib.*

See EXECUTOR AND ADMINISTRATOR, 3; USURY; VENDOR AND PURCHASER, 4.

II. Of Personal Property.

3. A., having given a mortgage of goods to B. which provided that if A. should attempt to sell them B. might take immediate possession, made, and delivered simultaneously, three mortgages of them, to C., D. and E. severally, each containing a clause that "this mortgage is of the same date, given at the same time, and to be recorded with" the two others, "all of which are alike in time, and neither is to have precedence of the other, but to be alike security to each," and each expressed to be subject to B.'s mortgage. *Held*, 1. that C., D. and E. took title under these mortgages as tenants in common, and might join in one action for a conversion of the goods; 2. that the title which they took was in the right of A. to redeem the goods from B.'s mortgage, and hence they were estopped by the Gen. Sts. c. 151, § 1, to contest its validity on the ground of an omission to record it; and 3. that the execution of their mortgages gave B. a right to take possession of the goods, and to maintain possession against them in the absence of any payment or tender of the amount due on his mortgage. *Howard v. Chase*, 249.
4. A mortgagee of personal property, who has proved his debt against the estate of the mortgagor in bankruptcy, without disclosing his security, is not thereby estopped to claim the property against a subsequent mortgagee who has not proved his debt. *Cook v. Farrington*, 212.

MUNICIPAL COURT OF THE CITY OF BOSTON.

See WRIT OF ERROR.

NAME.

See PROMISSORY NOTE, 1.

NAPHTHA.

See ACTION, 3-5; EVIDENCE, 2; SALE, 6.

NEGLIGENCE.

1. To sustain an action for an injury received by the plaintiff through the defendant's negligence, it is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence, but the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received. *Mayo v. Boston & Maine Railroad*, 137.

2. In an action against a hackman for negligently driving horses over a child four years and seven months old and of the average ability and intelligence of children of the age of five years attending the public schools, who was crossing a street on his way home from school at the time of the accident, the question whether the child's parents were negligent in permitting him to return from school alone, and in so doing to cross the street at the time when and place where he was injured, is for the jury. *Lynch v. Smith*, 52.
3. On the issue whether a child four years and seven months old, and "as intelligent as the average of children in his school five years of age, but rather small for that age," who in crossing a street on his way home from school suffered an injury by the negligence of another traveller, was using due care when he was injured, the opinion of his school-teacher as to his capacity to exercise such care is inadmissible in evidence. *Ib.*
4. If the parents of a child were not negligent in permitting him to cross a street alone, and while crossing he was injured by the negligence of another traveller, it is sufficient to entitle him to recover for the injury, if he was using that degree of care of which he was capable, though a less degree than would be appropriate for an adult to use under like circumstances; and, even if his parents were negligent in permitting him to cross the street alone, their negligence was not contributory, and he may recover, if in crossing he did no act which prudence would have forbidden and omitted no act which prudence would have dictated, whatever was his physical or intellectual capacity. *Ib.*
5. A. and his minor son B. were in the vestibule of their house preparing to set off fireworks while a procession was passing, when C. fired a rocket, from his house opposite, which struck and injured B. Many rockets and other fireworks were set off by other persons while the procession was passing the house. *Held*, in an action against C. for the injury as caused by his negligence, that the question whether A. and B. were careless in being in the vestibule was for the jury. *Held, also*, that evidence offered by C., that he and A. were members of a club, which got up the procession and published notices calling on citizens to decorate and illuminate their houses along its route, but not mentioning fireworks; that they both decorated and illuminated their houses, in aid of the object of the procession and in pursuance of the call; that C. fired the rocket as a part of his illumination; and that no one had license to set off fireworks on the occasion; was immaterial. *Fisk v. Wait*, 71.

See ACTION; CARRIER, 5; EVIDENCE, 2; JUDGMENT, 6; MORTGAGE, 2; OFFICER; RAILROAD, 4-8; SALE, 6; TOWN; WAY, 14-19.

NOTICE.

See CARRIER, 5; CONTRACT, 6; DISSEISIN; JUDGMENT, 5; OFFICER; POOR DEBTOR, 2; PROMISSORY NOTE, 1; REVIEW, 1; USURY; WAY, 16, 18.

OFFICER.

An officer, who has attached a horse and placed it in a suitable stable and made the stabler keeper, is liable for the neglect of the stabler to keep the horse with ordinary care; but if neither he himself, nor any one for whose care of the horse he is responsible, knows, or is negligent in not knowing that the horse has peculiar tricks or habits, he is not liable for an omission of extraordinary care to guard the horse against injury by reason of them. *Parrott v. Dearborn*, 104.

See CONSTABLE; EVIDENCE, 3; EXCEPTIONS, 3; REPLEVIN.

ORDINANCE.

See ACTION, 1; WATERWORKS.

PARENT AND CHILD.

See NEGLIGENCE, 2, 4, 5; SEDUCTION.

PARTIES TO ACTIONS.

See PLEADING, I.

PARTIES TO BILL IN EQUITY.

See CORPORATION, 3; EQUITY.

PARTIES TO CONTRACT.

See CONTRACT, II.

PARTNERSHIP.

1. Upon a bill in equity between partners to wind up the partnership, one of them who neglects or refuses to account fully for business of the firm, done by himself in a foreign jurisdiction, cannot, as a penalty, be denied his reasonable expenses of doing it, or sums otherwise owing to him from the firm, or be charged with interest with annual rests on actual or estimated balances in his hands; but in estimating the amount, expenses and profits of such business, and computing interest on such balances, if any interest thereon is chargeable, care should be taken, by making presumptions in favor of his copartners against him, to guard them from any injurious consequences of his concealment of facts. *Harvey v. Varney*, 436.
2. An agreement to share profits may, but does not necessarily, imply a joint interest in property held or used for the purposes of the business from which the profits are to arise. *Meserve v. Andrews*, 360.
3. In order to procure credit for a manufacturing corporation, its stockholders signed and gave to a bank a writing in which, after reciting that the stock had "all been recently purchased, and is now owned, by the subscribers, who desire and intend to continue the corporate organization, but not for the purpose of exempting themselves from their individual liability for the

deeds of the company," they declared that "as to creditors of the corporation, we do and shall hold ourselves liable, jointly and severally, as copartners, and such liability shall continue as to each one, so long as he shall continue a stockholder in said concern, but shall not apply to liability contracted after transfer of his stock." The bank then made two loans to the corporation, which it failed to repay, whereupon one of the signers repaid them, and sued for contribution the executors of the will of another signer, no transfer of whose stock had ever been made, and who died after the time of the first and before the time of the second loan. The will directed the executors to pay his just debts, and empowered them to continue his estate in trade so long as they should deem for its interest in prosecuting and completing business undertakings which at the time of his death he was engaged in as copartner or on his sole account, and apply any part thereof "for the performance of any engagement, and the payment of any debts, notes and obligations, which have been made or incurred by me or by any copartnership of which I am a member." The plaintiff made his payment to the bank more than two years after the executors gave bond, and brought the suit against the executors within a year after making the payment. *Held*, (1.) that the testator ceased by death to be a stockholder, within the meaning of the writing, and was not chargeable thereon for the loan made afterwards; (2.) that, as to the loan made before the death, even assuming that the plaintiff's payment of it created a right of action which first accrued upon such payment, the special statute of limitations of actions against executors and administrators, Gen. Sta. c. 97, § 5, was a bar to the suit, from which he was not excepted under §§ 8-11, if he had omitted to present the claim to the judge of probate under § 8; and (3.) that the mere delay of the executors to dispose of and transfer the testator's shares would not warrant an inference of any election by them, in their discretion under the will, to continue the estate in trade or make any part thereof liable for debts or obligations contracted by any copartnership either before or after the death. *Bacon v. Pomeroy*, 577.

See PLEDGE, 2; RECEIVER.

PASSENGER.

See RAILROAD, 2-7.

PATENT.

See CONTRACT, 6.

PAUPER

See SOLDIER.

PAYMENT.

See CONTRACT, 4; FRAUDULENT REPRESENTATIONS; MORTGAGE, 2
PLEDGE, 2; VENDOR AND PURCHASER, 4

PILOT.

The determination by the pilot commissioners, under the St. of 1862, c. 176, § 4, of the sufficiency of evidence of misconduct of a pilot in Boston harbor to warrant his suspension from office till the next meeting of the trustees of the Boston Marine Society, is not subject to revision on mandamus by this court; and if the pilot is notified of his suspension and has an opportunity to be heard before the trustees at the meeting, and they then decide that his commission ought to be revoked, and the commissioners accordingly revoke it, the revocation is final. *Lunt v. Davison*, 498.

PLEADING.

I. *Parties to Actions.*

1. In an action on a joint and several bond, it is too late to object to the nonjoinder of part of the obligors, after filing an affidavit of merits and an answer in bar. *Leonard v. Speidel*, 356.

See BOND, 2; CONTRACT, 2; CORPORATION, 3; INSURANCE, 1; JUDGMENT, 3-6; MORTGAGE, 3.

II. *Declaration.*

See ACTION, 3, 5; BOND, 1; CONTRACT, 6; FRAUDULENT REPRESENTATIONS, 1; VARIANCE.

III. *Answer.*

2. In an action on the Gen. Sta. c. 137, to recover possession of a tenement which the plaintiff claimed under a written lease, and which he alleged that the defendants held against his right, the answer was a general denial. *Held*, that evidence offered by the defendants of an oral submission to arbitrators of the question of the plaintiff's right to possession, and of an oral award against him, was not admissible. *Pike v. Witt*, 595.

See INTERROGATORIES; SALE, 3; WRIT OF ENTRY, 1.

PLEDGE.

1. A pledgee with power to sell the goods and apply the proceeds on the debt does not forfeit his lien by employing the pledgor as agent to make the sale, allowing him to contract for it in his own name, and delivering the goods on his order to the purchaser. *Thayer v. Dwight*, 254.
2. Partners, after pledging goods, with an invoice, as collateral security for a debt owed by them and payable on demand, dissolved the partnership, and, in consideration of the agreement of J. S. to pay its debts, conveyed to him all the property of the firm, made him their attorney to demand and receive all its effects and execute releases therefor as fully as they might do, and covenanted not to receive or release any demands of the firm or interfere with its affairs without his consent. The pledgee had notice of this contract, but never agreed to substitute J. S. as his debtor. J. S. then paid to him

part of the debt, and took from him, with his consent, what, so far as he knew or as was shown by the invoice, was a proportional part in value of the pledged goods, though in fact it was a much more valuable portion. Subsequently (J. S. having died insolvent) he made demand on the pledgors for the balance of the debt, and then caused the rest of the goods to be sold by auction, bid them in himself, and rendered to the pledgors an account of the sale. *Held*, that, in respect to the goods delivered by him to J. S., he was not liable to account to the pledgors for any greater sum than J. S. paid to him. *Held, further*, that he was not entitled to disaffirm the sale of the rest of the goods and return them to the pledgors without their consent; but that he could recover from the pledgors only the balance of the debt after deducting the proceeds of the sale. *Faulkner v. Hill*, 188.

2. A., holding stock of B. as collateral security for a debt of B. to him, sold the stock without authority and appropriated the proceeds to his own use. B. then demanded the stock, and offered to pay his debt, but did not tender any money. A., without objecting that money was not tendered, refused the demand, on the pretence that he had a right to hold the stock in pledge for the debt of a third person. *Held*, that B. might recover from A. the market value of the stock on the day of the demand, with interest, less the amount of his debt, without any further demand or tender. *Fisher v. Brown*, 259.

See BANKRUPT; BROKER.

POOR DEBTOR.

1. A judgment creditor, whose debtor had entered into a recognizance under the Gen. Sts. c. 124, § 10, agreed that in case the surety should desire to surrender his principal a new surety might be examined and approved by the magistrate, and waived notice of the examination. The debtor appeared before the magistrate at the time appointed for such a surrender; the surety surrendering him was not present, nor did he procure the attendance of an officer; and the magistrate approved a new surety, and took his recognizance in lieu of the former one. *Held*, that there was a sufficient constructive surrender of the debtor; and that the first surety was discharged, and the second surety held, on the recognizance. *Pacific Insurance Co. v. Canterbury & Smith*, 438.
2. A recognizance taken under the Gen. Sts. c. 124, § 10, after the passage of the St. of 1861, c. 112, is not invalid by reason of being conditioned that the debtor will deliver himself up for examination, "giving notice of the time and place thereof in the manner provided by the 124th chapter of the General Statutes," without referring to the St. of 1861. *Cassidy v. Hart*, 221.

POWER.

See EXECUTOR AND ADMINISTRATOR, 1.

PRACTICE.

See ARBITRAMENT AND AWARD; ARREST; ASSESSOR; ASSIGNMENT; ASSUMPSIT; BOND; CASE STATED; CONTRACT, 2, 5; CORPORATION, 2, 3;

COSTS; DIVORCE, 3; EQUITY, 2; EVIDENCE; EXCEPTIONS; INSURANCE, 1, 5, 8; INTERROGATORIES; JUDGMENT; MANDAMUS; MORTGAGE, 1; PARTNERSHIP, 1; PLEADING; RECEIVER; REPLEVIN; REVIEW; SALE, 3; TRUSTEE PROCESS, 2; USURY; VARIANCE; WRIT OF ERROR.

PRESUMPTION.

See EVIDENCE, 2, 13, 14; EXECUTOR AND ADMINISTRATOR, 3; SALE, 6 WAY, 3.

PRINCIPAL AND AGENT.

1. Factors wrote to traders, who proposed to consign goods to them for sale, that they were satisfied that they were taking no risk in advancing eighty per cent. on the invoice, and requested that the goods might be sent to them. After receiving the goods, they wrote again, asking if the consignors understood that the invoice prices were to be guaranteed. The consignors replied that they did not expect the factors to guarantee over eighty per cent.; and drew on them for that amount. The factors paid the draft, and then sold the goods for a sum which, after deducting their commissions and other charges, would yield less than eighty per cent. of the invoice prices. *Held*, that in accounting with the consignors they were not entitled to be allowed any charges, by way of commissions or otherwise, which would reduce the proceeds of the goods to the consignors below said eighty per cent. *Dalton v. Goddard*, 497.
2. A manufacturer in the interior of Massachusetts gave an order to brokers in Boston: "Send me twenty-five bags saltpetre at your earliest convenience." The order could not be filled in Boston at that time, and the brokers bought the saltpetre in New York, directed it to be delivered there to a common carrier for transportation, consigned to themselves, to a town near the factory, and advised their employer of what they had done, by a letter to which he made no reply. They had bought like merchandise for him before, on similar orders, but always in Boston, and had forwarded it to him from Boston. But the merchant from whom they bought this saltpetre had no knowledge of this course of dealing. He delivered it to the carrier, as he was directed; and it was lost in course of transportation. On being advised of the loss, the manufacturer denied the brokers' authority to make the purchase in New York. *Held*, that the merchant might recover from the manufacturer the price of the saltpetre. *Foster v. Rockwell*, 187.

See BROKER; CARRIER, 3-5; JUDGMENT, 5; LARCENY, 3; MORTGAGE, 2 OFFICER; PLEDGE, 1; PROMISSORY NOTE, 1; RAILROAD, 3; SALE, 4 SHIPPING, 1, 2; TOWN; TRUST AND TRUSTEE, 1; TRUSTEE PROCESS, 1 VENDOR AND PURCHASER, 1; WAREHOUSEMAN.

PRINCIPAL AND SURETY.

See BOND, 2; POOR DEBTOR, 1.

PROMISSORY NOTE.

1. One who, for and at the request of a partnership, and knowing that they intend to negotiate them as their business paper for the purpose of raising money to be used in their business, makes promissory notes payable to their order, and signs to each of the notes as maker the name either of a person whose name he has no authority to sign or use, or of a fictitious person; but who is not proved to have used either of those names for the purpose of transacting other business, or to have held himself out to the world as doing business under either; is not liable in contract upon the notes as maker, to one who buys them from the payees before maturity for full consideration as their business paper, without knowing that they are signed by him or giving him any credit thereon. *Bartlett v. Tucker*, 386.
2. If the payee of a promissory note indorses it in blank, and delivers it, before maturity, as collateral security, to his creditor, who transfers it, overdue, to a third person, the latter, while the debt which it was pledged to secure remains unpaid, may maintain an action on the note against the maker. *Lindsay v. Chase*, 253.

See INSURANCE, 8.

QUOTA.

See SOLDIER.

RAILROAD.

1. The misappropriation by a railroad corporation of land taken by right of eminent domain for the location of the railroad cannot be set up as working a forfeiture of the franchise on a writ of entry brought by the owner of the fee; but the demandant may maintain the writ to establish his right in the land and recover damages or mesne profits for the unauthorized use of it. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 1.
2. The surrender by a railroad corporation into the exclusive use and occupation of private traders or manufacturers for their trade or manufactures, as tenants for rent, of land taken by right of eminent domain for the location of the railroad, and buildings erected thereon by the corporation as freight-houses or engine-houses, is a misappropriation of the land, which entitles the owner of the fee to maintain a writ of entry to establish his right therein and recover damages or mesne profits for the unauthorized use of it; although the corporation derives advantages in its freighting business from the carriage of merchandise for the tenants and the receipt and delivery of it at these buildings instead of at the regular station-houses, and the buildings remain adapted to the purposes for which they were erected, and the corporation does not intend to permanently abandon the use of the premises for the railroad. *Ib.*
3. A railroad corporation is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize

his property to enforce payment of his fare. *Ramsden v. Boston & Albany Railroad Co.* 117.

4. If at a railroad station the direct and usual course for passengers to reach from the station-house cars waiting to receive them is by crossing one of the tracks, they have a right to rely, to some extent, for their safety in crossing, upon proper and usual signals of warning to be given by trains or cars approaching upon it. *Chaffee v. Boston & Lowell Railroad Co.* 108.
5. The fact that a person who, in attempting to cross a railroad track, does not, at the instant of stepping on it, look to ascertain whether a train is approaching, is not conclusive of a want of due care on his part. *Ib.*
6. At a railroad station, the direct and usual course for passengers to reach from the station-house trains going northward was by crossing a platform eight feet wide, and then one of the tracks. Upon the arrival at this station of a train going northward, between quarter and half past five o'clock on a dusky afternoon about the middle of November, a passenger, on his way to it from the station-house, walked diagonally across the platform some thirty feet, to the outer edge of the platform, looking meanwhile up and down the track to ascertain if a train or car was approaching upon it, and then stepped upon the track without so looking at the moment, and was instantly struck and injured by a hand-car which was passing southward over the track at a speed of more than ten miles per hour. His view northward, along the track, as he walked across the platform, extended only to a point from forty to forty-five feet north of the place where he stepped from the platform. There were no lights on the hand-car, nor any at the station except from the train which he was endeavoring to reach, and from two lanterns on a post at the point which bounded his northward view; and no signal of warning was given to him except simultaneously with the collision. *Held*, that the question whether he used due care was for the jury, in an action by him against the railroad corporation to recover for his injuries as caused by their negligence. *Ib.*
7. At a railroad station there was a double track, planked between the rails; and on each side of this track was a platform leading to a highway. The station-house adjoined the highway and one platform. A passenger, having arrived at this station in a train on the track furthest from the station-house, alighted upon the platform adjoining that track, stepped from the end of it down upon the highway, from four to six feet in the rear of the train as it departed, and attempted to reach the station-house by crossing the double track, over the planked space, at a proper place for passengers arriving like herself to cross to it, where there was nothing except the departing train to obstruct her view along the tracks, and where the platform on the other side would not retard her movements upon arriving there. In this attempt, she was struck and injured by a train approaching, on the track nearest to the station-house, from the direction in which the other train was departing. *Held*, in an action by her against the railroad corporation for the injury, that the mere fact that she began to cross at a time when her view along the tracks

was thus obstructed by the departing train was not conclusive that she did not use due care. *Mayo v. Boston & Maine Railroad*, 137.

8. The mere fact that a railroad corporation, transporting bales of cotton as a common carrier, packed them into a car so tightly that, on their taking fire, the car could not be unloaded, is not conclusive of negligence in the packing. *Pemberton Co. v. New York Central Railroad Co.* 144.

See CARRIER, 2, 3; WAY, 13, 14.

RATIFICATION.

See PRINCIPAL AND AGENT, 2; VENDOR AND PURCHASER, 1.

RECEIVER.

Upon a bill in equity to wind up a partnership, a receiver will not be appointed to take possession of its assets in a foreign jurisdiction. *Harvey v. Varney*, 486.

RECOGNIZANCE.

See POOR DEBTOR.

RECORD.

See CERTIORARI; EVIDENCE, 11; EXCEPTIONS, 3; JUDGMENT, 7; SOLDIER, 4.

RELIGIOUS SOCIETY.

See FIXTURE.

REPEAL.

See WAY, 2, 10.

REPLEVIN.

A manufacturer, from whom the entire machinery of his cloth printing factory, in running order and actual use, was replevied, including steam apparatus for supplying the motive power, took judgment for a return and for damages assessed by computing interest on the appraised value of the property from the date of the writ to the date of the judgment, under an agreement expressly provided to be without prejudice to his action on the replevin bond. On the demand of the officer upon the writ of return, tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that, or to replace it. This tender was not accepted; and the writ was returned in no part satisfied, and suit brought on the bond. *Held*, 1. that the officer had a right to treat the property as an organized whole, and refuse the offer to return part of it; 2. that the manufacturer's claim for damages, in the action of replevin, included compensation for the general inconvenience and loss resulting from the interruption of his possession, and for the expense, trouble and delay of restoring the factory to its former condition, as well as interest on the value of the property; but 3. that the claim

was an entire claim, and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and 4. that the measure of his damages in the suit on the bond was the sum which, under the ordinary circumstances attending a sale, might reasonably be agreed upon as a fair price for the property, between a seller desirous of selling, and a buyer desirous of buying, it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged. *Stevens v. Tuile*, 328.

See CONSTABLE.

RESCISSION.

See CONTRACT, VI.

REVIEW.

1. A review of a judgment rendered against a defendant on his default in an action of which, by a mistake in the service of the original writ, he had no knowledge until after judgment, may be granted on his petition filed within one year after he has notice of the judgment, although more than a year after the judgment was rendered, and although, when it was rendered, he was within the Commonwealth. *James v. Townsend*, 367.
2. Whenever the presence of the defendant in a suit is not secured, either in fact, by his appearance, or constructively, by the service upon him of the summons to appear, a judgment rendered therein upon his involuntary default is rendered "in his absence," within the meaning of the Gen. Sts. c. 146, § 21, concerning petitions for writs of review. *Id.*

RULES OF COURT.

Rules of Practice at Common Law, 556.

Rule of Practice in Divorce, 567.

Rules of Practice in Chancery, 568.

SALE.

1. A writing, in which A. "agrees to sell" to B. chattels of A. then being, and described as being, in B.'s possession, for a sum payable on or before a certain day, and B. "agrees to purchase the above named articles as above stated, and pay for the same as fast as he can," and pay the sum before the specified day or return the chattels in good order, free from any debts contracted by him, is an agreement for a present sale. *Martin v. Adams*, 262.
2. A contract of sale of a hundred barrels of whiskey in Philadelphia, to be delivered in Boston, "twenty-five barrels to be shipped by each steamer from Philadelphia, or as fast as that," does not necessarily imply that the delivery is to begin by the first steamer thereafter; nor, if the fact that there are two steamers a week from Philadelphia to Boston is contemplated by the parties, does the contract imply that precisely twenty-five barrels are to be delivered by each steamer. *Peck v. Waters*, 345.

8. On exceptions taken by the plaintiff at the trial of an action for a balance of the price of a lot of eight bales of wool alleged to have been sold by him to the defendant, in defence against which it was set up that the plaintiff warranted the wool to be of a particular kind, but one bale was not of that kind, and so was returned by the defendant, it was decided that the evidence showed that the contract of sale was an entire contract, which the defendant could not rescind in part. After this decision, the defendant amended his answer so as to allege that the bale of wool which he returned was distinct and different in kind from the other bales, and was returned on the ground that it was not included in the contract of sale. *Held*, that the amendment gave the defendant no right to have the question whether the contract of sale was an entire contract submitted to the jury at a second trial on substantially the same evidence, although the contract was oral. *Morse v. Brackett*, 494.
4. If a tenant in common of personal property, which is in the possession of a third person as bailee of all the owners, sells his undivided share, the possession of the bailee is his constructive possession so as to attach to the sale an implied warranty of title. *Shattuck v. Green*, 42.
5. The fact that the seller by parol of a chattel assigns and delivers to the buyer, whether as a muniment of title, or a symbolical delivery of the chattel, or a mere incident of the transaction, the bill of sale under which he himself acquired the chattel, does not prevent his liability upon an implied warranty of title. *Id.*
6. Whether, in order to charge, either criminally or civilly, a seller of naphtha under the name of oil, on the St. of 1867, c. 286, § 5, it is necessary to prove that he knew it was naphtha when he sold it, *quære*. *Wellington v. Downer Kerosene Oil Co.* 64.

See ACTION, 3-5; CONTRACT, 1, 4; EVIDENCE, 2, 13, 14; EXECUTOR AND ADMINISTRATOR, 1; FIXTURE; GOODS SOLD AND DELIVERED; INTOXICATING LIQUORS; PLEDGE; PRINCIPAL AND AGENT, 2; SPECIFIC PERFORMANCE; VARIANCE; VENDOR AND PURCHASER; WAREHOUSEMAN; WATERWORKS.

SAVINGS BANK.

- A. B. deposited in a savings bank a sum in his own name, and a like sum in the name of "A. B., trustee for C. D.," who was his daughter; and always retained the pass-books in his own possession. In a suit by the daughter, after his death, against the bank, for the sum deposited by him as trustee for her, parol evidence was offered to show that both deposits were his money, and that one was made in his daughter's name because the amount of both exceeded the sum which the law allowed the bank to hold for a single depositor. *Held*, that the evidence was admissible, notwithstanding that a by-law of the bank, assented to by A. B., provided that any depositor might designate at the time of deposit for whose benefit the same was made, and should be bound by such condition; and that, upon the facts, the plaintiff could not recover. *Brabrook v. Boston Five Cents Savings Bank*, 228.

SEDUCTION.

A ruling that an action for seduction of the plaintiff's daughter cannot be maintained, unless the seduction was followed by pregnancy or sexual disease, is erroneous. *Abrahams v. Kidney*, 222.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

See ARREST; POOR DEBTOR, 2; REPLEVIN; REVIEW.

SETTLEMENT.

See SOLDIER.

SEWER.

See ACTION, 2.

SHIPPING.

1. The master of a ship in Liverpool agreed with brokers, who did business there and in Boston, that they should load her for a voyage to Boston, for a fixed commission, and she should be consigned to them there and discharged at a certain wharf by their stevedore; that, should she put into a port for repairs or otherwise, she should be consigned to their agents; and that they should collect all the freight and general average in Boston, and take additional commissions thereon. They accordingly loaded her with goods of various owners, and were paid the first named commission. On the voyage, she put into a port of distress, where they had no agents, and was condemned and sold. The master chartered other vessels there to transport the goods to Boston; and borrowed money on a respondentia bond, and agreed with the obligee to consign the cargoes to an indorsee of the bond. When these vessels arrived in Boston, the brokers demanded that they should discharge at the wharf specified in the agreement made in Liverpool; but he did not comply with the demand, and he denied their right and refused to enable them to collect the freight and general average. *Held*, that, even if he had authority to make the agreement with them in Liverpool, yet they could not, under the circumstances, maintain an action against his owners for the additional commissions, and for damages on account of the failure to discharge at the specified wharf. *Warren v. Skolfield*, 503.
2. The master of a vessel in a foreign port has not implied authority to bind the owners by an agreement with brokers, who are loading her for a voyage for a fixed commission, that she shall be consigned to them at the port of destination, with a right on their part to supply the wharf and stevedore for her discharge, and collect all freight and general average for an additional commission. *Id.*

8. A common carrier, who ships goods over part of his route on a vessel which he does not own or charter, is not relieved from liability by the U. S. St. of 1851, c. 43, if the goods are destroyed by an accidental fire on the vessel. *Hill Manufacturing Co. v. Boston & Lowell Railroad Co.* 122.

See CARRIER, 4; EVIDENCE, 12; INSURANCE, II; TRUSTEE PROCESS, 8.

SIGNBOARD.

See WAY, 16.

SOLDIER.

1. The disability of a soldier from wounds or disease contracted while he was engaged in the military service of the United States during the civil war, intended by the St. of 1865, c. 230, § 1, to give him a settlement in the town to whose quota he belonged, is such a disability, and such only, as terminated his military service within one year from his enlistment. *Wayland v. Ware*, 46.
2. The St. of 1865, c. 230, § 1, gives a settlement to a soldier credited to the quota of a town in conformity with its terms, even if he was credited in excess of the proportion due from the town at the time of such credit. *Ib.*
3. On a trial of the issue whether a soldier gained a settlement in a town under the St. of 1865, c. 230, § 1, the facts that calls for troops were made by the President, and quotas assigned to all the towns in the Commonwealth, during the civil war, are to be assumed without express evidence. *Ib.*
4. On a trial of the issue whether a soldier, enlisted and mustered before the assignment of quotas to towns during the civil war, gained a settlement, under the St. of 1865, c. 230, § 1, in a particular town, by being credited to its quota when assigned, the fact that he was so credited may be proved independently of any record of the provost marshal or war department of the United States. *Ib.*
5. On the trial of an action for supporting as a pauper a discharged soldier who is alleged to have a settlement in the defendant town under the St. of 1865, c. 230, § 1, if the number of enlistments to the credit of the town at the time of the assignment of its quota is ascertained, evidence that the same number of soldiers, including the man in question, had previously enlisted therefrom as volunteers, or were claimed by the town as having so enlisted, in adjusting its quota with the officer having the duty of assignment, is competent, and, if uncontrolled, sufficient evidence to prove that the man was credited to the quota of the town. *Ib.*
6. On the issue whether a soldier was credited to the quota of a town so that he gained a settlement in it under the St. of 1865, c. 230, § 1, testimony of a person who was adjutant general of the Commonwealth during the civil war, that a certain table prepared by him in 1862 assigning quotas to towns was never allowed by the war department of the United States till after 1864, but he understood that it was so allowed afterwards, though he had no personal knowledge of the fact, is incompetent, as being mere hearsay. *Ib.*

SPECIFIC PERFORMANCE.

1. For a vendor to enforce specific performance of the contract of sale, it is not essential that when he made the contract he should have had such title and capacity to convey the property, or such means and right to acquire them, as would have enabled him to fulfil it on his part, but is sufficient if he is able to convey the property when by the terms of the contract or the equities of the case he is required to do so in order to entitle himself to the consideration; and if time is not of the essence of the contract, nor made essential by an offer to fulfil by the purchaser and his request for a conveyance, the vendor will be allowed reasonable time and opportunity to obtain or perfect title. *Dresel v. Jordan*, 407.
2. Inadequate consideration, or improvident formation of a contract, or decline in the value of its subject matter, is not, in general, in the absence of mistake, fraud or ambiguity, reason for the refusal of a decree of specific performance. *Lee v. Kirby*, 420.
3. The plaintiff and defendant in October 1865 made a written contract, by which the former agreed to sell a lot of land to the latter, and to advance to him, from time to time, sums of money for the purpose of building nine houses thereon, and the latter agreed to build the houses, and to pay for the land at the price of \$3.40 per square foot, and repay the advances, on or before December 1, 1866, with interest at six per cent. on the price of the land from November 1, 1865, and on the advances from the time they should be made. The price of the land was in fact arrived at in the negotiations which preceded the contract, by taking the land at \$2.50 per square foot, adding thereto a year's interest at four per cent. on that amount, six months' interest at four per cent. on the amount of the advances, and a bonus, besides a commission of two per cent. on both the price with these additions and the amount of the advances. Soon after this agreement, on the defendant's request for an extension of the time for building three of the houses, the plaintiff wrote to him, "Our agreement was on the basis of one year's interest upon the cost of the land, and average six months' interest on the advance; if you should desire an extension of a third of the cost of the land and one third of the whole advance, I shall be prepared to agree to it on the basis of our contract." The defendant replied, "Yours is before me, in which you give the basis of our agreement, and say you will be prepared to extend the time on one third of the cost of the land, and one third of the whole cash advance, upon the basis of our contract; all which I agree to." The defendant built five of the houses, paid for the land under them, and repaid the advances on them, according to the contract, but declined to build the other four houses. On a bill in equity to compel him to specifically perform the contract, the answer set forth the manner in which the price had been arrived at, and alleged that the contract had been modified by the subsequent correspondence, and that its enforcement against the defendant would be harsh and inequitable. *Held*, that the plaintiff was entitled to a decree for specific performance. *Id.*

See VENDOR AND PURCHASER.

SPIRITUOUS AND INTOXICATING LIQUORS.

See INTOXICATING LIQUORS.

STATUTE.

See ACTION, 4, 5; BANKRUPT; BRIDGE, 1; CORPORATION, 1; FISHERY;
HARVARD COLLEGE; SALE, 6; SHIPPING, 3; SOLDIER, 1, 2; TAX
TOWN; WATERWORKS; WAY, 2, 4, 7, 9-11, 13.

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SUPERIOR COURT.

See JUDGMENT, 7; WRIT OF ERROR.

SURETY.

See PRINCIPAL AND SURETY.

TAX.

The Sta. of 1865, c. 242, § 3, and 1868, c. 349, § 4, were not intended to create a new class of taxpayers, but to provide the mode in which shares in national banks should be assessed to those already liable to taxation; and therefore mutual life insurance companies are not liable to taxation under those statutes. *Murray v. Berkshire Insurance Co.* 586.

See HARVARD COLLEGE; LANDLORD AND TENANT; WATERWORKS; WAY, 1-11.

TENANT IN COMMON.

See MORTGAGE, 3; SALE, 4.

TENDER.

See MORTGAGE, 3; PLEDGE, 3; REPLEVIN.

TIME.

See ARREST; CONFESSION; DIVORCE, 1; EVIDENCE, 4, 5; INSURANCE, 1; LANDLORD AND TENANT, 1; REPLEVIN, 1; SPECIFIC PERFORMANCE, 1; WITNESS, 1.

FOR

SENT

TOWN.

A city is not liable for a personal injury resulting from the negligence of officers and members of its fire department in performing their duties, although the department was established and is regulated under a special statute which by its terms required acceptance by the city council before it took effect. *Fisher v. Boston*, 87.

See ACTION, 1, 2; BRIDGE, 2; EVIDENCE, 4, 11; EXCEPTIONS, 4; INTERROGATORIES; SOLDIER; WATERWORKS; WAY.

TRESPASS.

See JUDGMENT, 3.

TROVER.

Proof of the taking of exclusive possession of a building by a person who has a right to such possession, and of his putting a new lock on a door, the key of which he knows is held by the owner of some furniture in the building, will not warrant a finding of a conversion of the furniture by him, in the absence of any evidence that he ever made claim to the furniture or hindered its owner from removing it. *Poor v. Oakman*, 309.

See EVIDENCE, 3; MORTGAGE, 3; WAREHOUSEMAN.

TRUST AND TRUSTEE.

1. A husband cannot establish a resulting trust in a house and land bought by his wife with money supplied by him and the deed taken in her name, upon allegations, taken together, that he sent her the money from a foreign country with directions to buy the house and land and take the deed in her name so that in event of death or accident to him abroad she and their children might have a house to live in, but that she was but a nominal purchaser and acted really as his agent, that the property was bought for and belonged to him, and was always treated by them as his and not hers, that she made no claim to it, and that he did not intend to give her any beneficial interest in it except as his trustee. *Cairns v. Colburn*, 274.
2. A testator died, leaving a daughter and two sons, and in his will gave his dwelling-house and farm, and all the personal property in use in or about them, to J. S., in trust, "after defraying all expenses of repairs, taxes and insurance, then to permit the daughter to occupy, use and improve said real and personal estate" during her life, and on her death "to permit" the sons successively "to have the use and improvement of the same" during their respective lives. In a subsequent clause of the will, after disposing of property besides the foregoing, he gave the residue of all his estate, real and personal, to J. S., in trust until the death of the last survivor of the three children, "to take suitable care and charge of the said real estate aforesaid, and "after deducting all necessary expenses for repairs, taxes, public charges, and also any expense incurred in insuring the premises against fire," to di

vide "the net income of said estates" equally among them and such persons as either of them dying should by will appoint. J. S. assumed the trusts; permitted the daughter to occupy the dwelling-house and farm, either personally, or by tenants who paid rent to her; paid annually out of the income of the residuary fund the taxes and insurance on the dwelling-house and farm; and for twenty-three years presented to the three children annual accounts showing these payments, which they returned to him with their signatures under the word "approved." The twenty-fourth account of the trustee the younger son declined to approve, on the ground that such payments were a misapplication of the income of the residuary fund; and filed a bill in equity to restrain the trustee from defraying them out of that fund, and to recover one third of the amounts previously paid, (alleging that he approved the previous accounts under a mistake of his rights,) and to compel the making of repairs on the dwelling-house and farm. *Held*, that repairs, taxes and insurance on the dwelling-house and farm should be defrayed from rents and profits of the dwelling-house and farm, and were not proper charges upon the residuary fund or its income; but that the accounts of the trustee which the plaintiff had approved were not open to revision in this respect. *Amory v. Lowell*, 265.

See DEVISE AND LEGACY, 2; SAVINGS BANK.

TRUSTEE PROCESS.

1. In an action against a resident of another state who appears and answers, common carriers, having in their possession, in this state, in course of transportation to the defendant at his place of residence, a sealed package of money belonging to him, may be summoned and charged as his trustees. *Adams v. Scott*, 164.
2. Executors are chargeable as trustees of a legatee, on a trustee process against him, for shares in the stock of a corporation, specifically bequeathed to him in the will, which are not required to pay the testator's debts, and stand in the testator's name on the books of the corporation, and of which they hold the certificate in that name; and when so charged, upon final judgment against the legatee, it is their duty, upon demand by the officer, to transfer the shares, in such manner as the by-laws of the corporation may require, into the name of the legatee, so that they may be taken on the execution. *Vantine v. Morse*, 275.
3. The master of a vessel, whose damaged cargo was sold in a port of distress, transmitted the proceeds, with directions to hold them to his credit, to a creditor of the owners of the vessel, who were not the owners of the cargo; and the creditor received them with notice that they belonged to the owners of the cargo, but nevertheless credited them upon the debt owing to him. Insurers of the cargo, who had accepted an abandonment and paid its owners as for a total loss, then sued the owners of the vessel for said proceeds and summoned the creditor as trustee; and before judgment in the trustee process, never having intended to confirm his appropriation of them, they brought

suit for them directly against him, he having meanwhile made no change in his position in the matter. *Held*, that the pendency of the first suit was no bar to the prosecution of the second. *Sun Insurance Co. v. Hall*, 507.

See WRIT OF ERROR.

USAGE.

See INSURANCE, 7.

USURY.

To a bill in equity against the executor of the mortgagee to redeem lands from a mortgage, which set up the reservation of usurious interest, the defendant answered that he was ignorant of the usury, that he neither admitted nor denied it, but left the plaintiff to prove it; and that he was informed and believed that there was no usury; and prayed that if the usury was proved the account might be made up on the basis of the sum actually advanced. The master's report found that there was usury, but that the defendant did not know of it; the defendant excepted to the finding as to usury, and the exception was overruled. *Held*, that the plaintiff was entitled to the benefit of the statute penalty for usury, in reduction of the sum payable upon the mortgage. *Gerrish v. Black*, 400.

VARIANCE.

Proof of a sale of whiskey in Philadelphia to be delivered in Boston does not sustain an allegation of a sale of whiskey in Philadelphia without specification of a place of delivery; nor is an allegation of a sale of the whiskey for a certain sum sustained by proof of its sale for that sum together with payment by the buyer of charges on the whiskey for which the seller was liable. But amendments of the declaration may be allowed to cure such variances after verdict, and even after the argument of exceptions taken at the trial. *Peck v. Waters*, 345.

See BOND, 1.

VENDOR AND PURCHASER.

1. If a married woman makes a written contract in her own name and her husband's, with a third party, for the sale and conveyance to him of land owned in part by her in her own right and in part by her husband, their joint execution of the deed of the land to the purchaser, before any indication of his intent to repudiate the contract, is a sufficient assent of the husband to the sale of her part of the land, and ratification by him of the contract for the sale of his part, to enable them to enforce specific performance, without evidence of her original authority to enter into the contract in his behalf. *Dressel v. Jordan*, 407.
2. A contract of executors, not in pursuance of their official duty, to sell and convey, with a clear and satisfactory title, land of the testator's estate, the title to which is in the heir subject to payment of the testator's debts and

legacies and the charges of administration, is not necessarily void, but binds them individually; and if the terms of the contract imply that the title is to come from more than one source and may require more than one deed of conveyance, and the executors sell the land under license of the probate court, and then, to pass the title, tender to the other party a quitclaim deed of it from the purchaser at the sale, with a warranty deed from the heir, such party cannot avoid the contract, either on the ground of its original execution by the executors in their official name, or on the ground of his dissatisfaction with the form of their making title in its fulfilment. *Ib.*

3. The mere fact that the date of a deed in the chain of title to land is subsequent to the date of its acknowledgment, will not justify a refusal to take a conveyance of the land on the ground that the title is not clear and satisfactory. *Ib.*
4. An agreement to convey land subject to an existing mortgage, the amount of which is to be assumed by the grantee in part payment of the consideration for the conveyance, is not satisfied by conveying the land subject to a condition that the grantee shall pay the mortgage debt and save the grantor harmless and indemnified in respect to it; but a waiver of any objection to accept the conveyance in this form may be inferred from acts of the grantee. *Ib.*

See SPECIFIC PERFORMANCE.

VESTED INTEREST.

See DEVISE AND LEGACY, 1.

WAIVER.

See INSURANCE, 3; POOR DEBTOR, 1; TRUSTEE PROCESS, 3; VENDOR AND PURCHASER, 4; WRIT OF ERROR.

WAREHOUSEMAN.

A warehouseman had on storage two lots of flour, one belonging to A., the other and more valuable to B. A baker ordered twenty-eight barrels of flour from C.; and C., to fill the order, bought from A. twenty-eight barrels of his flour, and took from him an order on the warehouseman for them. The warehouseman, by mistake, delivered to C. twenty-eight barrels of B.'s flour; and the baker received this flour from C. and consumed it, not knowing, supposing or believing that it was different from that which he ordered, and gained no benefit from the mistake. *Held*, that the baker was not liable to the warehouseman in contract for the value of it, or any part of its value; nor in tort for its conversion. *Hills v. Snell*, 173.

See PLEDGE, 1.

WARRANTY

See SALE, 4, 5.

WATER AND WATERCOURSE.

See WATERWORKS; WAY, 12, 13.

WATERWORKS.

The St. of 1846, c. 167, gave the city of Boston authority to regulate the use of the Cochituate water and establish water rates; and enacted that "the occupant of any tenement" should be liable to pay the rate "for the use of the water in such tenement," and in certain cases "the owner thereof" should be liable also. A city ordinance accordingly provided that for the use of the water "in model houses, so called," there should be charged, "for each tenement having water fixtures within the same," a specified rate; delegated to a board its authority under the statute, with power to ascertain by meters the quantity used in any case and establish a rate therefor instead of the specific rate; and made it the duty of a registrar to cut off the water for nonpayment of rates. J. S., with his family, was "tenant and occupant" of one of ten suites of rooms in a model lodging-house owned by a corporation which had the general charge of the building and controlled the halls passages and outer doors. Each suite "was occupied by a separate tenant," and contained "a kitchen, sleeping-room and all the conveniences of a common dwelling-house," including separate water fixtures. All these fixtures were supplied with the water from the same pipe. The board set a meter on this pipe; established a rate for the use of the water as measured by the meter; and, against the protest of J. S. and the corporation, charged it to the corporation and refused to make a separate charge to each tenant; and the city treasurer, who was collector of the rates, refused to accept from J. S. the amount of the specific rate, which J. S. tendered in payment for the use of the water in his suite of rooms. *Held*, that J. S. was the occupant of a tenement entitled under the statute and ordinance to the use of the water therein on payment or tender of the specific rate, and might maintain a bill in equity to restrain the city and the registrar from cutting off the water from his suite of rooms. *Young v. Boston*, 95.

WAY.

1. An omission of the aldermen of Boston to allege, in an order altering a street, that the alteration was made under the St. of 1866, c. 174, is no ground for quashing the proceedings on *certiorari*, as not conducted under that statute, if the order was passed while it was in force, and the record shows that they intended to, and did, proceed in conformity with it. *Jones v. Aldermen of Boston*, 461.
2. The liability of estates abutting on a street in Boston altered under the St. of 1866, c. 174, to be assessed under § 5 for the expense of the alteration, proportionally to the benefit which they received from it, accrued on the passage of the order making the alteration, is to be estimated as of that date, and is not affected by the repeal of that section by the St. of 1868, c. 276, § 2. *Id.*
3. In the absence of evidence to the contrary, it is to be presumed that an adjudication by the aldermen of Boston under the St. of 1866, c. 174, § 5, of the

benefit received by abutting estates from the alteration of a street, and their assessment of the expense accordingly, were made as of the date of the order for the alteration. *Ib.*

4. An overvaluation by the aldermen of Boston, under the St. of 1866, c. 174, § 5, or the St. of 1868, c. 276, § 1, of the benefit received by real estate from altering a street, as the basis of an assessment thereon for the expense of the alteration, is no ground for quashing the proceedings on *certiorari*, but the remedy of the owner is by petition for a jury. *Ib.*
5. An order of the aldermen of Boston under the St. of 1866, c. 174, § 5, assessing for the expense of altering a street estates abutting thereon and benefited by the alteration, which lays the assessment on the estates named in a schedule annexed to the order and entitled "Schedule of assessments upon the estates that were benefited by the alteration," imports that the schedule includes all the abutting estates which were benefited. *Ib.*
6. An omission of the aldermen of Boston to allege, in the record of altering a street under the St. of 1866, c. 174, that their assessment of the expense of the alteration upon abutting estates thereby benefited was laid on all such estates, is no ground for quashing the proceedings on *certiorari*, in the absence of any allegation, in the petition for the writ, that the assessment was in fact not so laid, and of any evidence that the omission injured the petitioner. *Ib.*
7. The St. of 1866, c. 174, § 5, construed in connection with § 1, requires the aldermen of Boston, in assessing, for the expense of laying out or altering a street, abutting estates thereby benefited, to lay the assessment ratably upon all such estates; and is constitutional. *Ib.*
8. It is no ground for quashing on *certiorari* proceedings of the aldermen of Boston altering a street under the St. of 1866, c. 174, that, by a clerical error in the preamble of their adjudication of the benefit received by abutting estates, the date of the assessment of damages is substituted for the date of the order making the alteration. *Ib.*
9. The provision of the St. of 1868, c. 276, § 1, that in no case shall assessments upon real estate, for special benefits received from the laying out or alteration of a street in Boston, exceed the amount to be paid by the city for such laying out or alteration, construed in connection with the St. of 1866, c. 174, § 3, limits the assessments only to the whole amount of the cost of the laying out or alteration, which the city pays in the first instance, without any deduction on account of the partial reimbursement which it may derive from such assessments. *Ib.*
10. It is no ground for quashing on *certiorari* proceedings of the aldermen of Boston altering a street, under the St. of 1866, c. 174, as amended by the St. of 1868, c. 276, which repealed § 5 of the former statute, that the schedule of their assessment of the expense of the alteration upon real estate specially benefited by it purports to be made in pursuance of the provisions of the repealed section and of § 1 of the St. of 1868. *Ib.*
1. The remedy by petition for a jury, given by § 7 of the St. of 1866, c. 174

- to any party aggrieved by doings of the aldermen of Boston under that statute, extends also to their doings under it as amended by the St. of 1868 c. 276. *Ib.*
12. An alteration in the location of an existing highway was made by the county commissioners, upon the petitioner's land, and under his agreement to bear the whole expense. He was constructing a canal across his land, and had nearly finished digging the trench through the place of the new location at the time thereof; and he proceeded to build the new way and the canal together, and carried the way over the canal upon a bridge which was finished before water was let into the canal. *Held*, that he was liable for the subsequent expenses of maintaining and keeping in repair the bridge over his canal. *Lowell v. Proprietors of Locks & Canals*, 18.
 13. The proprietor of a canal built across a highway which is subsequently traversed by a horse railroad is not exonerated by the St. of 1866, c. 286, § 1, from his liability in the first instance to the town or city for the expenses of repairs made within the location of the railroad in the bridge which conducts the highway over the canal. *Ib.*
 14. A town may be liable on the Gen. Sts. c. 44, § 22, for an injury resulting to a traveller from a defect in a highway, although the defective place is within the location of a railroad which crosses the highway on a level therewith. *Pollard v. Woburn*, 84.
 15. In moving a building, by permission of a town, through a street which the town was bound to keep in repair, the ground was dug up around a post which obstructed the passage of the building, so as to cause the post to slope over and obstruct travel on the sidewalk, and at the base of the post on the side towards the carriageway there was left for several days an excavation across which some planks were laid, which at times were displaced so as to leave a hole a foot wide, open towards the carriageway. Between nine and ten o'clock on the evening of the fourth day after the moving of the building, three men, travelling on foot along the street, turned from the sidewalk into the carriageway, as they approached the obstruction, intending to pass around it, there being no sidewalk on the other side of the street. The night was dark and foggy; and there was no light on the street. Two of them had observed the hole during previous days. The third, though knowing of the removal of the building and generally of the obstruction and its dangerous nature, had never observed or known of the hole. The two passed safely. The third, who was walking at ordinary speed, abreast with and inside from the second, supposed that he was far enough out in the carriageway for safety, but, in passing the hole, his foot, on the side next to it, slipped into it, and he was thereby injured. *Held*, that, on evidence of these facts, a jury was warranted in finding that he was using due care at the time of the accident. *Ib.*
 16. A city is not liable on the Gen. Sts. c. 44, § 22, for an injury received by a traveller on a sidewalk, which it is bound to keep in repair, through the falling upon him of a signboard which the proprietor of an adjoining build

flag had suspended over the sidewalk on an iron rod insecurely fastened to the building ; although the city had notice of the position and insecurity of the signboard and its fastening. *Jones v. Boston*, 15.

17. In an action on the Gen. Sta. c. 44, § 22, for an injury alleged to have been received through a defect in a highway which the defendant town was bound to keep in repair, the evidence tended to show that the place alleged to be defective was covered with smooth and slippery ice, upon a steep and springy hillside, where the road sloped not only in the direction of its course, but across it from one side to the other. *Held*, that the defendants had no ground of exception to instructions which authorized the jury to return a verdict for the plaintiff only in event of their finding that there was some special reason for the formation of ice in that particular locality owing to the construction or condition of the road, that the ice there formed rendered the highway unsafe, and that but for such defect the injury to the plaintiff would not have happened. *Pinkham v. Topsfield*, 78.

18. The fact that a traveller on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it is not conclusive that he does not use due care in making the attempt. *Mahoney v. Metropolitan Railroad Co.* 73.

19. In an action against a street railway corporation for injuries alleged to have been caused to a traveller on the street by negligence of the defendants in heaping up snow by the side of their track, it appeared that the defendants heaped up snow on each side of the track so that it formed a trough, twelve or fourteen inches deep, with sides sloping down to the rails at angles of about forty-five degrees, and that, while the plaintiff was conducting across this trough his team of two horses, drawing a sled on two sets of runners, which was heavily loaded with lumber projecting over the back of the shaft horse, the load tilted forwards, when the front runners reached the first rail, so that the lumber fell on that horse and on the plaintiff, and injured them. *Held*, that the questions whether the plaintiff was negligent in attempting to cross the track, or in the manner in which he made the attempt, were for the jury. *Id.*

See ACTION, 1, 2; BRIDGE; EVIDENCE, 4; EXCEPTIONS, 4; HARVARD COLLEGE; INTERROGATORIES; LANDLORD AND TENANT; NEGLIGENCE, 2-4.

WILL.

See DEVISE AND LEGACY; PARTNERSHIP, 3; TRUST AND TRUSTEE, 2.

WITNESS.

See ASSESSOR, 2; COSTS, 1; DIVORCE, 3; EVIDENCE, 6, 7; EXCEPTIONS, 5; INTOXICATING LIQUORS; MORTGAGE, 2.

WORDS.

" Absent defendant." See *James v. Townsend*, 369.

" Agree to sell." See *Martin v. Adams*, 263.

" Civil imposition." See *Harvard College v. Aldermen of Boston*, 470.

- "Clear and satisfactory title." See *Dresel v. Jordan*, 407.
- "Continue a stockholder." See *Bacon v. Pomeroy*, 577.
- "Corruption." See *Brewer v. Boston Theatre*, 389.
- "Each his one half." See *Costigan v. Lunt*, 217.
- "Fiduciary character." See *Cronan v. Cotting*, 245.
- "Gross or wanton and cruel." See *Peabody v. Peabody*, 195.
- "Misfeasance." See *Tracy v. Warren*, 376.
- "Multitude." See *Pike v. Witt*, 597.
- "Port of discharge." See *Bramhall v. Sun Insurance Co.* 510.
- "Subject to a mortgage." See *Howard v. Chase*, 251; *Dresel v. Jordan*, 417.
- "Tenement." See *Young v. Boston*, 104.
- "Unusual number." See *Pike v. Witt*, 597.

WRIT OF ENTRY.

1. A specification of nontenure and disclaimer, pleaded with the general issue to a writ of entry, is falsified by proof of occupation of the demanded premises by the tenant with a permanent building, although such occupation is by a mistake of boundary and without intention to disseise. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad Co.* 1.
2. A writ of entry cannot be maintained against a tenant who holds an absolute deed from the demandant's grantor, prior to the deed to the demandant, although he has given a written agreement, not under seal, to reconvey to the grantor on performance of a condition, and the condition has been performed. *Wilson v. Black*, 406.

See EVIDENCE, 9; RAILROAD, 1, 2.

WRIT OF ERROR.

A writ of *scire facias* against a person charged as trustee is not a civil action, within the meaning of the Sta. of 1862, c. 217, § 4, and 1866, c. 279, § 9, authorizing the removal of such actions by the defendant from the municipal court of Boston to the superior court; and a judgment rendered therein for the plaintiff in the superior court, after such removal, may be reversed by writ of error for want of jurisdiction, although the defendant in that court appeared and filed both a motion to dismiss for that cause and an answer to the merits, and notwithstanding the provision of the Gen. Sta. c. 129, § 79, that, when the defendant has appeared and answered to the merits of an action, no defect in the writ or process by which he has been brought before the court shall be deemed to affect the jurisdiction of the court. *Gray v. Thrasher*, 373.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. CL

Page 466, 8th line from top. Substitute "El, Bl. & El." for "9 El. & Bl."

VOL. CIII.

Page 41, 5th line from top. Insert "not" between "and" and "with."

" 132, bottom line. Substitute "*S. B. Jess, Jr.,*" for "*C. Allen, Attorney General.*"

" 494, 8th line from bottom. Substitute "legal" for "local."

" 524, 2d line from top. Substitute "plaintiff" for "defendants."

" 530, 15th line from bottom.

" 619, 7th line of EVIDENCE, 12. } Delete "not" between "was" and "a defect."



